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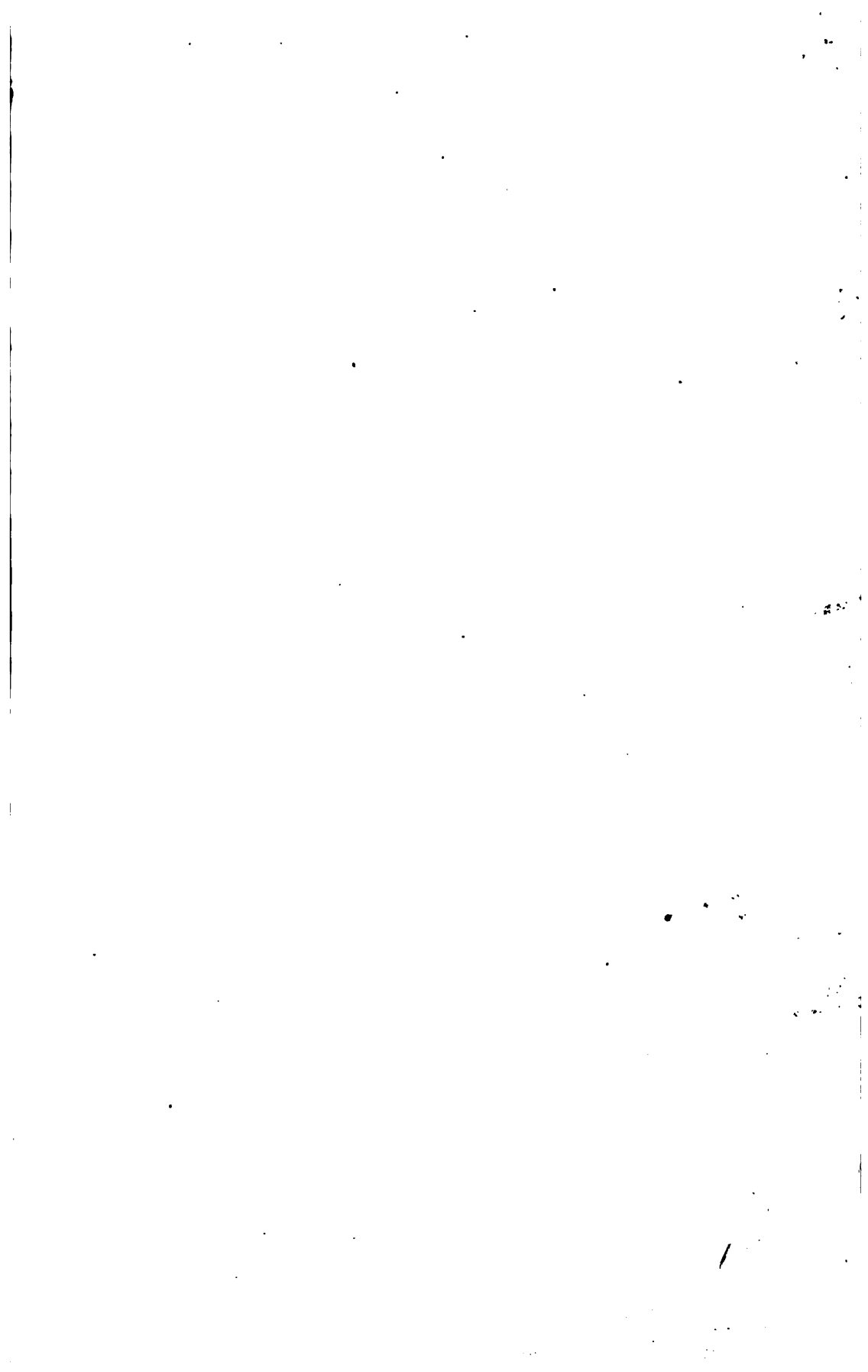
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7

THE LAWYERS REPORTS ANNOTATED

BOOK LX.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE, WITH FULL ANNOTATION.

BURDETT A. RICH AND HENRY P.

FARNHAM, EDITORS.

ROCHESTER, N. Y.

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LAWYERS' REPORTS

ANNOTATED.

MISSISSIPPI SUPREME COURT.

Wirt ADAMS, State Revenue Agent,
v.

YAZOO & MISSISSIPPI VALLEY RAIL-
ROAD COMPANY *et al.*

(77 Miss. 194.)

1. The phrase "such terms as they may agree upon," in a statute authorizing the consolidation of railroad companies, relates to the mere administrative details attending consolidation, and conveys no substantive powers or rights.
2. A consolidation of the stock of corporations results uniformly and necessarily in the creation of a new corporation.
3. A consolidation which results in the formation of a new company, and not merely a merger of the constituent com-

panies, retaining their separate existences, is authorized by statutes providing for the consolidation of companies under the name of one of them, without saying it shall be under its charter, and giving to the new company all the benefits, rights, franchises, and property of the original companies.

4. The right of corporations to consolidate is a grant of a corporate franchise subject to Const. § 180, so that any exemption of one of the old companies from taxation is cut off, although § 181 provides for the continuation of exemptions to which corporations "are legally entitled" at the adoption of the Constitution, and § 279 of the schedule provides for the continuation of the rights and charters of corporations.
5. A decision as to an exemption from taxation, in a case between the sheriff of a county and a railroad company, is not res

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I. Introduction.

Before entering upon the discussion of the subject of corporate taxation in the United States as affected by that clause in article I, § 10, of the Federal Constitution forbidding every state to pass any law impairing the obligation of a contract, it will be useful to take a preliminary survey of the litigation between the Yazoo & Mississippi Valley Railway Company and the public officers of Mississippi, of which the principal case is a part. The cases in the group are typical. In them were decided the main questions that arise in cases in this class.

The original act of the Mississippi legislature incorporating the Yazoo & Mississippi Valley Railway Company (February 17, 1882) contained (§ 8) an exemption from taxation. It provided: That, in order to encourage the investment of capital in the works which said company is hereby authorized to construct and maintain, and to make certain in advance of such investment, and as an inducement and consideration therefor, the taxes and burdens which this state will and will not impose thereon, it is hereby declared that said company, its stock, its railroads and appurtenances and all its property in this state necessary or incident to the full exercise of all the powers herein granted,—not to include compresses or oil mills,—shall be exempt from taxation for a term of twenty years from the completion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from the date of the approval of this act; and when the period of exemption herein prescribed shall have expired the property of said railroad may be taxed at the same rate as other property in this state.

Taxes having been assessed against this railroad before its construction had progressed as far as the Mississippi river, the company

judicata in a case between a state revenue agent and a different railroad company, although it may be persuasive under the doctrine of *stare decisis*.

6. A decision as to the taxes of one year is not *res judicata* as to the taxes for another year.
7. The legislature not only could but was required to impose taxes on the property of private corporations for pecuniary profit, just as and when it would tax the property of individuals, under Const. 1869, art. 12, § 13, providing that the property of such corporations "shall be subject to taxation the same as that of individuals," and § 20, providing for equal and uniform taxation of all property according to value.
8. The doctrine of *stare decisis* cannot be invoked in favor of decisions on former statutes which were merely similar to, but not identical with, one under review.
9. A decision that a statute constitutes a contract, and that an act repealing it is

void, is not an estoppel to a subsequent decision holding that the former statute itself is unconstitutional.

10. A constitutional provision adopted from another state must be construed according to the established meaning of the provision that had been acquired in the state from which it was taken.

On motion to strike from files.

11. The court has a right to file a new and fuller opinion containing every reason for the decision that was included in the first opinion and an additional reason also, although the cause has been remanded to a lower court.
12. The constitutional provision as to due process of law is not violated by filing a new and fuller opinion after the cause has been remanded to a lower court.

(Woods, Ch. J., dissents.)

(November 22, 1898.)

brought its bill in chancery against the sheriffs and tax collectors of the several counties through which its line extended for an injunction against their collection. Upon demurrer to the bill it was dismissed, and the corporation appealed to the Mississippi supreme court. That tribunal affirmed the judgment.

Planting itself upon the general principles that legislation which relieves any species of property from its due proportion of the burdens of government must be so clear that there can be neither reasonable doubt nor controversy in regard to its meaning: that statutes exempting persons or property from taxation, being in derogation of the sovereign authority and of common right, are to be strictly construed; and that, as taxation is the rule, and exemption the exception, the intention to create an exception must be expressed in clear and unambiguous terms, and it cannot be taken to be intended when the language of the statute on which it depends is doubtful or uncertain,—the court held that the exemption did not begin before the completion of the road to the Mississippi river: that when the road was finished that far the exemption would continue for twenty years thereafter, provided it had not taken more than five years to build. If it had, then, inasmuch as the exemption was limited to twenty-five years from the passage of the act of incorporation, it would be shortened by the extra time consumed in construction. *Yazoo & M. Valley R. Co. v. Thomas*, 65 Miss. 553, 5 So. 108.

This decision was affirmed on writ of error by the Supreme Court of the United States. 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68.

The affirmance was grounded upon the above-stated principles, and the case was declared controlled by that of *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625.

About the same time the railroad brought its bill in equity in the United States circuit court for the southern district of Mississippi for an injunction to restrain the collection of levee taxes. A demurrer to this bill was sustained, and the bill dismissed upon the same ground. *Yazoo & M. Valley R. Co. v. Levee Comrs.* 37 Fed. 24. Affirmed in 132 U. S. 190, 33 L. ed. 308. 10 Sup. Ct. Rep. 74.

The railroad was equally unsuccessful in its next case, a suit brought to enjoin the state revenue agent and the railroad commission from proceeding further in the assessment of its property for back taxes which the Louis-

ville, New Orleans & Texas Railroad Co., whose property and franchise it had acquired by consolidation, had escaped. No question of contract was raised in that case, but the railroad denied the jurisdiction of the commission to assess back taxes for the stated years on the ground that it was not, until subsequently, clothed with any power to assess railroad taxes. *Yazoo v. M. Valley R. Co. v. Adams*, 73 Miss. 648, 19 So. 91.

The railroad failed also in its defense of an action by the state revenue agent to recover back taxes due the municipalities of Jackson, and other cities, villages, and towns. The company insisted that it was exempt from such taxes by virtue of the concluding paragraph in § 8 of its charter, reading: All of said taxes to which the property of said company may be subject in this state, whether for county or state, shall be collected by the treasurer of this state, and paid into the state treasury to be dealt with as the legislature may direct; but said company shall be exempt from taxation by cities and towns. The court held that this provision did not confer an exemption absolute and perpetual from local municipal taxation, but merely the same exemption that the fore part of the section gave from state taxes; to wit, an exemption that did not begin until the road was completed as far as the Mississippi river. 75 Miss. 275, 22 So. 824.

In a subsequent appeal in this case the railroad set up a claim to exemption on the ground that its road was completed to the Mississippi river, not by a physical construction, but in virtue of its consolidation with the Louisville, New Orleans & Texas Railroad Company, which had bought out the Natchez, Jackson & Columbus Railway Company, whose line reached the river. The ruling was that an actual physical building of the appellant's road to the Mississippi river was necessary to earn the exemption. This was the consideration moving to the state for its grant, and a paper or constructive completion to the designated terminus did not satisfy such consideration. 76 Miss. 545, 23 So. 366.

A writ of error to the United States Supreme Court to review this decision was dismissed upon the ground that the Federal question of the impairment of a contract had not been properly raised. 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256.

The court thought the case resolved to this: Whether jurisdiction could be sustained when the only question involved was the construction of a charter or contract, although it ap-

CROSS-APPEALS from a judgment of the Circuit Court for Hinds County rendered in an action brought to enforce payment of taxes alleged to be due and unpaid for the years 1892, 1893, 1894, and 1895; the defendants appealing from so much of the judgment as permitted a recovery for the year 1895; and the plaintiff appealing from so much as denied a recovery for the other years. *Reversed on both appeals.*

The facts are stated in the opinion.

Messrs. Critz & Beckett, for plaintiff:

For a claim to exemption from taxation to arise at all, the party claiming must affirmatively and clearly bring himself within the language, and within the terms and conditions, of the statute on which the exemption is to take effect. An exemption is not transferable unless by express words, or by an intention clearly manifested by the lan-

guage of the statute. In both cases all doubts are resolved in favor of the state and against the exemption.

Yazoo & M. Valley R. Co. v. Thomas, 65 Miss. 562, 5 So. 108; *Greenville Ice & Coal Co. v. Greenville*, 69 Miss. 86, 10 So. 574; *State v. Simmons*, 70 Miss. 485, 12 So. 477; *Cairo & F. R. Co. v. Parks*, 32 Ark. 135; *People ex rel. Huck v. Graceland Cemetery Co.* 86 Ill. 339, 29 Am. Rep. 32; *Pearsall v. Great Northern R. Co.* 161 U. S. 664, 40 L. ed. 844, 16 Sup. Ct. Rep. 705; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 685, 686, 40 L. ed. 853, 854, 16 Sup. Ct. Rep. 714; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 177, 40 L. ed. 661, 16 Sup. Ct. Rep. 471; *Bank of Commerce v. Tennessee use of Memphis*, 163 U. S. 423, 41 L. ed. 213, 16 Sup. Ct. Rep. 1113; *Central R. & Bkg. Co. v. Wright*, 164 U. S. 335, 41 L. ed. 457, 17

appeared that there were statutes subsequently enacted which might have been, but were not, relied upon as raising a Federal question concerning the construction of the contract. *Ibid.*

Then came the litigation in the principal case. The Mississippi Constitution of 1869 contained two sections (art. 12, §§ 13 and 20) of supreme importance in this controversy. The one provided that the property of all corporations for pecuniary profit should be subject to taxation the same as that of individuals; the other, that taxation should be equal and uniform throughout the state, and that all property should be taxed according to its value, to be ascertained as directed by law.

The supreme court of Mississippi had held that, notwithstanding these provisions, the legislature had power to exempt from taxation corporations and their property for a limited time,—that is to say, that the constitutional requirement that corporate property should be subject to taxation did not require that it should always be subjected to taxation; but that the legislature could not put such property permanently beyond the reach of the taxing power. Its view was that the provisions were mandatory as to the continual liability of corporate property to be taxed, but permissive as to the taxation or exemption thereof at the discretion of the legislature. *Mississippi Mills v. Cook*, 56 Miss. 40.

In the case involving the levee taxes, in the Federal court, above cited, Hill, J., expresses the opinion that despite the constitutional provisions referred to the Mississippi legislature was competent to pass laws exempting property from taxation for definite periods, and in so far agrees with and approves the last case. But he differs with the majority in that case in the view that such an exemption was subject to repeal, at the discretion of the legislature, at all times. He admits that such may be the case with respect of private corporations created solely for the profit of their stockholders, in which the public has no interest, but thinks it is not so as to corporations like railroads charged with public duties. A grant of exemption to such a corporation, he thinks, constitutes an irrepealable contract. But he says he can cite no authority for this distinction. *Yazoo & M. Valley R. Co. v. Levee Comrs.* 37 Fed. 24, *supra*.

It was while the Mississippi Constitution of 1869 was in force that the original act of incorporation of the Yazoo & Mississippi Valley Railway Company was passed (February 17, 1882), and the decisions have been noted holding that the exemption thereby granted did not

become operative until the road was completed to the Mississippi river; that completion meant an actual physical construction to a terminal on the river; and that the exemption was not earned by the acquisition, through consolidation or otherwise, of another railroad having such a terminal. While, too, that Constitution was in force, there were incorporated several other Mississippi railroads, and these in turn merged by consolidations into the Louisville, New Orleans, & Texas Railway Company. One of these roads, the Mobile & N. W. Railway Company, incorporated by act of July 20, 1870, was granted (§ 21) an exemption whereby the state agreed with said company (and which agreement is irrepealable) that all taxes to which said company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied to the debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands, or otherwise, to be used in constructing said road or paying debts incurred by said company in constructing the same, with a proviso that the exemption should cease whenever the annual profits warranted an 8 per cent dividend.

The provisions of this section were extended by an act of August 8, 1870, to other railroads, among which were the Memphis & Vicksburg and the Natchez & Jackson companies.

An act of the same date, incorporating the Memphis & Vicksburg Railway Company, provided (§ 16) that such company should have the right and power to consolidate its stock, property, and franchises with any other road or roads in or out of the state at any time its president and directors might deem proper, and upon such terms as might be consistent with the powers conferred upon it.

The act incorporating the New Orleans, B. R., V. & M. Short Line Railway Company of March 9, 1882, enacted (§ 25) that such company should have power and authority to purchase and hold any connecting railroad, and to operate the same, or to consolidate with any other company under the name of one or both; and that, when such purchase was made or consolidation effected the said company, should be entitled to all the benefits, rights, franchises, lands, and property, of every description, belonging to said road or roads so sold or consolidated.

The two companies just mentioned were by merger agreement consolidated August 12, 1884, into the Louisville, New Orleans, & Texas Railway Company.

An act approved March 3, 1882, and amended

Sup. Ct. Rep. 80; 1 *Desty*, Taxn. p. 135; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 29 L. ed. 626, 6 Sup. Ct. Rep. 375; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 668, 29 L. ed. 771, 6 Sup. Ct. Rep. 625; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 587, 41 L. ed. 583, 17 Sup. Ct. Rep. 198; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 507, 38 L. ed. 801, 14 Sup. Ct. Rep. 968.

The decision as to taxes for any one year is not *res judicata* as to the taxes of any other year.

Keokuk & W. R. Co. v. Missouri, 152 U. S. 313, 38 L. ed. 455, 14 Sup. Ct. Rep. 592; *Last Chance Min. Co. v. Tyler Min. Co.* 157 U. S. 683, 39 L. ed. 859, 15 Sup. Ct. Rep. 733; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 185, 40 L. ed. 664, 16 Sup. Ct. Rep. 471.

March 15, 1884, authorized the Memphis & Vicksburg road to consolidate with any other company or companies, domestic or foreign, so that all the companies so consolidating should be merged into and become one company, and provided that the company so formed by such consolidation should be deemed and held to be a domestic corporation, and should have, enjoy, and possess all the rights, ways, privileges, franchises, property, grants, and immunities which were then possessed by the companies entering into such consolidation as fully as though the same were conferred specially in such act. Another section (5) applied § 21 of the Mobile & Northwestern charter to the company so consolidated.

The original charter of the Yazoo & Mississippi Valley Railway Company of February 17, 1882, authorized that corporation, also, to consolidate with any other railroad company, in or out of Mississippi, upon such terms as the consolidating companies might agree upon, and provided that upon any such consolidation the consolidated company should have and enjoy all the property, rights, privileges, powers, liberties, immunities, and franchises therein granted, but that such consolidation should not have the effect of exempting from taxation the railroad or property owned by the other consolidating company prior to the consolidation, nor of exempting from taxation any property which the consolidated company might, after the consolidation, acquire under the charter of such other company.

And lastly, the Louisville, New Orleans & Texas Railway Company and the Natchez, Jackson & Columbus Railway Company were, by act of February 19, 1890, authorized to consolidate under the name of the former, upon such terms as they might agree.

In the situation thus brought about, the Mississippi supreme court decided: (a) That the exemption given by § 21 of the Mobile & Northwestern Railway Company charter was one which the legislature had power to confer; (b) that it did not constitute an irrepealable contract; (c) that it had been legally extended and confirmed to the Natchez, Jackson & Columbus Railway Co.; and (d) that it inured upon consolidation to the Louisville, New Orleans & Texas Railway Company. *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33.

In 1890 Mississippi adopted a new constitution. That instrument provided (§ 180) that all existing charters or grants of corporate franchise under which organizations had not in good faith taken place at the time of its adoption should be subject to its provisions; and 60 L. R. A.

The legislature could not grant an irrepealable exemption.

Mississippi Mills v. Cook, 56 Miss. 44; *Fant v. Gibbs*, 54 Miss. 396; *Baldwin v. Franks*, 120 U. S. 685, 30 L. ed. 768, 7 Sup. Ct. Rep. 656, 763; *Marshall Field & Co. v. Clark*, 143 U. S. 695, 36 L. ed. 310, 12 Sup. Ct. Rep. 495.

The consolidation created a new company, into which an exemption could not enter under the Constitution.

Keokuk & W. R. Co. v. Missouri, 152 U. S. 304, 38 L. ed. 451, 14 Sup. Ct. Rep. 592; *Trask v. Maguire*, 18 Wall. 391, 21 L. ed. 938; *Shields v. Ohio*, 95 U. S. 320, 24 L. ed. 357; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 360, 25 L. ed. 186; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 248, 27 L. ed. 924, 3 Sup. Ct. Rep. 193; *Memphis & L. R. R. Co. v. Railroad Comrs.* 112 U. S. 621, *sub nom.*

(§ 181) that the property of all private corporations for pecuniary gain should be taxed in the same way and to the same extent as the property of individuals, but with a saving clause continuing in full force and effect tax exemptions to which corporations were legally entitled at the time of its adoption for the period named in their several charters or by general laws unless sooner repealed by the legislature. After the adoption of the new constitution, and on October 24, 1892, articles of consolidation were entered into between the Louisville, New Orleans, & Texas Railway Company and the Yazoo & Mississippi Valley Railway Company, and the consolidated road took the name of the latter company. The case last cited was decided after this final consolidation, and, beside holding as stated, also held that the last combined company succeeded to the same immunity from taxation on that part of its lines which formerly comprised the Natchez, Jackson & Columbus Railroad.

This is the history of affairs to the decision in the principal case, which denied all exemption to the railroad and explicitly overruled the prior decisions above cited. *Mississippi Mills v. Cook*, 56 Miss. 40, and *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33.

The principal case has now been affirmed by the United States Supreme Court. *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

Further futile attempts of this company to escape taxation have, down to the present time, been reported.

In one, no question of impairment of a contract of exemption was involved. The company resisted payment of the taxes sued for upon the ground that in assessing them the constitutional rule of uniformity and equality had been violated, and that the machinery for assessment and collection amounted to a denial of the equal protection of the laws and to a deprivation of property without due process of law in contravention of the 14th Amendment to the United States Constitution. 77 Miss. 764, 25 So. 355.

Another involved the question whether the *Lambert Case* was to be regarded as *res judicata*. It was insisted that overruling it amounted, so far as this railroad was concerned, to a violation of the 14th Amendment. We are earnestly urged in behalf of appellants, said the court, to overrule 77 Miss. 194, 297, 309, 24 So. 200, 317, Affirmed in 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240 (the principal case), which denies to them the exemption set up in these pleas, and to reestablish the

Memphis & L. R. R. Co. v. Berry, 28 L. ed. 841, 5 Sup. Ct. Rep. 299; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 466, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529, 41 Ark. 509; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Mercantile Bank v. Tennessee use of Memphis*, 161 U. S. 161, 40 L. ed. 656, 16 Sup. Ct. Rep. 461; *Memphis City Bank v. Tennessee use of Memphis*, 161 U. S. 186, 40 L. ed. 664, 16 Sup. Ct. Rep. 468; *Clearwater v. Meredith*, 1 Wall. 25, *sub nom. Ferguson v. Meredith*, 17 L. ed. 604; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 586, 41 L. ed. 562, 17 Sup. Ct. Rep. 198; *Atlanta & R. Air-Line R. Co. v. State*, 63 Ga. 483; *Wilmer v. Atlanta & R. Air Line R. Co.* 2 Woods, 411; *Fed. Cas. No. 17,775; Ridgway Twp. v. Griswold*, 1 McCrary, 151; *Fed. Cas. No. 11,819; Charlotte,*

C. & A. R. Co. v. Gibbs, 27 S. C. 391, 4 S. E. 49; *California Southern R. Co. v. Southern P. R. Co.* 67 Cal. 61, 7 Pac. 123; *Petersburg v. Petersburg R. Co.* 29 Gratt. 773; *Arkansas Midland R. Co. v. Berry*, 44 Ark. 22; *McMahan v. Morrison*, 10 Ind. 172, 79 Am. Dec. 418; *People v. New York, C. & St. L. R. Co.* 61 Hun, 60, 15 N. Y. Supp. 635; *New Orleans Charity Hospital v. New Orleans Gaslight Co.* 40 La. Ann. 384, 4 So. 433; *State ex rel. Wine v. Keokuk & W. R. Co.* 99 Mo. 36, 6 L. R. A. 222, 12 S. W. 290; *Black, Tax Titles*, 2d ed. § 59; *Green's Brice, Ultra Vires*, pp. 538, 539, note; 2 *Morawetz, Priv. Corp.* §§ 945, 948.

Permission in the charter of a railroad to consolidate is not a right, but a mere license; and, if not availed of before the policy of the state has changed, the license is considered withdrawn.

Lambert Case. Careful reconsideration of the *Lambert Case* has strengthened, rather than shaken, our conviction as to its unsoundness in so far as the exemption in question, if it then existed, passed to the consolidated company. 77 Miss. 780, 28 So. 959, Affirmed in 180 U. S. 26, 45 L. ed. 408, 21 Sup. Ct. Rep. 282.

The latest phase of the litigation reported to date was an action by the Mississippi state revenue agent to recover back taxes for the years 1886 to 1891, inclusive, upon the railroad property formerly owned by the Louisville, New Orleans & Texas Railroad Company, embracing that which had belonged to the Natchez, Jackson & Columbus Railroad Company, and to enforce thereon a lien for the same.

The railroad, among several defenses, invoked the protection of § 21 of the charter of the last-named road, in vain. The court disposed of it by saying: If the legislature, in enacting § 21, exceeded the authority granted by the Constitution, or acted in contravention of the provisions of the Constitution, the action was void and could not confer rights upon anyone. The question was presented thoroughly, was ably discussed, and was exhaustively considered and decided by this court in the principal case and it was there held that such attempt by the legislature to confer a special exemption upon a special person or corporation would violate art. 12, § 13, of the Mississippi Constitution of 1869, and be, therefore, void. "A careful examination of the question there decided confirms us in the correctness of the conclusion then reached, and we adhere to and confirm the same. By the Constitution taxes are imposed upon all property alike owned by either individuals or corporations, and special exemptions to the one or the other were forbidden by the organic law." *Yazoo & M. Valley R. Co. v. Adams (Miss.)* 32 So. 937.

It is not to be expected that there will be any substantial change in the law thus laid down should the controversy continue between this railroad and the state of Mississippi over questions of taxation. The decisions may be taken as settling, so far as the present topic is concerned, the following propositions:

First. That under the Mississippi Constitution of 1869 the legislature lacked power to grant a corporation immunity from taxation; therefore the various grants of exemption to the several railroads were nullities.

Second. That if any one of such grants could be admitted to be within the legislative competency, the benefit of such exemption did not pass to, or vest in, the successor corporation upon consolidation.

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Third, and finally. That, even if such grants, or any of them, did descend to the successive consolidated companies that may have merged before the adoption of the new Constitution of 1890, yet, when the final consolidation took place after that Constitution was adopted, there sprang into being a new corporation that was governed altogether by the provisions of the new instrument, and which did not and could not acquire any exemption whatever from taxation.

The exemptions which the Yazoo & Mississippi Valley Railway Company has hitherto claimed in its own right and in the right of its predecessors are forever lost.

II. Scope of note.

This note is confined to cases relating to the construction and application of special statutory provisions in acts of incorporation, or more general laws whereby particular corporations, actually or supposedly, become entitled, either to absolute exemption from taxes, wholly or in part, or, by the payment of commuted taxes, to freedom from the burdens of all other taxation. Cases involving immunity from state or local taxation because of general statutes that apply to whole classes of corporations, such as railroads, manufacturing companies, and savings banks, whether they provide for exemptions or commutations, are not embraced in this commentary. Neither are questions here discussed that have arisen in respect of land grants in aid of railroads, as to when, how far, and under what circumstances the granted lands become taxable. And no decision is dealt with herein that merely passes upon the taxability of a particular piece, article, or kind of property belonging to a corporation, as being within or without the protection of a contract of exemption or commutation as a part of the corporate franchise.

III. Controlling principles.

a. In general.

It is taken for granted throughout this note, without further citation of authority, that by the famous Dartmouth College Case (*Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629) the principle that a corporate charter, act of incorporation, or other grant of corporate powers and privileges constitutes a contract between the state and the corporators within the meaning and protection of the contract clause of the Federal Constitution is so firmly embedded in American jurisprudence as to be no

Pearsall v. Great Northern R. Co. 161 U. S. 667, 40 L. ed. 845, 16 Sup. Ct. Rep. 705; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 695, 40 L. ed. 857, 16 Sup. Ct. Rep. 714; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 312, 38 L. ed. 455, 14 Sup. Ct. Rep. 592; 2 Morawetz, Priv. Corp. §§ 945, 948.

A consolidation of stock universally means the formation of a new corporation.

Green's Brice, Ultra Vires, p. 538, note; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 360, 25 L. ed. 186; *Clearwater v. Meredith*, 1 Wall. 25, sub nom. *Ferguson v. Meredith*, 17 L. ed. 604; *Ridgway Twp. v. Griswold*, 1 McCrary, 151; Fed. Cas. No. 11,819; *Atlanta & C. Air-Line R. Co. v. State*, 63 Ga. 486; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 406, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 308, 38 L. ed. 454, 14 Sup. Ct. Rep. 592.

longer disputable. As the United States Supreme Court put it half a century afterwards: "It has been so often decided by this court that a charter of incorporation granted by a state creates a contract between the state and the corporators which the state cannot violate that it would be a work of supererogation to repeat the reasons on which the argument is founded." *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568.

And it is now equally established that a state may make a valid contract with a corporation for its exemption, complete or partial, from taxation, for a limited time, or perpetually, and that when it does so explicitly and upon consideration in a corporate charter the provision for tax immunity is as sacred from violation, and as binding, as any other part of the grant. *New Jersey v. Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. ed. 529; *Achison v. Huddleson*, 12 How. 293, 13 L. ed. 903; *Piqua Branch Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401; *Mechanics' & T. Bank v. Deboit*, 18 How. 380, 15 L. ed. 458; *Mechanics' & T. Bank v. Thomas*, 18 How. 384, 15 L. ed. 460; *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173; *Franklin Branch Bank v. Ohio*, 1 Black, 474, 17 L. ed. 180; *McGhee v. Mathis*, 4 Wall. 143, 18 L. ed. 314; *Von Hoffman v. Quincy*, 4 Wall. 535, sub nom. *United States ex rel. Von Hoffman v. Quincy*, 18 L. ed. 403; *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. ed. 498; *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189; *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326.

Nield, J., writing for the court in *The Delaware Railroad Tax Case*, set forth the doctrine of the United States Supreme Court in relation to the above-stated principles, as follows: That the charter of a private corporation is a contract between the state and the corporators, and within the provision of the Constitution prohibiting legislation impairing the obligation of contracts, has been the settled law of this court since the decision in the *Dartmouth College Case*. Nor does it make any difference that the uses of the corporation are public if the corporation itself be private. The contract is equally protected from legislative interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators. This doctrine is not controverted by anyone. 60 L. R. A.

Power to consolidate "the stock, property, and franchises" only passes the ordinary right to exist as a corporation, have stock, and run the railroad.

Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 176, 40 L. ed. 661, 16 Sup. Ct. Rep. 471; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 586, 41 L. ed. 562, 17 Sup. Ct. Rep. 198; *Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 672, 39 L. ed. 575, 15 Sup. Ct. Rep. 413; *Picard v. East Tennessee, V. & G. R. Co.* 130 U. S. 640, 32 L. ed. 1052, 9 Sup. Ct. Rep. 640; *Louisville, & N. R. Co. v. Palmes*, 109 U. S. 251, 27 L. ed. 924, 3 Sup. Ct. Rep. 193; *Home Ins. & T. Co. v. Tennessee use of Memphis*, 161 U. S. 108, 40 L. ed. 669, 16 Sup. Ct. Rep. 476; *Atlanta & R. Air-Line R. Co. v. State*, 63 Ga. 484; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 304, 38 L. ed. 451, 14 Sup. Ct. Rep. 592.

It is the established law; and the question in all cases when it becomes necessary to apply it is whether the particular legislative interference does in fact impair the obligation of the contract: for it is not every kind of legislative interference with the powers, action, and property of the corporation which will have that result. It has also been repeatedly held by this court that the legislature of a state may exempt particular parcels of property, or the property of particular persons or corporations, from taxation either for a specified period or perpetually, or may limit the amount or rate of taxation to which such property shall be subjected. And when such immunity is conferred, or such limit is prescribed by the charter of a corporation, it becomes a part of the contract, and is equally inviolate with its other stipulations. *Delaware Railroad Tax*, 18 Wall. 206, sub nom. *Minot v. Philadelphia, W. & B. R. Co.* 18 Wall. 206, 21 L. ed. 888.

The same doctrine was again asserted in *Hoge v. Richmond & D. R. Co.* 99 U. S. 348, 25 L. ed. 303.

It is unnecessary further to enlarge upon these points.

In construing and interpreting contracts of this class, the courts are guided by a set of principles that have now become fundamental. The rules are especially inflexible with respect of contracts for exemption from, or limited taxation of, corporations. These, in brief, are, chiefly, that taxation is the rule, and exemption the exception; the power of taxation is an essential attribute of sovereignty, necessary and vital to the very existence of government: the whole community is interested in its maintenance unimpaired; it is presumed never to have been surrendered; and the intention to surrender it must be expressed in language so clear and free from ambiguity as to admit of no reasonable doubt. An exemption never arises by implication; it is always restricted to its lowest possible terms; a doubt is fatal to its existence. Every doubt must be resolved in favor of the government and against the claimant of tax immunity. Every contract of exemption from taxation must be construed *strictissimi juris*.

Over and over again, in almost every possible form of expression, these cardinal canons of construction of contracts for corporate tax exemption have been stated and applied by the courts. *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 920; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Philadelphia & W. R. Co. v. Maryland*, 10 How. 376, 13 L. ed. 461;

If there are inconsistent provisions in the charters of the two companies, the consolidated company gets only that which is common to both, or else the power of the consolidated company would be enlarged.

State v. Maine O. R. Co. 66 Me. 488.

The power to consolidate is "the grant of a corporate franchise," and as the consolidation did not take place till after November 1, 1890, any claim of exemption would be cut off.

2 Morawetz, Priv. Corp. § 945, p. 903; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Pearshall v. Great Northern R. Co.* 161 U. S. 667, 40 L. ed. 845, 16 Sup. Ct. Rep. 705; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 309, 38 L. ed. 454, 14 Sup. Ct. Rep. 592; 1 Morawetz, Priv. Corp. § 288; *Planters' F. & M. Ins. Co. v. Tennessee use of*

Memphis, 161 U. S. 193, 40 L. ed. 667, 16 Sup. Ct. Rep. 466.

If a railroad company is exempted from taxation, and is afterwards authorized to buy or build branch lines, this will not exempt them from taxation.

Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 686, 40 L. ed. 854, 16 Sup. Ct. Rep. 714; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 170, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 311, 38 L. ed. 455, 14 Sup. Ct. Rep. 592.

If the railroad fails to comply with the law allowing it to claim an exemption, it is but just that it should be considered as waived for that year.

Cooley, Taxn. p. 749, note; *Freedom v. Waldo County*, 66 Me. 175; *Fairfield v.*

Ohio Life Ins. & T. Co. v. Debolt, 16 How. 416, 14 L. ed. 907; *Jefferson Branch Bank v. Skelly*, 1 Black. 436, 17 L. ed. 173; *Glman v. Sheboygan*, 2 Black. 510, 17 L. ed. 305; *Binghamton Bridge, 3 Wall. 51, sub nom. Chenango Bridge Co. v. Binghamton Bridge Co.* 18 L. ed. 137; *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 558; *Raleigh & G. R. Co. v. Reid*, 13 Wall. 269, 20 L. ed. 570; *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 22 L. ed. 237; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595; *Bailey v. Maguire*, 22 Wall. 215, 22 L. ed. 850; *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805; *Hoge v. Richmond & D. R. Co.* 99 U. S. 348, 25 L. ed. 308; *Annapolis & E. R. R. Co. v. Anne Arundel County*, 103 U. S. 1, 26 L. ed. 359; *Bank of Commerce v. Tennessee*, 104 U. S. 493, 26 L. ed. 810; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; *Memphis Gaslight Co. v. Shelby County Taxing Dist.* 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; *Memphis & L. R. R. Co. v. Railroad Comrs.* 112 U. S. 609, *sub nom. Memphis & L. R. R. Co. v. Berry*, 28 L. ed. 337, 5 Sup. Ct. Rep. 299; *Southwestern R. Co. v. Wright*, 116 U. S. 231, 29 L. ed. 627, 6 Sup. Ct. Rep. 375; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; *Chicago, B. & K. C. R. Co. v. Guffey*, 120 U. S. 569, *sub nom. Chicago, B. & K. C. R. Co. v. Missouri ex rel. Guffey*, 30 L. ed. 732, 7 Sup. Ct. Rep. 693; *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *New York ex rel. Schurz v. Cook*, 148 U. S. 397, 37 L. ed. 498, 13 Sup. Ct. Rep. 645; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; *Ford v. Delta & P. Land Co.* 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230; *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 26, 45 L. ed. 408, 21 Sup. Ct. Rep. 282. Affirming the principal case; *People ex rel. Manhattan F. Ins. Co. v. New York Tax & A. Comrs.* 76 N. Y. 64; *People ex rel. Westchester F. Ins. Co. v. Davenport*, 91 N. Y. 574; *People ex rel. Twenty-third Street R. Co. v. New York Tax Comrs.* 95 N. Y. 554; *People ex rel. Woodhaven Gaslight Co. v. Deeban*, 153 N. Y. 528, 47 N. E. 787; *State, Trenton Water Power* 60 L. R. A.

Co., Prosecutors, v. Parker, 32 N. J. L. 426; *Crawford v. Burrell Twp.* 53 Pa. 219; *Jones & N. Mfg. Co. v. Com.* 69 Pa. 137; *Union Pass. R. Co. v. Philadelphia*, 83 Pa. 429; *State v. Bank of Smyrna*, 2 Houst. (Del.) 99, 73 Am. Dec. 699; *Alexandria Canal R. & Bridge Co. v. District of Columbia*, 1 Mackey, 217; *Gordon v. Baltimore*, 5 Gill, 231; *Buchanan v. Talbot County*, 47 Md. 286; *Frederick County v. Sisters of Charity*, 48 Md. 34; *Richmond v. Richmond & D. R. Co.* 21 Gratt. 604; *Com. v. Chesapeake & O. R. Co.* 27 Gratt. 344; *Probasco v. Moundsville*, 11 W. Va. 501; *Kentucky C. R. Co. v. Bourbon County*, 82 Ky. 497; *German Bank v. Louisville*, 22 Ky. L. Rep. 9, 56 S. W. 504; *Knoxville & O. R. Co. v. Harria*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115; *State v. Simmons*, 70 Miss. 485, 12 So. 477; *Athens City Waterworks Co. v. Athens*, 74 Ga. 413; *Stein v. Mobile*, 17 Ala. 234; *Mobile & S. H. R. Co. v. Kennerly*, 74 Ala. 566; *Dauphin & L. Streets R. Co. v. Kennerly*, 74 Ala. 583; *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 509; *Atlantic & P. R. Co. v. Lesueur (Ariz.)* 1 L. R. A. 244, 2 Inters. Com. Rep. 189, 19 Pac. 157; *People ex rel. Huck v. Western Seaman's Friend Soc.* 87 Ill. 246; *Presbyterian Theological Seminary v. People ex rel. Johnson*, 101 Ill. 579; *Re Swigert*, 119 Ill. 83, 59 Am. Rep. 789, 6 N. E. 469, 123 Ill. 267, 14 N. E. 32; *Montgomery v. Wyman*, 180 Ill. 17, 22 N. E. 845; *People ex rel. Swigert v. Illinois C. R. Co. (Ill.)* 6 West. Rep. 725; *People ex rel. Breyer v. Watska Camp Meeting Asso.* 160 Ill. 576, 43 N. E. 716; *Bloomington Cemetery Asso. v. People ex rel. Baldrige*, 170 Ill. 377, 48 N. E. 905; *St. Peter's Church v. Scott County*, 12 Minn. 395, 611. 280; *Chicago, M. & St. P. R. Co. v. Pfander*, 23 Minn. 217; *Hennepin County v. Bell*, 43 Minn. 344, 45 N. W. 615; *Beilinger v. White*, 5 Neb. 401; *Young Men's Christian Asso. v. Douglas County*, 60 Neb. 642, 52 L. R. A. 123, 83 N. W. 924; *Watson v. Cowles*, 61 Neb. 216, 85 N. W. 35; *State ex rel. Crumpacker v. Chicago, B. & K. C. R. Co.* 89 Mo. 523, 14 S. W. 522; *Salisbury v. Lane (Idaho)* 63 Pac. 383.

Indeed, in one case the court, after laying down the principle of strict construction, said: "It is a waste of time to cite authorities upon this point; it is too well settled to need examination." *Weston v. Shawano County*, 44 Wis. 242.

Lest the reader should gather from this general and formidable array of authorities a too partial impression of the universality and unbending rigor of the application of the just-stated principles, attention will be called, before passing to another topic, to some utter-

County Comrs. 66 Me. 387; *Winslow v. Kennebec County*, 37 Me. 561; *Young v. Parker*, 33 N. J. L. 192; *Burroughs*, *Taxn.* pp. 240, 241.

By not fixing its domicile in Vicksburg, as required by law, the railroad company forfeited its charter and all claims to exemption.

State ex rel. Atty. Gen. v. Milwaukee, L. S. & W. R. Co. 45 Wis. 579; *Simmons v. Norfolk & B. S. Co.* 113 N. C. 147, 22 L. R. A. 677, 18 S. E. 117.

The consolidation was unauthorized.

A gigantic trust or combination was formed between the Illinois Central Railroad Company and its competitor, the Louisville, New Orleans, & Texas Railroad Company, by which all competition whatever in the entire western half of the state was suppressed.

State ex rel. Watson v. Standard Oil Co.

ances of the United States Supreme Court, and of certain of the state courts in cases in point.

All contracts, says the former tribunal, are to be construed to accomplish the intention of the parties; and in determining their different provisions a liberal and fair construction will be given to the words, either singly or in connection with the subject-matter. It is not the duty of the court by legal subtlety to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it. If there is no ambiguity, and the meaning of the parties can be ascertained, effect is to be given to the instrument used whether it is a legislative grant or not. In the case of the Charles River Bridge the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized that charters are to be construed most favorably to the state, and that in grants by the public nothing passes by implication. This court has repeatedly since asserted the same doctrine. The principle is this: That all rights which are asserted against the state must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power it does not exist. If on a fair reading of the instrument reasonable doubts arise as to the proper interpretation to be given to it those doubts are to be solved in favor of the state; and where it is susceptible of two meanings, the one restricting and the other extending the powers of the corporation, that construction is to be adopted which works the least harm to the state. But if there is no ambiguity in the charter, and the powers conferred are plainly marked, and their limits can be readily ascertained, then it is the duty of the court to sustain and uphold it, and to carry out the true meaning and intention of the parties to it. Any other rule of construction would defeat all legislative grants, and overthrow all other contracts. *Binghamton Bridge*, 3 Wall. 51, *sub nom. Chenango Bridge Co. v. Binghamton Bridge Co.* 19 L. ed. 137.

While the Maryland court of appeals, in passing upon the claim of a corporation that an exemption from taxation given in its charter extended to local, as well as state, taxes, said: The intention of the legislature is the all-controlling principle by which the construction of its enactment is to be governed,—and nothing is more conclusively established, as well by the decisions of the Supreme Court of the United States as by those of Maryland and of other

49 Ohio St. 176, 15 L. R. A. 145, 30 N. E. 279; *Louisville & N. E. Co. v. Kentucky*, 161 U. S. 688, 40 L. ed. 854, 16 Sup. Ct. Rep. 714; *Pearson v. Great Northern E. Co.* 161 U. S. 672, 40 L. ed. 847, 16 Sup. Ct. Rep. 705; *Mobile & O. R. Co. v. Nicholas*, 98 Ala. 123, 12 So. 723.

It is against public policy and *ultra vires*, without any statute or Constitution.

Louisville & N. E. Co. v. Kentucky, 161 U. S. 688, 40 L. ed. 854, 16 Sup. Ct. Rep. 714.

Mr. J. A. P. Campbell, also for plaintiff:

The powers conferred on the respective companies by §§ 16 and 25 of the respective charters did not survive their exercise in the formation of the Louisville, New Orleans, & Texas Railroad Company, but were thereby exhausted; and the new company formed by

judicial tribunals, than that the right of taxation is never presumed to be surrendered by the sovereign power,—and that such surrender is never made, unless it be the result of express terms, or necessary inference. The effort made to restrict the immunity now under consideration to state taxes only, cannot be sustained. The terms used in the grant are so broad, unambiguous, and universal, and the reasons for making them so accordant therewith, that their full and natural import must be given to them. The exemption covers county and city, as well as state, taxes. There are no words used by the legislature qualifying or limiting the extent of the immunity conferred. *Baltimore v. Baltimore & O. R. Co.* 6 Gill, 288, 48 Am. Dec. 531.

The doctrines of this case were approved long afterwards by the same court when its membership had completely changed. *State v. Baltimore & O. R. Co.* 48 Md. 49.

Still stronger expressions, amounting in fact to a repudiation of the rule of strict construction *in toto*, have come from the courts of Wisconsin and New York concerning laws imposing specific taxes in commutation of all others. (See VI. a, 2, *infra*.) *Milwaukee & St. P. R. Co. v. Crawford County*, 29 Wis. 116; *Binghamton Trust Co. v. Binghamton*, 72 App. Div. 341, 76 N. Y. Supp. 517.

b. In the United States Supreme Court.

There is, in cases where it is alleged that a state law impairs the obligation of a contract, a governing principle that forms an exception to the general rule observed by the Supreme Court of the United States in reviewing the decisions of the state courts. That principle is that the court will and must decide for itself whether or not there is a contract as alleged, and, if so, whether or not it has been impaired by the challenged legislation, wholly regardless of the conclusions of the state courts. That exception was early recognized, and has since been consistently observed.

The rule observed by this court, said McLean J., on one occasion, to follow the construction of the statute of the state by its supreme court, is strongly urged. This is done when we are required to administer the laws of the state. The established construction of a statute of the state is received as a part of the statute. But we are called upon in the case before us, not to carry into effect a law of the state, but to test the validity of such a law by the Constitution of the Union. We are exercising an appellate jurisdiction. The decision of the supreme court

the exercise of these powers did not possess them. The new company, made by consolidation, succeeded to all their respective rights and powers, as to the road acquired from each. Consolidation did not invest the company with the rights and powers of each charter of the constituents, as to the other road.

If the Louisville, New Orleans, & Texas Railroad Company had any power to further consolidate or unite with any other, it arose from § 16 of the charter of the Memphis & Vicksburg, one constituent, and that applied only to the road it contributed in the consolidation, and did not extend to all the road of the Louisville, New Orleans, & Texas Railroad Company.

Philadelphia, W. & B. R. Co. v. Maryland, 10 How. 376, 13 L. ed. 461; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189.

of the state is before us for revision, and if its construction of the contract in question impairs its obligation we are required to reverse its judgment. To follow the construction of a state court in such a case would be to surrender one of the most important provisions of the Constitution. *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977.

And Chief Justice Taney, speaking to the same proposition, about the same time, said: But this rule of interpretation is confined to ordinary acts of legislation, and does not extend to the contracts of the state although they should be made in the form of a law. For it would be impossible for this court to exercise any appellate power in a case of this kind unless it was at liberty to interpret for itself the instrument relied on as the contract between the parties. It must necessarily decide whether the words used are words of contract, and what is their true meaning, before it can determine whether the obligation the instrument created has or has not been impaired by the law complained of. And in forming its judgment on this subject it can make no difference whether the instrument claimed to be a contract is in the form of a law passed by the legislature or of a contract or agreement by one of its agents acting under the authority of the state. *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 14 L. ed. 997.

And Wayne, J., followed a little later with a fuller exposition. This court, said he, has repeatedly said, whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been that the constructions given by the courts of the states to state legislation and to state constitutions have been conclusive upon this court with a single exception, and that is when it has been called upon to interpret the contracts of states, "though they have been made in the forms of law," or by the instrumentality of a state's authorized functionaries in conformity with state legislation. It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the supreme court of a state whenever such a court shall adjudge that not to be a contract which has been alleged in the forms of legal proceedings by a litigant to be one, within the meaning of that clause of the Constitution which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by

It did not act under this power, manifestly. It was by virtue of the ample power conferred by the charter of the Yazoo & Mississippi Valley Railroad Company that the consolidation of the Louisville, New Orleans, & Texas Railroad Company was authorized and effected; and the consequence of such consolidation must be determined by the charter authorizing it. Its provision is that the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties, immunities, and franchises herein granted, etc.; thus carefully providing that the charter of the Yazoo & Mississippi Valley Railroad Company should be the measure of the enjoyment of power by the consolidated company.

The Louisville, New Orleans, & Texas Railroad Company had an immunity from taxation, and might have retained it by con-

the supreme court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by the supreme court of a state? It was never intended, and cannot be sustained by any course of reasoning, that this court should or could, with fidelity to the Constitution of the United States, follow the construction of the supreme court of a state in such a matter when it entertained a different opinion; and in forming its judgment in such a case it makes no difference in the obligation of this court in reversing the judgment of the supreme court of a state upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a state by its authority. *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173.

Later Miller, J., dealt with the same point, thus: It is said, however, that it is not the validity of the act of 1860 which is complained of by plaintiffs, but the construction placed upon that act by the state court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract unless it takes jurisdiction of such cases. *Proprietors of Bridges v. Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571.

This court has always jealously asserted the right, declared the same judge again, when the question before it was the impairing of the obligation of a contract by state legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the state courts giving such construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional state legislation. *Delmas v. Merchants' Mut. Ins. Co.* 14 Wall. 661, 20 L. ed. 757.

The rule was recognized, and an elaborate explanation made as to why it did not operate in that particular case, in *Kennebec & P. R. Co. v. Portland & K. R. Co.* 14 Wall. 25, 20 L. ed. 851.

Justice Miller once more calls attention to this principle by saying: Whether that contract is such as to be impaired by these later laws is one of the questions of which this court

tinuing to exist. It merged its existence in the Yazoo & Mississippi Valley Railroad Company,—was devoured by it,—and in surrendering its existence and organization and name, and all it had, to the Yazoo & Mississippi Valley Railroad Company, it surrendered all that pertained to it.

If a new company was formed, exemption was gone; and, if the Yazoo & Mississippi Valley Railroad Company was enlarged and extended by the absorption of the other, the charter of the Yazoo & Mississippi Valley Railroad Company became the law of the being of the organization, for so it is declared. The charter was drawn for a purpose, and the provision that consolidation was not to give exemption from taxes was intended to capture the legislature, and doubtless had that effect. Being the work of the promoters, it must be taken most strongly against the corporation.

always has jurisdiction. *Northwestern University v. Illinois ex rel. Miller*, 99 U. S. 309, 25 L. ed. 287.

And Waite, Ch. J., restates and approves this exceptional rule in *Wright v. Nagle*, 101 U. S. 791, 25 L. ed. 921.

Still later, Matthews, J., thus expressed it: The question we have to consider and decide is whether, in the judgment under review, the supreme court of Florida gave effect to a law of the state, which, in violation of the Constitution of the United States, impairs the obligation of a contract. In reaching a conclusion on that point, we decide for ourselves, independently of the decision of the state court, whether there is a contract, and whether its obligation is impaired; and, if the decision of the question as to the existence of the alleged contract requires a construction of the state Constitution and laws, we are not necessarily governed by the previous decisions of the state courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well-settled doctrine of this court. *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 8 Sup. Ct. Rep. 198.

And Harlan, J., thus states the rule: Whether an alleged contract arises from state legislation, or by agreement with the agents of a state, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment, and independently of the adjudication of the state court, to decide whether there exists a contract within the protection of the Constitution of the United States. *Louisville Gas. Co. v. Citizens' Gaslight Co.* 115 U. S. 683, 29 L. ed. 510, 6 Sup. Ct. Rep. 265.

Gray, J., refers to it in this wise: In determining whether the statute of a state impairs the obligation of a contract, this court, doubtless, must decide for itself the existence and effect of the original contract, although in the form of a statute, as well as whether its obligation has been impaired. *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625.

The rule was recognized and approved, but held not to apply, in *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

In a case involving the full faith and credit clause of the Federal Constitution, anent the question whether, by a judgment sued upon in a state where it was not rendered, the nature of the cause of action had changed, the court said: 'The case in this regard is analogous to one
-60 L. R. A.

The attempt of the consolidating companies to avoid the effect of consolidation by their agreement can have no effect. They had the right to agree on terms, but could not vary the legal consequence of what they did, by any declaration or agreement. The law determines that.

The power to consolidate is a corporate franchise, and where it was not exercised so as to effect organization before the adoption of the Constitution, its subsequent exercise was subject to the provision for the taxation of all the property of private corporations for pecuniary gain, in view of which there cannot be an exemption of the property of such corporation, except when like exemption is extended to individuals.

1 *Thomp. Corp.* § 365; *Memphis & L. R. Co. v. Railroad Comrs.* 112 U. S. 609, sub nom. *Memphis & L. R. Co. v. Berry*, 23 L. ed. 837, 5 Sup. Ct. Rep. 299; *St. Louis, I.*

arising under the clause of the Constitution which forbids a state to pass any law impairing the obligations of contracts, in which if the state court gives effect to a subsequent law which is impugned as impairing the obligations of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

The principle is now accepted as of course. "So that it is necessary to inquire as to the existence and effect of the alleged contract. And that question must be determined by this court upon its own judgment, independently of any adjudication by the state court." *Bryan v. Kentucky Annual Conference M. E. Church, South, Bd. of Edu.* 151 U. S. 639, 38 L. ed. 297, 14 Sup. Ct. Rep. 465.

It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or charter provision does not constitute a contract, is not binding upon this court. The question of the existence or nonexistence of a contract in cases like the present is one which this court will determine for itself. *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

In reversing *State ex rel. Marr v. Stearns*, 72 Minn. 200, 75 N. W. 210, the Supreme Court of the United States again declared that the general rule of that court was to adopt as conclusive the construction of a state constitution made by the highest court of the state, but to this rule there was one exception which had been constantly recognized, and that was, when a question of contract arises the competency of a state, through legislation, to make the alleged contract, and the meaning and validity of such contract, are matters which the United States Supreme Court, in discharging its duties under the Federal Constitution, must determine for itself; and, while in doing so it would lean to the interpretation of the state court, such leaning cannot relieve it from the duty of independently answering the question of contract or no contract. *Stearns v. Minnesota ex rel. Marr*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73.

And in dismissing one of the writs of error sued out by the railroad company in the principal case, the court once more declared that there is no doubt of the general proposition that where a contract is alleged to have been impaired by subsequent legislation it would put its own construction upon the contract, though

M. & S. R. Co. v. Berry, 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; *Louisville & Y. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Trask v. Maguire*, 18 Wall. 391, 21 L. ed. 938; *Willamette Woolen Mfg. Co. v. Bank of British Columbia*, 119 U. S. 101, 30 L. ed. 384, 7 Sup. Ct. Rep. 187; *Pierce v. Emery*, 32 N. H. 507; *Ang. & A. Priv. Corp.* 3.

The Constitution preserved the *status quo* of existing exemptions, but does not apply to exemption in a new organization effected by the exercise of a corporate franchise, after the adoption of the Constitution.

Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

The case of *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33, so far from being an adjudication of any question here

involved, can have no influence on this case. The case did not present any of the questions here presented. There was a careful avoidance of any expression of opinion, even, as to the effect of the consolidation of the Louisville, New Orleans, & Texas Railroad Company with the Yazoo & Mississippi Valley Railroad Company, as to anything except the matter before the court.

Cromwell v. Sac County, 94 U. S. 351; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

The parties are not the same or in privacy. The state was not a party to the former litigation, and the fact that the attorney general appeared in this court for the sheriff did not make the state a party or bound by the result. It is not to be tolerated that the state is to be conclusively estopped by the result of litigation between parties and every one of the seventy-five sheriffs of the

it might differ from that of the supreme court of the state. *Yazoo & M. Valley R. Co. v. Adams*, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256.

But the conclusion of a state court that a general state statute which declared that certain property therein mentioned, not inclusive of any railroad property, and none other, should be alone exempt from taxation, operated to repeal a special railroad act granting such an exemption, notwithstanding a further provision in such general statute declaring private and local laws not revised and brought into it not affected by its enactment unless expressly so therein provided, is conclusive upon the United States Supreme Court when the exemption contended for does not amount to an irrepealable contract, and hence is not protected by the contract clause of the Federal Constitution. *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 46, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

IV. Legislative and governmental powers.

The courts are ever reluctant to declare a statute unconstitutional. Whether the act be one granting an exemption from taxation, or taking it away, the courts equally incline to sustain the law.

In the early case of *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648, Chase, J., expressed himself thus vigorously upon this point: I am under a necessity to give a construction or explanation of the words "*ex post facto* laws," because they have not any certain meaning attached to them. But I will not go farther than I feel myself bound to go; and if I ever exercise the jurisdiction I will not decide any law to be void but in a very clear case.

The question, said the United States Supreme Court, soon afterward, in a case arising under the constitutional provision forming the subject of this note, whether a law be void for repugnancy to the Constitution, is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of

their incompatibility with each other. *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162.

And Chief Justice Marshall in the greatest of all cases in point, said, upon this subject: On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the Constitution. *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L. ed. 629.

It is only when a law transcends the legislative power that the courts can interfere. *People ex rel. Panama R. Co. v. New York Tax Comrs.*, 104 N. Y. 240, 10 N. E. 437.

To declare an act of a co-ordinate department of the government an unwarrantable assumption or usurpation of power because it is a violation of a constitutional prohibition is an exercise of the judicial office of a grave and delicate nature, and which never can be warranted but in a clear case. *State v. Baltimore & O. R. Co.*, 12 Gill & J. 399, 38 Am. Dec. 317.

When the validity of a particular power exercised by the legislature is contested, it is not necessary to show that the power was granted by the Constitution. Those who dispute the power must establish affirmatively and clearly that it has been denied. It is presumed to exist. The legislature is the depository of the power of the people, and its authority cannot be curtailed without diminishing the power of the people. It is upon this ground, as well as from a becoming respect for the action of a co-ordinate department of the government, that the courts have uniformly declared that in no doubtful case would they pronounce a legislative act to be contrary to the Constitution. *Martin, J.*, in the court below, whose decision is affirmed in *Baltimore v. State ex rel. Board of Police*, 15 Md. 370, 74 Am. Dec. 572.

The New York court of appeals in one case pauses to call attention to "certain principles which, though not controverted," it thought had "sometimes been overlooked in the argument" of the case then at bar. The people of that state, it said, in framing their Constitution committed to the legislature the whole law-making power of the state which they did not expressly or impliedly withhold. Plenary power in the legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is the exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show that it is forbidden. *People ex rel. Wood v. Draper*, 15 N. Y. 543.

state. Estoppel does not apply to the sovereign.

State ex rel. Atty. Gen. v. Cincinnati Gas-light & Coke Co. 18 Ohio St. 262; *State ex rel. Bradford v. Stock*, 38 Kan. 154, 16 Pac. 106; *State v. Bevers*, 86 N. C. 588; *Alexander v. State*, 56 Ga. 478; *People v. Brown*, 67 Ill. 435.

A suit for taxes for one year is no bar to one for the taxes of another year.

Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 633; *Bigelow, Estoppel*, 94.

To constitute *res judicata*, the matter involved in the second suit must have been decided in the first; and this must not be left to inference, or be matter of argument.

Herman, Estoppel, 279; *Freeman, Judgm.* §§ 256-462.

It is a well-established principle of judicial construction that before an act of the legislature ought to be declared unconstitutional its repugnancy to the provisions or necessary implications of the Constitution should be manifest and free from all reasonable doubt. If its character in this regard be questionable, then comity and a proper respect for a co-ordinate branch of the government should determine the matter in favor of the action of the latter. This doctrine has been uniformly held. *Baltimore v. State ex rel. Board of Police*, 15 Md. 376, 74 Am. Dec. 572.

In the decision below, which the case just cited affirmed, *Martin, J.*, had said on this point: In reference, therefore, to the question whether this act is to be treated as unconstitutional, I assume that the legislature is to be considered in the possession of all powers properly legislative, so far as the Constitution of the state of Maryland is concerned, which have not been by that Constitution prohibited expressly or by necessary implication. *Ibid.*

Obviously these principles apply with equal cogency to statutory contracts exempting persons and property from taxation as to laws imposing taxes.

In the Ohio bank tax cases, which were regularly reversed by the Supreme Court of the United States as fast as they came before it for review, the state courts denied, and the Federal Court affirmed, the legislative power, in the absence of restrictive provisions of the Ohio Constitution, to make beyond recall a partial surrender of the power of taxation by statute law. The cases are commented upon below.

In the cases of *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. ed. 495, and *Washington University v. Rouse*, 8 Wall. 439, 19 L. ed. 498, where the validity of a perpetual exemption was upheld as an irrevocable contract by a majority of the judges of the Supreme Court of the United States, three of the judges, *Chase, Ch. J., Miller and Field, JJ.*, dissented upon the broad ground that no legislative body sitting under a state Constitution of the usual character has a right to sell, give, or bargain away forever the taxing power of the state,—a power absolutely necessary to the continued existence of every modern political society.

This view, while meeting here and there with approval of courts and judges in isolated cases, has not prevailed, and the current of authorities has run in the contrary direction.

The supreme court of Pennsylvania, in one case, denied the power of the legislature of that state to barter away the sovereign right 60 L. R. A.

Messrs. Calhoun & Green also for plaintiff.

Messrs. Mayes & Harris, for defendants:

The consolidation effected between the Yazoo & Mississippi Valley Railroad Company and the Louisville, New Orleans, & Texas Railway Company on the 24th day of October, 1892, was not a waiver of the privilege conferred by § 5 of the act of March 3, 1882, incorporating § 21 of the charter of the Mobile & Northwestern Railroad Company.

Natchez, J. & C. R. Co. v. Lambert, 70 Miss. 779, 13 So. 33.

The fact that two suits are for different taxes does not prevent the operation of the doctrine of *res judicata*.

1 Greenl. Ev. §§ 523, 534, 535, note 9; 21 Am. & Eng. Enc. Law, p. 2006; *Lovejoy v. Murphy*, 3 Wall. 1, 18 L. ed. 129; *Robbins*

of taxation, and asserted that any piece of legislation which did so would be unconstitutional and void. That case was a suit in equity for an injunction to prevent the carrying into effect of a statute providing for the public sale of the main line of public improvements belonging to the state, and closing with a provision upon which the attack upon its constitutionality was based, that if the Pennsylvania Railroad Company became the purchaser, it should pay in addition to the purchase price at which the property was knocked down, \$1,500,000, in consideration whereof such railroad and the Harrisburg Railroad Company should be discharged by the commonwealth forever from payment of all tonnage taxes, and all other taxes whatever except local ones. The decision was rendered in 1858, and opinions were written by *Lewis, Ch. J., Lowrie and Knox, JJ.*, and a memorandum of concurrence in the opinion of the chief justice by *Woodward, J.* The learned chief justice plainly considers state Constitutions as grants of power from the people to the legislatures, and not limitations upon powers inherent. He regards a legislature as possessed of no powers not expressly or by necessary inference conferred upon it by the people. He says of *Gordon v. Appeal Tax Court*, 3 How. 142, 11 L. ed. 533, that the attorney general of Maryland admitted therein that there was a contract, and that it was protected, so that "the question of the constitutional power of the legislature to contract away the taxing power was therefore neither raised nor decided." If the question had been decided in the *Gordon Tax Case* it would have related "to powers conferred" by the Maryland Constitution, and not "to those granted" by that of Pennsylvania. And, in referring to *Hardy v. Waltham*, 7 Pick. 110, he says that it was a case of the people confirming in their Constitution an exemption of a college in an old colonial ordinance, and that the power of the people has never been doubted. All power emanates from the people. "But it is denied that they have in this state granted any such power to the legislature." *Mott v. Pennsylvania R. Co.* 30 Pa. 9, 72 Am. Dec. 664.

Mr. Justice Miller, of the United States Supreme Court, was of this opinion. "The writer of this opinion," he says in one case, "has always believed, and believes now, that one legislature of a state has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the Constitution will permit. But so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a con-

v. Chicago, 4 Wall. 657, 18 L. ed. 427; *Butterfield v. Smith*, 101 U. S. 570, 25 L. ed. 868; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14, 26 L. ed. 61; *Hale v. Finch*, 104 U. S. 261, 26 L. ed. 732; *Plumb v. Goodnow*, 123 U. S. 560, *sub nom. Plumb v. Crane*, 31 L. ed. 268, 8 Sup. Ct. Rep. 216; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Nesbit v. Independent Dist.* 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

A privilege like this passed to the consolidated company, whether the statutes authorizing the consolidation do or do not so provide; and it so passed, whether the consolidation does or does not create a new company in the legal sense.

Philadelphia, W. & B. R. Co. v. Maryland,

tract has been made." *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352.

If the question were an open one, afterwards said Dixon, J., of New Jersey, I should have no hesitation in reaching the conclusion that the power of taxation could not be made the subject of contract by the legislature; that it was intrusted to the legislature to be exercised, not to be destroyed or abridged; that, as it resided in our prototype, the English Parliament, unimpaired by acts of previous sessions of that body, so it was possessed by our legislature unfettered save as fundamental law restrained it; and that the constitutional clause protecting contracts could not, with reason, be extended to what, in all our history, had been regarded, not as a bargain between parties at liberty to assent or dissent, but as an exertion of the sovereign power controlling the willing and unwilling alike. But, unfortunately, as I think, the question is closed by judicial decisions which no court in this state can disturb; and, unless these decisions shall be reversed, it must be conceded that the legislature has power to barter away this essential attribute of government. *Little v. Bowers*, 46 N. J. L. 300, Affirmed in 48 N. J. L. 370, 5 Atl. 178.

And Freeman, J., writing for the supreme court of Tennessee, declares it to be his personal opinion that, as a general proposition, the power of the state to sell or give away forever, or for a limited period, the untrammelled right of taxation is one not possessed by a legislature unless expressly granted (and he knows of no constitution in which such a grant can be found). Of the dissent in the last-mentioned United States Supreme Court cases, he says that the argument was not only unanswered, but was unanswerable. But he admits that the question is settled by controlling decisions the other way, although the tendency is against extending such cases. *State v. Nashville*, C. & St. L. R. Co. 12 Lea, 583.

Whatever may be our opinion, said the same court soon afterward, of the power of the legislature in the granting of a charter of incorporation providing for the exemption from taxation of the property of such corporation so as to tie the hands of succeeding legislatures from imposing an equal share of the burdens of maintaining the government upon such corporation as the exigencies of the state may require, it is now too well settled by repeated decisions that such provisions create a contract, the obligation of which cannot be impaired, for us to attempt to disturb or review them here. *State use of Memphis v. Butler*, 86 Tenn. 614, 8 S. W. 586.

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10 How. 376, 13 L. ed. 461; *Tomlinson v. Branch*, 15 Wall. 400, 21 L. ed. 189; *Charleston v. Branch*, 15 Wall. 470, 21 L. ed. 193; *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757; *Southwestern R. Co. v. Georgia*, 92 U. S. 676, note, 23 L. ed. 762; *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718, 24 L. ed. 310; *Green County v. Conness*, 100 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; *Tennessee v. Whitworth*, 117 U. S. 130, 29 L. ed. 833, 6 Sup. Ct. Rep. 649; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Scotland County v. Thomas*, 94 U. S. 682, 24 L. ed. 219; *Schuyler County v. Thomas*, 98 U. S. 169, 25 L. ed. 88; *Wilson v. Salamanca Twp.* 99 U. S. 499, 25 L. ed. 330; *Empire v. Darlington*, 101 U.

It is no longer debatable, but affirmatively settled whether a legislature can bind the state by contract with a corporation created by its charter not to tax for a given time the franchise or property of such corporation further than is agreed on in its charter. *State v. Bank of Smyrna*, 2 Houst. (Del.) 99, 73 Am. Dec. 690.

The proposition that the legislature has no authority to surrender the sovereign power of taxation, and that any attempt to do so is unconstitutional and void, when no constitutional limitation upon the power of the legislature in this particular exists, has been conclusively negated by a line of contrary decisions by the Supreme Court of the United States, to which the state courts have no alternative but to submit. *State v. Dexter & N. R. Co.* 69 Me. 44; *State v. Knox & L. R. Co.* 78 Me. 92, 2 Atl. 846.

The power of exemption, as well as the power of taxation, is one of the essential elements of sovereignty. *Richmond v. Richmond & D. R. Co.* 21 Gratt. 604; *Com. v. Richmond & P. R. Co.* 81 Va. 855.

Says Staples, J., in the first of these cases: "The right of a legislature to surrender the power of taxation in specific cases has been the subject of one of the ablest and most exhaustive judicial discussions ever known in the Supreme Court of the United States, and is now regarded as established upon the most solid foundations of public policy and expediency."

If not restrained by constitutional provision, the legislature has the power to release a corporation from liability to taxation, however improvident and unwise may be such action. *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568.

A legislature has power, when not restricted by some constitutional provision, to contract with a corporation for its immunity from taxation. *State v. Baltimore & O. R. Co.* 48 Md. 49; *Mobile & S. H. R. Co. v. Kennerly*, 74 Ala. 566; *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 509.

A state legislature, not restrained by any constitutional provision to the contrary, may, in a given case, alienate or abridge the taxing power by charter to a corporation. And a territorial legislature, whose powers by the organic act of Congress are declared to extend to all rightful subjects of legislation consistent with the Federal Constitution and the provisions of the organizing act, has like powers, and may lawfully relieve lands granted by the general government in aid of a railroad from taxation in consideration of the annual payment of a percentage tax upon gross earnings in lieu

S. 87, 25 L. ed. 878; *Menasha v. Hazard*, 102 U. S. 81, 26 L. ed. 85; *New Buffalo Twp. v. Cambria Iron Co.* 105 U. S. 73, 26 L. ed. 1024; *Citizens' Street R. Co. v. Memphis*, 53 Fed. 715; *People ex rel. Walker v. Louisville & N. R. Co.* 120 Ill. 48, 10 N. E. 657; *Ohio & M. R. Co. v. People ex rel. Hanna*, 123 Ill. 467, 14 N. E. 874; *State ex rel. Wine v. Keokuk & W. R. Co.* 99 Mo. 31, 6 L. R. A. 222, 12 S. W. 290.

The charters authorized a consolidation to be made upon such terms as the consolidating companies should agree on; and the articles of consolidation expressly stipulated that the consolidation, when made, should not disturb the corporate existence of the Yazoo & Mississippi Valley Railroad Company, or form any new and distinct corporation.

Philadelphia, W. & B. R. Co. v. Howard,

thereof. First Div. St. Paul & P. R. Co. v. Farcher, 14 Minn. 297, Gil. 224.

The supreme court of Vermont, in 1899, in upholding the validity of an exemption from municipal taxation granted after a popular vote taken by statutory authority, put forth relative to the legislative power of taxation and exemption the following maxims: Unless prohibited by constitutional restrictions, the legislature may confer upon municipalities such power to tax as the state itself possesses. The power to tax includes the power to exempt unless specially denied by the Constitution. The general right to make exemptions is involved in the right to apportion taxes, and exists in the supreme legislative power, unless expressly forbidden. The power of the Vermont legislature in this respect has not only not been abridged by the Constitution, but, on the contrary, throughout the entire legislative history of the state its power to declare what property should be untaxed has been recognized and exercised. *Colton v. Montpelier*, 71 Vt. 413, 45 Atl. 1039.

And in Michigan it is held that the legislative power, when unhampered by constitutional restrictions, to exempt from taxation or to contract with a railroad corporation for a percentage tax on earnings as commutation for and in lieu of other taxes, may be delegated to a municipality in respect of an urban street railway. *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809.

Hunt, J., for the United States Supreme Court, in one case has this to say: Another question is raised. That the legislature possesses no power to grant a corporation perpetual immunity from taxation. It is said that the power of taxation is among the highest powers of a sovereign state, that its exercise is a political necessity, without which the state must cease to exist, and that it is not competent for one legislature, by binding its successors, to compass the death of the state. It is too late to raise this question in this court. It has been held that the legislature has the power to bind the state in relinquishing its power to tax a corporation. It has been held that such a provision in the charter of a corporation constitutes a contract which the state may not subsequently impair. These doctrines have been reiterated and reaffirmed so recently as 1871 by Davis, J., in *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568. They must be considered as settled in this court. *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326.

In the Delaware Railroad Tax Case, Field, J., remarks: If the point were not already ad- 60 L. R. A.

13 How. 332, 14 L. ed. 168; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757; *Southwestern R. Co. v. Georgia*, 92 U. S. 676, note, 23 L. ed. 762; *Green County v. Conness*, 109 U. S. 104, 27 L. ed. 872, 3 Sup. Ct. Rep. 69; *Citizens' Street R. Co. v. Memphis*, 53 Fed. 715; *Meyer v. Johnston*, 53 Ala. 237.

The bare fact that by a consolidation a new company is formed does not cause a lapse, or forfeiture, or waiver of any privilege, even of exemption from taxation, previously enjoyed by one of the consolidating companies.

Tennessee v. Whitworth, 117 U. S. 138, 29 L. ed. 832, 6 Sup. Ct. Rep. 645; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

judged, it would admit of grave consideration whether the legislature of a state can surrender this power and make its action in this respect binding upon its successors, any more than it can surrender its police power or right of eminent domain. 18 Wall. 206, 21 L. ed. 888.

The power of the legislature of a state to exempt particular parcels of property of individuals, or of corporations, not merely during the period of its own existence, but so as to be beyond the control of the taxing power, has been asserted in several cases by the United States Supreme Court, although against this doctrine there have been earnest protests by individual judges. *Hoge v. Richmond & D. R. Co.* 99 U. S. 348, 25 L. ed. 303.

A constitution providing that all lands liable to taxation, held by deed, grant, or entry, town lots, bank stock, slaves, and such other property as the legislature may from time to time deem expedient shall be taxable, does not make it the duty of the legislature to tax all property, but leaves it discretionary with that body to tax, or omit to tax,—that is, to exempt,—as it may deem expedient. Such a provision merely requires that when property is taxed it shall be ad valorem, according to uniform rules. Inasmuch, then, as such a constitution does not command all property to be taxed, the state legislature has power to grant exemption from taxation in a charter of incorporation, which, being accepted, becomes a binding and irrevocable contract of which the obligation may not be impaired by subsequent law. *Knoxville & O. R. Co. v. Hicks*, 9 Baxt. 442; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

In determining what power the legislature of a state may rightfully exercise, the Constitution is not to be regarded as a grant of power. The legislature has inherently all legislative power, and the Constitution only limits or restricts such power; it does not confer it. As a power to grant corporate charters is a legislative power, and it is settled that such a grant becomes, when accepted, a contract which may not be impaired by subsequent legislation when no right to do so is reserved, stipulations in it for exemptions from, or commuted, taxation are held to be important elements therein, and protected by the contract clause of the Federal Constitution. The authorities, however, upon this point all go upon the assumption that there is no constitutional restraint upon the power of the legislature to grant charters of that character. *Knoxville & O. R. Co. v. Hicks*, 9 Baxt. 442.

The harm against which § 180 of the Constitution was directed was this: To subject charters theretofore granted, but not accepted because not organized under, to the new rules of the Constitution, they being as yet mere offers of franchises by the state, and not closed contracts. The provision had no relation to a mere consolidation of two old companies long since organized and in active business under their charters.

People ex rel. Atty. Gen. v. Stanford, 77 Cal. 371, 2 L. R. A. 92, 19 Pac. 693, 18 Pac. 55; *Santa Ana Water Co. v. San Buenaventura*, 56 Fed. 339.

The convention did not intend to embrace, as a condition to the exercise of any powers contained in charters already granted and organized under and put into operation, the requirement that the companies should come

under any new and different law as made by the Constitution itself.

Scotland County v. Thomas, 94 U. S. 682, 24 L. ed. 210; *Calhoun County v. Galbraith*, 99 U. S. 214, 25 L. ed. 410; *Pretty v. Solly*, 26 Beav. 606; Endlich, Interpretation of Statutes, § 216.

Whitfield, J., delivered the opinion of the court:

The question which lies at the foundation of this case is this: Conceding, for argument's sake, that the Louisville, New Orleans, & Texas Railroad Company had an exemption from taxation, did the consolidation of that railroad with the Yazoo & Mississippi Valley Railroad Company on October 24, 1892, create a new corporation, as of that date, and thus result in the cutting off of said exemption, by § 180 of the Constitu-

The power of a legislature to grant exemption from taxation, wholly or partially and for fixed or indefinite periods, necessarily includes the power to exempt upon conditions or contingencies which are to happen in the future, as, for instance, to exempt a railroad from taxes whenever the imposition thereof will reduce its dividends below a stated percentage. *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

Since the days of the Revolution taxation has been recognized as a representative act. The power to tax necessarily implies a power to exempt. Taxation being a legislative power, it is not the province of a court to review it, except in cases where the power is limited by constitutional restrictions. A provision in the Constitution that all laws should be made for the good of the whole, and the burdens of the state ought to be fairly distributed among its citizens, does not limit the legislative power of taxation and exemption. It is directory, not mandatory. *Crafts v. Ray*, 22 R. I. 179, 49 L. R. A. 604, 46 Atl. 1043.

The New York legislature, so far as the Constitution of that state stood in 1880, had the power to exempt railroads from taxation. Whether or not the exercise of such a power is wise, it is not for the courts to say. *People ex rel. Troy Union R. Co. v. Carter*, 52 Hun, 458, 5 N. Y. Supp. 507, Affirmed in 117 N. Y. 625, 22 N. E. 1128.

The legislature of Georgia is competent to contract in the charter of a corporation that its tax shall not exceed a stated rate per cent of its earnings; and, having so contracted without reservation, it is not competent for a subsequent legislature to impair the obligation of such contract by assessing a higher tax. A statute attempting to do so is unconstitutional and void. *State v. Georgia R. & Bkg. Co.* 54 Ga. 423.

The court in so holding did so rather against its convictions, feeling constrained by the decisions of the United States Supreme Court, which it deemed controlling, but unsound.

The power of the legislature to grant a corporate charter, constituting in terms an irrevocable contract for a definite term for the payment by the corporation annually of a stated sum into the public treasury as a full commutation for all taxes, imposts, and assessments on the capital stock or corporate property, is not affected or limited by an article in the state Constitution declaring that no man or set of men is entitled to exclusive separate public emoluments or privileges but in consideration 60 L. R. A.

of public services. *Daughdrill v. Alabama Life Ins. & T. Co.* 31 Ala. 91.

The power of the legislature to exempt particular classes or kinds from taxation and assessment is well settled. Such power is not affected by a constitutional provision making it the duty and empowering the legislature to provide for the organization of municipalities, and to restrict their power of taxation and assessment, borrowing money, contracting debts, and loaning their credit so as to prevent abuses. *Milwaukee Electric R. & Light Co. v. Milwaukee*, 95 Wis. 42, 69 N. W. 796.

The territorial legislature of Minnesota had power to exempt from taxation lands granted to aid railroad construction, and, having exercised such power, its grant constituted a contract irrevocable, not only by its successors and the state of Minnesota, but none the less so by the territory of Dakota after the organization thereof as an independent government. *Winnona & St. P. R. Co. v. Deuel County*, 3 Dak. 1, 12 N. W. 561.

A provision in a state Constitution that mines and mining claims bearing gold, silver, and precious metals (except as to net proceeds and surface improvements) shall be exempt from taxation for ten years after its adoption, and thereafter taxable as provided by law, does not make the subsequent taxation mandatory upon the legislature, but leaves it in the discretion of that body; and the exemption continues until the legislature expressly and positively provides otherwise. *People ex rel. Iron Silver Min. Co. v. Henderson*, 12 Colo. 369, 21 Pac. 144.

Inasmuch as a legislature has no power, in the face of a constitutional provision prohibiting all exemptions from taxation, to transfer to a new corporation an exemption formerly enjoyed in virtue of an antecedent irrevocable contract by a railroad taken over by the state upon mortgage foreclosure, a grant of all the rights, franchises, privileges, and immunities of the extinct company has no such effect. *Trask v. Maguire*, 18 Wall. 391, 21 L. ed. 938.

The legislature has no power to continue an irrevocable charter contract for tax exemption enjoyed by a constituent railroad to the consolidated company, which it enters by virtue of a consolidating statute passed after a constitutional provision making all corporate charters subject to alteration, amendment, or repeal becomes operative. *State v. Northern C. R. Co.* 44 Md. 131.

The legislature has no power to grant an irrevocable right to tax immunity by a compromise agreement, when it lacks power to do so by

tion of 1890? If this question be answered in the affirmative, then, obviously, the contention of the state must prevail throughout, without regard to any other questions in the case. The power to consolidate must be granted by the state, and permission to consolidate, so granted, is not a contract, but a mere license. 6 Am. & Eng. Enc. Law, 2d ed. p. 802; *Pearsall v. Great Northern R. Co.* 161 U. S. 667, 40 L. ed. 845, 16 Sup. Ct. Rep. 705; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 695, 40 L. ed. 857, 16 Sup. Ct. Rep. 714; *Kcokuk & W. R. Co. v. Missouri*, 152 U. S. 312, 38 L. ed. 455, 14 Sup. Ct. Rep. 592. These railroad companies were perfectly free to consolidate or not. The Louisville, New Orleans, & Texas Railroad Company, if it had a legal exemption, could have retained it by simply retaining the precise corporate existence it then had.

original action. The power to continue an ir-repealable charter exemption vanishes when the Constitution intervenes to take away the power to confer it by original grant. *Northern C. R. Co. v. Maryland*, 187 U. S. 258, 47 L. ed. — 23 Sup. Ct. Rep. 62, Affirming 90 Md. 449, 45 Atl. 465.

When the legislature has no constitutional power to exempt any property from taxation, a provision in a bank charter exempting it from taxation except upon its real estate is ineffectual. *New Orleans v. Louisiana Sav. Bank & S. D. Co.* 31 La. Ann. 826.

While it is true that a corporate charter constitutes a contract with the state which grants it, which may not be impaired by subsequent legislation within the purview of the Federal Constitution, the protection afforded to it extends only to property rights thereunder, and not to governmental ones; hence, the exercise of the police power by one legislature cannot be barred away by the contract of an earlier one, and any agreement to withhold such legislative action is a mere license revocable at pleasure of any legislature. But none the less, a constitutional provision making such a contract will bind the legislature from impairing it, where an ordinary piece of legislation would not have that effect. *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198.

When a state Constitution declares that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals; that taxation shall be equal and uniform throughout the state; that all property shall be taxed ad valorem, to be ascertained as directed by law,—a legislature of such state has no power to make an ir-repealable grant of exemption from taxation to any railroad by charter or other law; but corporate property must always remain subject—that is, liable—to taxation, whether or not immediately and always actually thereunto subjected. *Gulf & S. I. R. Co. v. Hweas*, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

A constitutional mandate that all property shall be taxed prevents the legislature from granting any exemption whatever, no matter what the consideration. It is not the nature or extent of the consideration which is to be looked to, but the legislative power. Existing exemptions cannot, of course, be interfered with; but new exemptions are beyond legislative competency. *Memphis & C. R. Co. v. Gaines*, 3 Tenn. Ch. 604.

This doctrine is quoted approvingly in *Chattanooga v. Nashville, C. & St. L. R. Co.* 7 Lea, 561.

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Const. 1890, § 181. Consolidation was voluntary on their part, and effected subject to the law and Constitution then in force. What the effect of consolidation is, depends upon the will and purpose, not of the corporations, but of the state, speaking through the legislature.

Great stress has been laid upon the provisions of § 5, p. 843, Acts 1882, to the effect that the Yazoo & Mississippi Valley Railroad Company might consolidate with other railroad companies "upon such terms as they may agree upon." But this simply meant "such terms as they, the companies, might agree upon," consistent with the law as announced in their charters and otherwise. The charter of the Memphis & Vicksburg Railroad Company, one of the constituents of the Louisville, New Orleans, & Texas Railroad Company, expressly stipulates that

The case itself, after affirmance by the supreme court of Tennessee, was finally affirmed by the United States Supreme Court. *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091.

The declaration in the Kentucky Bill of Rights, that no man or set of men is entitled to exclusive separate public emoluments or privileges from the community but in consideration of public services, is held by the courts of that state to deprive the legislature of power to grant exemptions from taxation save in return for services rendered or to be rendered to the public. And, as it is further held that city waterworks, even when owned by municipalities in their corporate right, do not render public services, but are held for profit and convenience rather than for governmental ends, acts granting them exemptions from taxation, whether charters or not, are unconstitutional to that extent. *Com. v. Makibben*, 90 Ky. 384, 14 S. W. 372; *Covington v. Com.* 19 Ky. L. Rep. 105, 39 S. W. 836; *Clark v. Louisville Water Co.* 90 Ky. 515, 14 S. W. 502.

The last case was affirmed in the Supreme Court of the United States upon the ground that the right to withdraw the exemption had been reserved by antecedent statute reserving generally a right to alter, amend, and repeal all corporate charters. *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346.

The Indiana constitutional provision (art. 10, § 1, Burns's Rev. Stat. 1894, § 193, and Horner's Rev. Stat. 1897, § 193) that the general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specially exempted by law, is construed by the courts of that state as taking away the power of the legislature to grant any property exemptions outside of the specified classes. *State ex rel. Tieman v. Indianapolis*, 60 Ind. 375, 35 Am. Rep. 223; *Warner v. Curran*, 75 Ind. 300; *Deniston v. Terry*, 141 Ind. 677, 41 N. E. 143; *Harn v. Woodward*, 151 Ind. 132, 50 N. E. 33; *State ex rel. Morgan v. Workingmen's Bldg. & Loan Fund & Sav. Asso.* 152 Ind. 278, 53 N. E. 168.

A Tennessee county court has, neither by the Constitution, nor any statute, the power to release a railroad corporation from taxation for county purposes; and an attempt by it to do so is void in spite of the fact that it induced

any consolidation shall be "on such terms as may be consistent with the powers conferred on said company." Substantially identical language with the language of § 5, *supra*, occurred in the charters under consideration in *Keokuk & W. R. Co. v. Missouri*, 152 U. S., at page 309, 38 L. ed. at page 454 and 14 Sup. Ct. Rep. 595, and *Atlantic & G. R. Co. v. Georgia*, 98 U. S., at page 361, 25 L. ed., at page 186, and in many other cases. These words, "upon such terms as they may agree upon," are not new. They perhaps appear substantially in all grants of power to consolidate railroad or other corporations,—as, for example, in *Atlanta & R. Air-Line R. Co. v. State*, 63 Ga., at page 486. They have no magic in them. They are plain, everyday phrases, and relate alone to the mere administrative details attending the consolidation of corporations, which

must, of course, be left to the officers of such corporations, and with which the legislature cannot be burdened, and they convey no substantive powers or rights. These must be found, if anywhere, expressly set forth by the legislature in the charters in the first instance, and not delegated to the corporations, to be worked out under the gloss of these mere administrative phrases. Whether, therefore, the union of these two corporations resulted, in consolidation and the creation of a new corporation, or in mere merger of the Louisville, New Orleans, & Texas Railroad Company with the Yazoo & Mississippi Valley Railroad, is to be found, not in this phrase so much relied on, but in the clear purpose of the legislature. The articles of consolidation are to be carefully looked to, of course; but they must conform in what they do, if valid, to the purpose of

foreign investments for the purpose of constructing the road. *Nashville & K. R. Co. v. Wilson County*, 89 Tenn. 597, 15 S. W. 446.

A municipality has no power to contract by ordinance irrevocably with a street railway company in limitation of its obligations respecting street improvements so as to deplete the state legislature of its right to increase the corporate burdens, when, at the time such company was organized, there was in force a state statute expressly subjecting to legislative control, regulation, alteration, abridgment, and cancellation all corporate charters, by-laws, rules, and regulations, and making every corporate franchise open to withdrawal, regulation, and conditional enjoyment at the legislative will. *Sioux City Street R. Co. v. Sioux City*, 135 U. S. 98, 34 L. ed. 808, 11 Sup. Ct. Rep. 228. *Affirming* 78 Iowa, 367, 43 N. W. 224.

When a state Constitution requires that all property, whether owned by natural persons or corporations, shall be taxed ad valorem unless exempted by the organic law; that all corporate property shall pay the same rate of taxation paid by individual property; and provides that the legislature may, besides, impose taxes on incomes, licenses, and franchises; when, too, it authorizes the legislature to delegate the like power as to franchisees to municipalities, and the legislature has enacted a statute requiring every street railway company, in addition to other taxes laid upon it, to pay annually on its franchise both a state tax and a local tax to the county, city, town, or taxing district wherein such franchise may be exercised and according to the value thereof; and when, beyond all that, the charter of a municipal corporation forbids its board of trustees to grant any special privilege to any person, corporation, or company, or to exempt any such person or body from the payment of taxes,—such municipality has no power to exempt a street railway operating within its limits from payment of taxes upon its franchise ad valorem, either by contractual ordinance upon good consideration, or otherwise. *South Covington & C. Street R. Co. v. Bellevue*, 20 Ky. L. Rep. 1184, 57 L. R. A. 50, 49 S. W. 23.

V. Constitutional changes.

It is not at all times easy in a given case to decide just what is the effect of an amended state Constitution upon exemptions from taxation operative at the time of its adoption. In general it may be said that exemptions enjoyed by virtue of irrevocable contracts are not affected thereby, for a constitutional provision, equally with a statutory enactment, is a law 60 L. R. A.

within the meaning of the contract clause of the Constitution of the Union, which states are forbidden to pass if thereby the obligation of a contract is impaired; that repealable contracts of exemption become immediately subject to the provisions of the new organic law; and that continued, extended, or transferred grants of exemption can only be made subject to the conditions and limitations imposed by the new Constitution.

A constitutional limitation upon the legislative power to exempt from taxation does not prevent the continuing of an immunity contracted for in a corporate charter antedating the adoption of the Constitution so restricting. *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469.

A constitutional declaration that the legislature shall never in any manner suspend or surrender the power of taxation does not affect a contract to the contrary in a corporate charter antecedently granted. *State v. Dexter & N. R. Co.* 69 Me. 44.

There is a radical difference between a constitutional provision that all lands liable to taxation held by deed, grant, or entry, town lots, bank stock, and such other property as the legislature may from time to time deem expedient, shall be taxable; that all property shall be taxed ad valorem, the value to be ascertained as the legislature shall direct, so that it shall be equal and uniform throughout the state; and that no one species of property from which a tax may be collected shall be taxed higher than another of equal value (*Tenn. Const. 1834, art. 2, § 28*),—and another providing that all property, real, personal, and mixed, shall be taxed, but that the legislature may exempt certain enumerated kinds, and then, that all property shall be taxed ad valorem, etc., etc., as in the other provision (*Tenn. Const. 1870, art. 2, § 28*). Under the former, the legislature may tax, or omit to tax, as it chooses; under the latter it has no power to exempt outside of the excepted classes. *Memphis v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1045.

Stock issued from time to time by a banking corporation to increase its capital from \$200,000, upon which it was authorized to organize and elect directors, to \$1,000,000, by virtue of a charter provision that it might receive on deposit any and all sums not below a minimum weekly amount, and when such deposits reached a stated sum they might, at the option of the depositor, be converted into stock, is all, as respects taxation, upon the same footing as the initial issue. It participates in the rights and benefits of the contract in the charter in that regard, and is unaffected by a new state Consti-

the legislature as to what the effect of the consolidation shall be. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 305, 38 L. ed. 453, 14 Sup. Ct. Rep. 592; *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 605, 23 L. ed. 757.

Let us inquire, then, what the effect of this consolidation was. And, first, what railroads entered into this consolidation? The Louisville, New Orleans, & Texas Railroad Company and the Yazoo & Mississippi Valley Railroad Company. What was the Louisville, New Orleans, & Texas Railroad Company? It is described in the "articles of consolidation" as "the Louisville, New Orleans, & Texas Railroad Company, a corporation of the states of Tennessee, Mississippi, and Louisiana, of the first part;" and it is further expressly declared in said articles that the consolidation is effected "under and by virtue of the charters of the re-

spective states of Tennessee, Mississippi, and Louisiana in such case made and provided," etc. The two ends of this railroad are in Louisiana and Tennessee. Now, what were the laws touching consolidation in these states, "in such case made and provided?" Of course, we deal here exclusively with the Mississippi corporation under our laws; but the laws of Louisiana and Tennessee are expressly referred to as having been held in mind in effecting this consolidation, and they will materially aid us in solving this question. The road, with all its property, was a unit in the three states. If the effect of the consolidation in Tennessee and Louisiana was known necessarily to be the creation of a new corporation, it hardly comports with reason to suppose that any different consolidation would have been sought at the hands of the Mississippi legislature, or

tution adopted in the meantime. *State v. Bank of Commerce*, 95 Tenn. 221, 31 S. W. 993.

The Tennessee legislature had power, under the Constitution of 1834 (art. 2, § 28; art. 11, § 7), to grant exemptions from both ad valorem property and privilege taxes. When in a given case it had exercised that power, its action was conclusive on the state, even after a change and reversal of governmental policy by a new constitution. *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115.

In New Jersey, domestic fire insurance companies having capital stock and taxable upon the amount thereof paid in and their accumulated surplus less the value of their real estate, and entitled, in estimating the value thereof, to the deduction of their investments in exempt property, are entitled to have included in such deductions school bonds issued by authority of a state law and made thereby exempt from taxation, although after the issue and negotiation thereof a constitutional amendment forbidding such exemptions was adopted. But they are not entitled to the like deduction of township bonds also made exempt by statute, which were not issued until after such constitutional amendment took effect, because that amendment *ex proprio vigore* abrogated and annulled all local and special laws exempting property from taxation, unless they constituted irrepealable contracts, which was, of course, the case with securities anteriorly negotiated. *Merchants' Ins. Co. v. Newark*, 54 N. J. L. 138, 23 Atl. 305.

The proposition that an amendment to the Constitution prohibiting exemptions from taxation operates *ipso facto* to abrogate every special or local law providing for such exemptions which does not amount to an irrepealable contract was affirmed in *State, Newark & S. O. Horse Car R. Co., Prosecutor, v. Clark*, 53 N. J. L. 332, 21 Atl. 302, and in substance, also, in *Newport v. Masonic Temple Asso.* 103 Ky. 592, 15 S. W. 581, Rehearing denied in 103 Ky. 599, 46 S. W. 697.

A provision in a railroad charter exempting the main and branch lines of the company generally from taxation does not relieve from taxation a new branch road built pursuant to a special enabling act silent on the subject of taxation, passed after an amended Constitution had deprived the legislature of the power it possessed when the original charter was granted to exempt such property. *State ex rel. Guffey v. Chicago, R. & K. C. R. Co.* 89 Mo. 523, 14 S. W. 522. Affirmed in 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. Rep. 693, Rehearing denied 122 U. S. 100, 30 L. R. A.

U. S. 561, 30 L. ed. 1135, 7 Sup. Ct. Rep. 693, 1300.

When the charter of an eleemosynary or educational institution declares that all the property of the corporation shall be exempt from taxation, and that relevant sections of the general corporation law of the state shall not apply (one of these being that every corporate charter should be subject to alteration, suspension, or repeal), the corporate real estate is exempt from state taxation, notwithstanding the adoption of a new Constitution prohibiting the legislature from contracting to exempt property from taxation; since, to permit such taxation would impair the obligation of the contract contained in the act of incorporation. *Home of the Friendless v. Rouse*, 8 Wall. 430, 19 L. ed. 495; *Washington University v. Rouse*, 8 Wall. 439, 19 L. ed. 498.

The dissenting judges in these cases (Miller, J., Chase, Ch. J., and Field, J.) admitted that the settled doctrine of the court was that it would decide, when the questions were properly brought before it, whether a state law impaired the obligation of a contract, and that, if it did, that it was void; also, that state legislatures could, by statute, make contracts which could not subsequently be impaired by other statutes. They conceded, too, that such contracts were so far protected by the provisions of the Federal Constitution that even a change in the fundamental law of the state by the adoption of a new Constitution cannot impair them, though express provisions to that effect are incorporated in the new Constitution. But they insisted that when a state law was challenged on the ground that it impaired a contract contained in a former law, the power to make such contract was always open to question, and that the decisions relied on to sustain the proposition that an exemption from taxation was a contract not to be impaired invariably assumed the power of the legislature to grant the exemption in the first place. And they asserted that the power to exempt forever, to grant perpetual immunity from taxation, to contract away without limit the whole taxing power, did not, and never could, exist in a constitutional legislature.

If a state Constitution be so amended as to prohibit all tax exemptions, an exemption antecedently granted to a railroad corporation by an irrepealable contract is irretrievably lost when the railroad properties are taken on mortgage foreclosure by the state and conveyed to a new corporation. *Trask v. Maguire*, 18 Wall. 391, 21 L. ed. 338.

This is so although the authorizing statute, and conveyance in pursuance thereof, are

granted by it if sought. And so we shall find it to be. Act No. 157 of 1874 of Louisiana, set forth in *New Orleans Charity Hospital v. New Orleans Gaslight Co.* 40 La. Ann. 385, 4 So. 433 (a general law), expressly provides that "any two business . . . companies . . . may consolidate said corporations, . . . and form one consolidated company, holding," etc., "all property," etc., "belonging to each, and under such corporate name as they may . . . agree upon; . . . and a certificate of the fact of such consolidation, with the name of the consolidated company, shall be filed and recorded in the office of the secretary of state." This is like the Ohio and Missouri statutes referred to in *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 308-310, 38 L. ed. 454, 14 Sup. Ct. Rep. 592; and they were all held to provide for a consolida-

couched in language sufficiently comprehensive and unequivocal to carry over to the successor corporation the tax immunity as theretofore enjoyed. *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193.

After such amendment of the state Constitution, no new corporation is capable of receiving and enjoying old exemptions of this character. *Bloxham v. Florida C. & P. R. Co.* 35 Fla. 625, 17 So. 902.

A constitutional prohibition against tax exemptions affects, not only corporations created by original charters after it takes effect, but those which, after its adoption, grow out of earlier ones by consolidation. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592. Affirming 90 Mo. 30, 6 L. R. A. 222, 12 S. W. 390; *Keokuk & W. R. Co. v. Scotland County Ct.* 152 U. S. 317, 38 L. ed. 457, 14 Sup. Ct. Rep. 608; *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

This is equally true where the new Constitution vests in the legislature power to change or revoke all corporate charters. The irrepealable character of an exemption ceases upon consolidation. *State v. Northern C. R. Co.* 44 Md. 131; *Northern C. R. Co. v. Maryland*, 187 U. S. 258, 47 L. ed. —, 23 Sup. Ct. Rep. 62, Affirming 90 Md. 440, 45 Atl. 465.

However, a slight amendment to a railroad charter accepted by the company, not professing to repeal or change an exemption from taxation therein, containing no allusion to the subject of taxation, and not relating to it, does not operate as a new incorporation so as to bring the charter within the terms of a subsequently adopted Constitution making all corporate charters thereafter granted subject to alteration or repeal at the will of the legislature. *Richmond & D. R. Co. N. C. Div. v. Brogden*, 74 N. C. 707.

A bank not organized until after the adoption of a new constitution which changed matters in that respect, although organized under a new free banking act in substance the same as one in force before the new constitution was adopted, is not entitled to tax exemptions enjoyed by banks organized under the old law and former constitution. *State v. Southern Bank*, 31 La. Ann. 519.

And when a corporate charter containing a clause that in consideration of certain property vesting in the state after a limited period its stock shall be exempt from taxation by the state or any political subdivision thereof is extended for twenty-five years longer by special statute, but in the meantime there is adopted a new state 60 L. R. A.

tion resulting in a new corporation. *New Orleans Charity Hospital v. New Orleans Gaslight Co.* 40 La. Ann. 384, 4 So. 433. The provisions of the Tennessee Code (Milliken & V.) of 1884 (§§ 1263-1270) are stronger and more explicit still in necessitating the creation of a new corporation; § 1270 expressly declaring that no exemption from taxation of any constituent company should pass to the consolidated company. The Tennessee and Louisiana ends of the Louisville, New Orleans, & Texas Railroad are integral parts now of the present Yazoo & Mississippi Valley Railroad. As to these ends, under Louisiana and Tennessee law, the present Yazoo & Mississippi Valley Railroad is undoubtedly a new corporation. How, then, can this corporation (the present Yazoo & Mississippi Valley, an entire corporation) be one new corporation, with

Constitution providing for equal and uniform taxation, the extension act is unconstitutional so far as it continues the exemption, for want of legislative power to exempt in any wise. *New Orleans v. New Orleans Canal & Bkg. Co.* 32 La. Ann. 104.

VI. Incorporation and exemption acts.

a. Grants constituting contracts.

1. Generally.

The doctrine that the charter of a private corporation is, as between the state and the corporation, a contract, has become an established principle of American law. Uniformity and universality have been imparted to the rule by repeated decisions of the Supreme Court of the United States so that nothing in the whole range of law is better settled. *Goldsmith v. Rome R. Co.* 62 Ga. 473.

It is conceded as settled law that an exemption from taxation granted in the charter of a railroad company constitutes a contract which is protected by the Federal Constitution, and cannot be repealed by the state when the right to do so has not been reserved, or does not exist. *Com. v. Richmond & P. R. Co.* 81 Va. 355.

An exemption from taxation given in a railroad charter when the state Constitution neither restrains the power of the legislature to confer such an exemption, nor reserves to that body the right to alter, amend, or repeal corporate charters, and when such right is not otherwise reserved, is irrevocable. *State v. Baltimore & O. R. Co.* 48 Md. 49.

A total or partial exemption from taxation, given to a railroad corporation in the incorporating act in unambiguous terms, when there is not anywhere therein, nor by either a constitutional provision or a statute apart therefrom, any reservation of power to alter, amend, or repeal, constitutes an irrevocable contract which is protected from impairment by subsequent laws by constitutional sanctions. *Mobile & S. I. R. Co. v. Kennerly*, 74 Ala. 566.

It may be conceded that it were better for the interest of the state that the taxing power, which is one of the highest and most important attributes of sovereignty, should on no occasion be surrendered, says Davis, J., in one case in behalf of the United States Supreme Court. In the nature of things, the necessities of the government cannot always be foreseen, and in the changes of time the ability to raise revenue from every species of property may be of vital importance to the state; but the courts of the

stock of but one corporation (the new one), in Louisiana and Tennessee, and in Mississippi not one new corporation, and having double stock of both constituent roads? As counsel very pertinently asks, "Which is Tennessee stock, which is Louisiana stock, and which is Mississippi stock?"

What, now, are the provisions of the Mississippi law, as to this consolidation? The Louisville, New Orleans, & Texas had itself no power to consolidate, and it is conceded that this consolidation of the Louisville, New Orleans, & Texas with the Yazoo & Mississippi Valley did not take place under § 1 of the act of 1882,—the charter of the Louisville, New Orleans, & Texas,—but that the power of consolidation authorized by that section was exhausted in the consolidation of the Baton Rouge Railroad with the Memphis & Vicksburg Railroad, forming the

Louisville, New Orleans, & Texas Railroad. The provisions of law we look to, then, as authorizing the consolidation under consideration are § 16 of the Acts of 1870, p. 326 (the charter of the Memphis & Vicksburg Railroad Company), § 25 of the Acts of 1882, p. 932 (the charter of the New Orleans, Baton Rouge, Vicksburg, & Memphis Railroad Company, the Baton Rouge charter), and § 5 of the Acts of 1882, pp. 842, 843 (the Yazoo & Mississippi Valley Railroad charter). The language of said § 16 is as follows: "That said company shall have the right and power to consolidate the stock, property, and franchises of the road with any other road or roads, in or out of this state, at any time that the president and directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company."

country are not the proper tribunals to apply the corrective to improvident legislation of this character. If there be no constitutional restraint on the action of the legislature on this subject, there is no remedy except through the influence of a wise public sentiment reaching and controlling the law-making power. *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568.

Frequently, however, it is no small task to apply these principles to concrete cases. In the early case of *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939, it was held that a mere grant of a charter without a bonus or promise of exemption did not prevent the subsequent taxing of the franchise. But when, not long afterward, Maryland assumed to tax the franchise of a corporation she had created, the protection of the contract clause was successfully invoked to defeat her.

The Maryland statute extended the charters of several banks on condition that they respectively should subscribe in proportion to the paid-in capital of each, for as much stock in a corporation organized to build a state road as should be necessary to complete the highway. It pledged the faith of the state, in case such banks accepted and complied with such condition, not to impose any tax or burden upon them during the continuance of their several charters beyond an annual tax upon their capital specifically mentioned in the act. The United States Supreme Court held that this constituted a contract between Maryland and the banks that accepted and complied with the named condition, protected from impairment by the Constitution of the Union, and, therefore, that a subsequent statute directing all stocks and shares in any domestic bank to be assessed and taxed at a stated rate per cent on every \$100 of assessable property was void. *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. ed. 529.

The decision was not acceptable to Maryland. Dorsey, J., of the court of appeals of that state, afterwards commenting upon it, said: "As grounds for its opinion the United States Supreme Court said that when a banking franchise was bought the price was paid for the use of the privilege while it lasted, and any tax upon it would be substantially an addition to the price. And, again, that the franchise is corporate property which, like any other property would be taxable if a price had not been paid for it which the legislature accepted as the consideration for allowing the banks to use the franchise during the continuance of the charters. If, Judge Dorsey, proceeds to say, the Supreme Court meant by any tax a special
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legislative charge or imposition upon the franchise, the correctness of the principle cannot be denied, and if it meant a special tax, technically speaking, levied for the support of the government of Maryland, it would be clearly unconstitutional and void as repugnant to art. 13, Declaration of Rights, that every person in the state ought to contribute his proportion of the public taxes, etc. But if, as must be done, the Supreme Court be understood as speaking in reference to the general tax laid upon all property within the state under the act of 1841, then, it is respectfully insisted that the proposition cannot be maintained, and that a franchise, as property, is, according to its value, liable to taxation for the support of the government, whether paid for by a bonus or not. *Baltimore v. Baltimore & O. R. Co.* 6 Gill, 288, 48 Am. Dec. 531.

A section in a North Carolina bank charter, providing that the president or cashier should annually pay into the state treasury a stated sum on each share of the capital stock subscribed for and paid in, the first payment to be made one year after the bank began operations, was held to constitute a contract with the state which fixed a price to be paid by the bank for its franchise. And, as a subsequent general taxing act requiring all banks annually to pay into the state treasury a percentage tax on the stock owned by their stockholders therein, provided the same did not reduce the annual profits of the owners thereof below 6 per cent, was considered to impose a franchise tax upon the bank, rather than a tax upon the several stockholders, collected through the bank, it was adjudged void for impairing the obligation of such contract. *Atty. Gen. v. Bank of Charlotte*, 57 N. C. (4 Jones Eq.) 287.

It is not necessary, said the court in the above case, that it be declared in such a charter in express terms that no further or other tax shall thereafter be imposed upon the franchise. The state is bounden, and cannot constitutionally impose another or additional tax upon such franchise unless it has explicitly and distinctly reserved the right so to do.

A contract of exemption from taxation arose between the state of New Jersey and the society for establishing useful manufactures by the section of its charter of incorporation providing that all its lands, tenements, hereditaments, goods, and chattels should be free from all taxes, charges, and impositions whatsoever, whether for state, county, or other uses, save that after ten years its real estate might be lawfully taxed for state purposes. By that contract, the state alone could, after a decade,

We understand the well-settled rule of law, as declared by the Supreme Court of the United States, to be that a consolidation of stock results uniformly and necessarily in the creation of a new corporation. *Clearwater v. Meredith*, 1 Wall. 25, *sub nom. Ferguson v. Meredith*, 17 L. ed. 604; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 361, 363, 364, 25 L. ed. 186, 187; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 308, 38 L. ed. 454, 14 Sup. Ct. Rep. 592; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 466, 473, 28 L. ed. 1055, 1057, 5 Sup. Ct. Rep. 529; *Green's Brice, Ultra Vires*, note p. 538. In 98 U. S., *supra*, at pages 363, 364, 25 L. ed. at page 187, the court says: "That generally the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out

of the elements of the former, is asserted in many cases, and it seems to be a necessary result. In *McMahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418, the effect of a consolidation was said to be a 'dissolution of the corporations previously existing, and at the same instant the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence.' So, in *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42, 72 Am. Dec. 685, the court said: 'Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old as enter into the new.' This court, in *Clearwater v. Meredith*, 1 Wall. 40, *sub nom. Ferguson v. Meredith*, 17 L. ed. 608, expressed its approval of what was said in the former of these cases. It is

tax the corporate real estate for state uses, and the corporation upon all its properties, and its stockholders upon all their shares, were immune from all other taxes, both state and local. *State v. Flavell*, 24 N. J. L. 370; *State, Colt, Prosecutor, v. Powers*, 24 N. J. L. 400; *State v. Blundell*, 24 N. J. L. 402; *State v. Powers*, 24 N. J. L. 406; *State v. Society for Establishing Useful Manufactures (N. J.)* 4 Cent. Rep. 139.

A corporate charter of a cemetery company, which provides that the premises, burial lots, vaults, monuments, and other erections and fixtures shall not be subject to any assessments, taxes, or fines until otherwise ordered by the board of chosen freeholders of the county, and which constitutes an irrevocable contract, was held effective to exempt the corporation from a municipal assessment for a street improvement, although specially authorized by an act of the legislature, so long as such county board has taken no action in the premises. *Mt. Pleasant Cemetery Co. v. Newark*, 52 N. J. L. 539, 20 Atl. 832.

A case very like this is *Colston v. Eastern Cemetery Co.* 12 Ky. L. Rep. 763, 15 S. W. 245, which held that a similar exemption in the corporate charter covered with immunity lands not yet taken up for graves, as well as funds in trust to improve, care for, and ornament the burial grounds.

Provisions in an incorporating statute authorizing a railroad company to build, equip, and operate a line from a city within to a city outside of the enacting state, and charge and collect fares and tolls for transportation and carriage of passengers and freight, and requiring such railroad to pay the state one fifth of its gross collections for passenger fares on its line, constitute, when formally accepted by the company, a binding contract between the state and the corporation, and valid acts of legislation. The objection is not open that the effect and operation of such contract is to impose a 20 per cent capitation tax upon the right of travelers to enter, leave, or pass through the state, and hence violative of the constitutional rights of citizens of the United States. *State v. Baltimore v. O. R. Co.* 34 Md. 374, Affirmed in 21 Wall. 456, 22 L. ed. 678.

Anticipated public benefits are sufficient consideration to support a contract of exemption from taxation in a corporate charter. *Carondelet Canal Nav. Co. v. New Orleans*, 44 La. Ann. 394, 10 So. 871; First Div. of *St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297, Gil. 224.

Railroads holding charters which during a stated period from the completion of the road

exempt from taxation the corporate stock and the real estate that may be purchased therewith and be connected with, and subservient to the corporate works thereby authorized, and which forever exempt from taxation, state and local, the capital stock, the dividends thereon, and all the property and estate, real and personal, until the dividends exceed legal interest, after which the stock and dividends may be taxed like other money at interest and the interest thereof, are, until the specified period has run, and while the dividends have not exceeded the stated rate, not taxable in virtue of a statute imposing a state tax of 1 per cent on the gross incomes of all railroads not exempted by law. *State ex rel. South Carolina R. Co. v. Hood*, 15 Rich. L. 177.

A railroad charter declaring that the capital stock of the company, and all other property belonging to or connected with its road, shall be exempt from all taxation for a certain number of years after the road shall be in operation, prevents the legislature from levying even a privilege or franchise tax upon the corporation before the stated period expires. *Grand Gulf & P. G. R. Co. v. Buck*, 53 Miss. 246.

The act of Congress incorporating the Northern Pacific Railroad Company, and granting a right of way to construct a railroad and telegraph line through the public lands to the extent of 200 feet in width each side of the track where it passed through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, slide tracks, turntables, and water stations; and declaring that the right of way should be exempt from taxation within the territories of the United States through which it passed, constituted a contract that it was not afterwards in the power of Congress or of any territorial legislature, to impair by imposing any tax upon the right of way. Hence, a tax assessed upon such company under the designation "20 miles of railroad and rolling stock," by the officials of a territorial county, was held invalid. *Northern P. R. Co. v. Carland*, 5 Mont. 146, 3 Pac. 134.

A congressional grant to a state of all the overflowed and swamp lands in such state belonging to the United States, on condition that these or the proceeds thereof be applied, as far as necessary, in reclaiming them for cultivation by means of levees and drains, which the state accepts, and follows by legislation providing for the sale of such lands, for the issue of transferable scrip receivable for any lands not already taken at the time of selection by the holder, for contracts for making levees and

true, these expressions have not all the weight of authority, for they were not necessary to the decisions made, but they are worthy of consideration, and they are in accordance with what seems to be sound reason." Justice Strong, who delivered this opinion, also delivered the opinion in 92 U. S., where, at page 671, 23 L. ed. page 760, he referred, in the spirit of criticism, to these cases. It is therefore noteworthy that three years later, after fuller consideration, he says, speaking for a unanimous court: "They are in accordance with sound reason." The authority in 98 U. S. 361, 25 L. ed. 186, was to "consolidate their stocks, upon such terms as might be agreed upon by the directors, and ratified by a majority of the stockholders;" and it was unanimously held that it was not merger, as in 92 U. S. 665, 23 L. ed. 757, nor alliance or confederation, but

consolidation, resulting in the formation of a new company. Said the court, at page 364, 98 U. S., page 187, 25 L. ed.: "When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or quasi partners, in a new concern. Each set of stockholders is shorn of the power which as a [separate] body it had before. Its action is controlled by a power outside of itself. To illustrate: The stockholders of the Savannah & Albany Railroad Company could not after consolidation have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic & Gulf Railroad Company. They could not have built their road or controlled its management. They could not, therefore, have performed the duties which by their original charter were imposed upon them. Those duties could only

drains, and for the payment of contractors in scrip or otherwise; and providing, also, to encourage reclamation, that such lands shall be exempt from taxation for ten years, or until reclaimed,—constitutes a state contract with the holders of such scrip for tax exemption accordingly. A law enacted after the issue of such scrip, repealing the exemption clause and authorizing a special tax upon the granted lands to meet the cost of building levees and drains thereby authorized, is, therefore, void for violating the contract clause in the Federal Constitution. *McGee v. Mathis*, 4 Wall. 143, 18 L. ed. 314.

The corporate charter of a lottery company, providing that it should pay the state annually \$40,000 in quarterly payments, to be credited to the educational fund, and that it should thereupon be exempt from all other taxes and licenses of every kind whatever, state, parish, and municipal, which charter the legislature, attempted to repeal by a later statute and to abolish the company, but which, later still, a constitutional amendment restored with some modifications not affecting the tax immunity, was decided to amount to a contract with the state which could not be impaired by the imposition of other and additional taxation. *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198.

A clause in a railroad charter that no tax shall ever be laid on said road or its fixtures which will reduce the dividends below 8 per cent constitutes a binding contract with the state. Its force is not weakened by indefiniteness as to what the dividends are to be computed upon, since obviously capital stock is intended, nor by the fact that taxation is made to depend upon a future contingency. *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968.

When there is inserted in a statute incorporating a bank an exemption relieving the corporation and its capital stock from the payment of all taxes during the corporate term, and the legislature enacts successive renewals of such charter with all the powers, privileges, immunities, and benefits enjoyed under the original act of incorporation, each upon consideration of a cash bonus paid into the state treasury, the original exemption continues unimpaired for the term of each renewal, and precludes the taxation of the stockholders upon their stock in such bank locally not less than by the state. Hence, a municipal ordinance of the city where such stockholders reside, imposing a tax of 5 per cent on dividends from bank stock, passed pursuant to legislative authority 60 L. R. A.

to make such assessments on its citizens or those holding taxable property within such city for the safety, convenience, benefit, and advantage of such city as shall appear to be expedient, cannot be enforced against such stockholders. *State ex rel. Sebring v. Charleston*, 5 Rich. L. 562.

This decision was in line with *State Bank v. Charleston*, 3 Rich. L. 342, that held the real property of such banks, although within the city limits, exempt from taxation by the city council.

A railroad company with banking powers and privileges, whose charter stipulates that the stock of the company and its branches shall be exempt for a term of years, and afterwards shall be subject to a tax not exceeding $\frac{1}{2}$ of 1 per cent on the net proceeds of its investment, is not taxable upon its real estate and banking capital by a municipality through or into which its railroad extends, and is taxable by the state only, and to the extent limited by its charter. And this, notwithstanding an amendment to such charter declaring that it should not be so construed as to exempt from taxation, at the discretion of the legislature, the banking part of the capital stock, in the absence of any express exercise of such legislative discretion. *Augusta v. Georgia R. & Bkg. Co.* 26 Ga. 651.

Contracts between governments and corporations in relation to taxation do not solely arise out of charters, but are sometimes made by independent instruments or special acts. Municipal franchise or license ordinances are familiar instances. As a matter of course, the same principles apply to these that are applicable to charter compacts.

A municipal ordinance authorizing and empowering an electric light company to erect poles and run wires upon, over, and across all the streets, alleys, avenues, and public places, and to maintain an electric-light outfit in the city for twenty years, accepted by the company and followed by its constructing a plant for the purpose of lighting the city, setting up poles and stringing wires, all at great expense; and again followed by an agreement with the city to light the streets with a certain number of arc lights of a stated candle power for ten years, under penalty of a daily pecuniary forfeit for failure of light power after a short period,—constitute altogether an executed contract between the city and the corporation. This contract the city is not at liberty to impair. An ordinance exacting a license tax of 50 cents each for the privilege of erecting and maintaining poles in the streets, and as a compensation for the use of the streets for the same, is, there-

have been performed by another organization composed partly of themselves and partly of others. Their powers, their franchises, and their privileges were therefore gone,—no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant, and which has all its powers, facilities, and privileges by virtue of the consolidation act. What, then, was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and duties. But the new company comes into existence under a fresh grant. Not only its being, but its powers, its franchises, and immunities, are grants of the legislature which gave it its existence." Since, then, a consolidation of the stock of two corporations means the

creation of a new corporation, it necessarily follows that the power to consolidate given by this § 16, *supra*, did not authorize a merger, or any consolidation except such as resulted in the formation of a new company. The next source of power to consolidate is § 25, Acts 1882, p. 932, *supra*. That provides "that the company shall have power and authority to . . . consolidate the company with any other company, under the name [not under the name and charter, as in 92 U. S. 667, 23 L. ed. 759], of one or both; but when such . . . consolidation is effected, the said company shall be entitled to all the benefits, rights, franchises, lands, and property of every description belonging to said road or roads so consolidated." The language here sharply distinguishes between the old companies and the new in a way that makes it perfectly clear the

fore, void. Hot Springs Electric Light Co. v. Hot Springs, 70 Ark. 300, 67 S. W. 761.

An interesting controversy in this regard arose between the city of St. Louis and the Western Union Telegraph Company. In 1881 the city passed an ordinance relative to planting poles and stringing wires in the streets for telegraph companies (Ord. 11,604), of which § 8 ordained that any company erecting poles under the provisions of such ordinance should, before obtaining a permit therefor from the board of public improvements, file an agreement in the office of the city register permitting the city of St. Louis to occupy and use the top cross arm of any pole erected, or which was already set up, for the use of the city for telegraph purposes free of charge. The Western Union Telegraph Company accepted this ordinance and complied with its terms. A few years afterwards the municipal assembly amended the ordinance, and added several sections thereto, one of which provided that from and after a named date in the then future all telegraph and telephone companies not taxed by ordinance for city purposes on their gross incomes should pay the city of St. Louis, for the privilege of using its streets, alleys, and public places, \$5 a year for every telegraph or telephone pole erected or used by them therein. (Ord. No. 12,733, § 11, March 23, 1884.) The city, having sued the Western Union to recover \$22,635 alleged to have accrued in virtue of this amended ordinance, met defeat at first on the ground that it provided for a license or privilege tax upon the instrumentalities of interstate commerce, and so was invalid. *St. Louis v. Western U. Teleg. Co.* 39 Fed. 59.

But this decision was reversed, and the case remanded for a new trial, by the Supreme Court of the United States in 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, Rehearing denied, 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990.

Upon the new trial with additional proof, it was considered that, under the decision of the Supreme Court, two principal questions were involved, one of these being: Did the passage of § 8 of the old ordinance, on its acceptance by the company, and the erection and acquisition thereafter of additional poles, and the use, ever since continued by the city, of both old and new poles free of charge, amount to a contract between the city and the company which would be violated by enforcing the new ordinance? And this question was answered affirmatively by the decision, and the city was again defeated. *St. Louis v. Western U. Teleg. Co.* 63 Fed. 68. 60 L. R. A.

A very similar case arose in New Orleans, when that city, after granting a telegraph company authority to construct and maintain its lines without limitation as to time and with no other consideration than the furnishing of certain free telephonic facilities to the city, undertook, by another ordinance, after the company had established its plant, constructed its lines, and complied with the conditions, to exact \$5 a year for each pole. The Louisiana supreme court refused its sanction, and held the imposition void for impairing a contract obligation, saying, if the city could at that time exact a large additional consideration for the continued enjoyment of privileges already granted, she could have done so the very day after the defendant had invested its money, and before it received a particle of return: and if she could charge \$5 a pole, she could with equal power charge \$1,000, or revoke arbitrarily the grant at pleasure. She was either bound by the terms of her proposition accepted and acted upon, or not at all. And thereupon the court concluded, "upon the clearest principles of law and justice," that the grant of authority, when accepted and acted upon, became an irrevocable contract, and that the city was powerless to set it aside or to interpolate new and more onerous considerations therein. *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41, 3 So. 533.

The principle that municipal ordinances granting corporations such as telegraph and street railway companies the right to construct lines in the streets amount to irrevocable contracts which the municipality may not afterwards impair by exacting additional considerations or imposing new burdens has been recognized and applied in many cases. *Chicago v. Sheldon*, 9 Wall. 50, 19 L. ed. 594; *Western Paving & Supply Co. v. Citizens' Street R. Co.* 128 Ind. 525, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88; *State ex rel. Kansas v. Corrigan Consol. Street R. Co.* 85 Mo. 263, 55 Am. Rep. 861; *Kansas City v. Corrigan*, 86 Mo. 67; *Coast-Line R. Co. v. Savannah*, 30 Fed. 646; *State, Hudson Teleph. Co., Prosecutor, v. Jersey City*, 49 N. J. L. 303, 60 Am. Rep. 619, 8 Atl. 123; *Rutland Electric Light Co. v. Marble City Electric Light Co.* 65 Vt. 377, 20 L. R. A. 821, 26 Atl. 635.

2. Commutations.

There is an obvious distinction between contracts for a total immunity from taxation and those for the payment of specific and certain taxes as substitutes for taxation in other and general forms. But, plain as it is, the distinc-

legislature meant the consolidation to result in the creation of a new corporation. Said company (that is, the new consolidated company) may be under the name of one, but not the charter of one. On the contrary, it (said company) shall be entitled to all the benefits, etc., belonging to said roads (all of them) so consolidated. Manifestly, the legislative purpose here was the consolidation of two or more companies into one new company. No power can be found here for merger. The next source of power to consolidate is § 5 of the Acts of 1882, p. 843, which provides: "Said company may consolidate with any other railroad company in or out of the state of Mississippi upon such terms as the consolidated company may agree upon; and upon any such consolidation the consolidated company shall have and enjoy all the property, rights, privileges, powers,

liberties, and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidated company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation, acquire under the provisions of the charter of such other consolidating company." Clearly, here, also, it is consolidation, and not merger, which is provided for, and such consolidation as should result in a new company,—a "consolidated company which should" enjoy all the property, etc., of its previously existing constituent companies. It will not fail to be noted that in none of these acts is the word "merger" ever used. Always and everywhere it is consolidation alone that is au-

tion is generally ignored in the decisions. The courts for the most part consider charter contracts for commuted taxes as if, like those conferring exemptions, they were altogether to the advantage and benefit of the taxpayer, and not at all to that of the state. The cases are rare where a different view is taken.

It is a part of the legislative history of Minnesota declared the supreme court of that state quite recently in deciding one of the numerous cases wherein county authorities sought to tax the lands granted to railroads in aid of their construction, both as a territory and as a state, that its policy in regard to taxing land-grant roads was adopted with reference alike to facilitating the early construction of these lines of road, and to securing to the state what was supposed an ultimate and adequate return for the value of the franchises conferred, and which would, in the long run, be equivalent to the companies' fair share of taxation. The policy was to provide for these companies paying to the state a certain percentage of their gross earnings in lieu of all other taxation. *Traverse County v. St. Paul, M. & M. R. Co.* 73 Minn. 417, 76 N. W. 217.

And, it added, further on: It has been repeatedly held by this court, as well as by the Supreme Court of the United States, that the substitution of an assessment upon gross earnings in lieu of all other taxes on the road and the granted lands does not exempt the lands from taxation, but merely substitutes one method of taxation for another upon the terms and conditions specified; and for that reason the latter court, which is very tenacious of the doctrine that an exemption from taxation must be clearly shown and strictly construed, has held that this doctrine does not apply, at least to its full extent, in such a case. *Ibid.*

The two cases in the United States Supreme Court, cited as authority for this last proposition, afford it considerable support. *Northern P. R. Co. v. Clark*, 153 U. S. 252, 38 L. ed. 706, 4 Inters. Com. Rep. 641, 14 Sup. Ct. Rep. 809; *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242.

The rule that a statute exempting from taxation, says the New York supreme court, in a late case in that state, must be so clear that there can be neither reasonable doubt nor controversy about its terms; that the language must be such as to leave no room for discussion; and that all doubts must be resolved against the exemption, does not apply to a statute which substitutes for one in vogue a new method of taxation, and relieves the subject thereof from the old burden. Such a statute

is not one that exempts from its due proportion of the general burdens of government within the rule. *Binghamton Trust Co. v. Binghamton*, 72 App. Div. 341, 76 N. Y. Supp. 517.

The Wisconsin supreme court, in construing a statute of that state which gave to a railroad company an exemption of its track, right of way, depot grounds, buildings, machine shops, rolling stock and other property necessarily used in railroad operation from taxation upon the payment of a gross earnings tax in lieu thereof, in order to determine whether or not the exemption extended to a railroad hotel and restaurant on the line of the road, said, in substance, that in other states the statutes not only differed, but the courts were governed by the rule or maxim of construction that statutes exempting property from the burden of general taxation are to be most strictly construed against the corporation or party benefited thereby and in favor of the public. It is not easy to say, it added, that this rule has any application in the present case, or, if it has, that it applies with much force. The payment by the railway companies of the gross-earnings tax to "take the place and be in full of all the other taxes of every name and kind" upon the roads, their property and the shares of their stock, must, in the light of past legislation upon the subject, be regarded as, in the judgment of the legislature, an equivalent for the taxes which the companies would otherwise be required to pay if assessed and taxed by the ordinary methods. A strict construction, therefore, against the company, or a liberal one in favor of the public, can with difficulty be justified in view of what seems to have been the legislative intent; and it would seem that little or no effect can be given to the rule. We are at liberty, therefore, and, indeed, required, to give the statute a fair and liberal construction in favor of the company, or such an one as it should receive supposing there is no injustice in the claim made by the company or advantage to be gained by it over the public. *Milwaukee & St. P. R. Co. v. Crawford County*, 29 Wis. 116.

This view was again adopted, and the case approved, a few years later, in *Milwaukee & St. P. R. Co. v. Milwaukee*, 34 Wis. 271.

And as recently as 1837 the same court remarked of a similar statute, that if it were a question of construction the act would, for the reasons stated in those cases, have to be liberally construed in favor of the corporation. *Milwaukee Electric R. & Light Co. v. Milwaukee*, 95 Wis. 42, 60 N. W. 796.

On the other hand, the supreme court of Louisiana has in two cases laid down the prop-

thorized. If merger merely was intended, what was easier than to have used the words appropriate to manifest that intention? Why this careful and exclusive use of the word "consolidation?" And not of this word only, but of other terms indicating a clear intention to create a new consolidated company? We conclude, therefore, on a review of the statutes authorizing the consolidation under review, that, so far as the purpose of the legislature was concerned, it was its clear purpose that consolidation, and not merger, should occur, and such consolidation as should result in the creation of a new corporation.

Counsel for the railroad company relies on three authorities especially to show that what the legislature here intended was merger: *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189; *Central R. & Bkg. Co. v. Georgia*,

92 U. S. 666, 23 L. ed. 758, and *Meyer v. Johnston*, 53 Ala. 313. But, in *Tomlinson v. Branch*, Mr. Justice Bradley properly characterized what was done as "amalgamation," which is merger, and not consolidation (p. 463, 15 Wall., p. 190, 21 L. ed.), and the act of the legislature expressly provided for merger. It provided (p. 463, L. ed. p. 190) that "the said South Carolina Canal & Railroad Company shall be merged in the said South Carolina Railroad Company," and provided expressly that the South Carolina Railroad Company should retain its autonomy and previous existence. There was no room for construction in this case, and it was conceded on all hands that what occurred was merger. So, in *Central R. & Bkg. Co. v. Georgia*, it was expressly provided (92 U. S. 671, 23 L. ed. 760) that the union should take place under "the name

omission that the power to commute taxes is but an incident of the power to exempt, and when the latter does not exist the incidental power must be denied. *New Orleans v. St. Charles Street R. Co.* 28 La. Ann. 497; *Louisiana Cotton Mfg. Co. v. New Orleans*, 31 La. Ann. 440.

And this proposition is adopted in unqualified terms by the supreme court of Texas, which adds on its own account that the thing given or paid in commutation is but the price paid for exemption from liability to do some act or to pay some other sum. *Austin v. Austin Gaslight & Coal Co.* 69 Tex. 180, 7 S. W. 200.

In a modern New Jersey case, *Depue, J.*, writing for the majority of the court of errors and appeals, says: The contract between the *Morris & Essex Railroad Company* and the state is a contract for the commutation of taxes by the payment annually of a certain percentage upon the cost of its railroad, in lieu of other taxation. The legal effect of the contract is to secure to the company immunity from other taxation in consideration of the prescribed tax to be paid. It is a privilege of a personal character, entirely distinct from the franchises of the corporation, etc., etc. Thereupon the learned gentleman proceeds to build his argument and cite his authorities precisely as if the contract he has just spoken of was one of exemption from, instead of for a commutation of, taxation. *State Board v. Morris & E. R. Co.* 49 N. J. L. 193, 7 Atl. 826.

The general proposition, that a provision in a corporate charter for the payment of a stated commutation tax in lieu of all other taxes relieves the commuting taxpayer, not merely from franchise and privilege taxes, imposts and excises, but, as well, the corporation generally from taxes upon its property to which, in common with individuals, it would have been subjected, whether state or local, but for such provision, is well established. *State v. Berry*, 17 N. J. L. 80; *Camden & A. R. Co. v. Hillegas*, 18 N. J. L. 11; *Camden & A. R. & Transp. Co. v. Appeal Comrs.* 18 N. J. L. 71; *Gardner v. State*, 21 N. J. L. 557; *State v. Bank of Smyrna*, 2 Houst. (Del.) 99, 73 Am. Dec. 699; *Philadelphia, W. & B. R. Co. v. Neary*, 5 Del. Ch. 600, 8 Atl. 363; *Farmers' Bank v. Com.* 6 Bush, 127; *State v. Butler*, 13 Lea. 400; *Daughdrill v. Alabama Life Ins. & T. Co.* 31 Ala. 91; *Le Roy v. East Saginaw City R. Co.* 18 Mich. 233, 100 Am. Dec. 162.

The exemption extends to local taxes because taxes for county and township purposes are as much state taxes as those imposed for state purposes, unless an express and definite distinction in terms is made in the statute grant-

ing the immunity. *Camden & A. R. Co. v. Hillegas*, 18 N. J. L. 11.

Because, too, a municipal corporation has no powers with respect of taxation that its creator state is without. *Memphis v. Hernando Ins. Co.* 6 Baxt. 527.

One case went even to the extent of holding that such a charter provision was effectual against a special assessment upon a railroad and its real estate for a local improvement. *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469.

A provision in a railroad charter that its stock shall not be liable to any tax, duty, or imposition whatever, unless such and no more as is laid now on banks of the state, protects the company from any taxation upon its capital stock greater than the rate on bank stock at the time its charter was granted. But it leaves the company open to taxation upon its surplus at the same rate as other taxable property. *Goldsmith v. Rome R. Co.* 62 Ga. 473.

The case followed and reaffirmed that of *Rome R. Co. v. Rome*, 14 Ga. 275.

Although a provision in a charter for a specific tax upon the capital stock of a corporation is not a substitute for all other taxes, and hence does not confer immunity from ordinary taxation, yet, as it is a consideration paid and continued for the privilege of using the corporate franchise, it renders the corporation not amenable to taxes of this kind so long as the legislature does not see fit under its reserved power to change the rate. *State v. Nashville Sav. Bank*, 16 Lea, 111.

An agreement whereby a state gives permission to a foreign railroad corporation to build and operate within its borders a part of its line in consideration of the payment of \$10,000 and annual taxes upon the cost of constructing that piece of road as so much of the capital stock employed within the state is no barrier to the enforcement of a subsequent tax act of such state requiring the railroad company to collect for the state a state tax upon its bonded debt so far as held by citizens of such state by deductions from interest payments thereon. *Com. v. New York, L. E. & W. R. Co.* 150 Pa. 234, 24 Atl. 609.

But when a corporation is exempted by its charter from all taxes and licenses of any kind whatever in excess of a stated sum payable annually, a subsequent statute making an assessment, not upon the capital stock of the corporation, but upon the shares of its shareholders as these appear upon the corporate books, and requiring the tax so assessed to be paid by the corporation and by it collected from

and charter of the Central Railroad & Banking Company." Merger was clearly provided for. Pages 671-673, L. ed. pp. 760, 761. And in *Meyer v. Johnston*, 53 Ala., the court lay stress upon the word "unite" (p. 319): "Were united with those of the Alabama company, and vested in it, so as to enable it (called in the contract the consolidated company, because their franchises were consolidated with its)," etc.,—a case, again, of merger. The authorities are wholly inapplicable to a case like this, where the statutes all sedulously avoid the word "merger," exclusively use the word "consolidate," and accompany that word, definite enough in itself, with other provisions which leave no doubt that consolidation resulting in the creation of a new corporation was intended.

Turning now from the legislative purpose, let us see what was actually done in pursu-

its stockholders, but paid absolutely, irrespective of any dividends or profits due the shareholders out of which the company may be repaid, is invalid, and the tax thus laid is void, because, being imposed substantially upon the corporation itself, it impairs the obligation in the charter. *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198.

A provision in the charter of an urban railroad for the payment of a percentage of its net income, to be expended without entering the general municipal funds by a special commission appointed for the purpose, in improving the condition and appearance of, and in removing obstructions from, the city streets in which the line is built, and providing that such payment shall be legal compensation in full for the use and occupation of such streets, and shall constitute an agreement or contract between the city and the company entitling the latter to the privileges and the fares allowed by law not changeable without mutual consent, does not amount to a commuted or substituted system of taxation, but only provides for the payment of franchise fees; therefore the road is not exempt from taxation upon its rails, supports, foundations, and other structures as real estate, and upon its real and personal property generally. *People ex rel. New York Elev. R. Co. v. New York Tax. & A. Comrs.* 19 Hun, 460, Affirmed in 82 N. Y. 459.

A municipal ordinance providing for the payment, in lieu of all city taxes except a land tax, of a percentage of the gross receipts of a street railway company organized under a general statute of the state, which, amid many things, provided that no company formed under it should construct its road upon any city street without the consent of the municipal authorities, and save under such regulations and upon such terms as they should from time to time prescribe, with a proviso, however, that after such consent was given and its terms accepted no regulations or conditions should be made whereby the rights or franchises so granted should be destroyed or unreasonably impaired, or such company be deprived of the right to build, maintain, and operate its road in the streets, consented to upon the terms prescribed at the outset, constitutes a contract which the city may not impair by differently taxing, although the state, in the lawful exercise of its power of alteration and repeal, has changed the mode and standard of taxing such corporations for state purposes. *Detroit v. Detroit City R. Co.* 76 Mich. 421, 43 N. W. 447.

The consideration that the city of Detroit in that case was clothed with the power to make

ance of this power to consolidate: First. The stock of the two companies was consolidated. Learned counsel for the railroad insists that the testimony of Welling shows that the stock was never exchanged. He is mistaken in this. Welling does so state, but on cross-examination expressly declares on this very point: "I do not know as to that question. I do not recall the fact,—just what was done." And he is a witness for the railroads. This falls far short of showing that the stock was not exchanged. The other testimony shows it was. Second. The deed of consolidation on its face provides for and creates a new organization and new officers. See articles 4, 5, 6, 7, and 8. Third. The 5th article of consolidation conveys all the "rights, . . . property," etc., "of every kind belonging to either of the parties,—to the consolidated company, without

the contract should be given due weight. If a municipality has not the power to agree with a local corporation for a commuted or substituted system of city taxation, an ordinance attempting so to do will fail to give protection because of inherent invalidity. *Austin v. Austin Gaslight & Coal Co.* 69 Tex. 180, 7 S. W. 200.

The commuted tax provided for, and the exemption from all other taxes granted in the act of incorporation and two successive supplements thereto passed by the New Jersey legislature for the Morris & Essex Railroad Company, were held, by the state supreme court (*State, Morris & E. R. Co., Prosecutors, v. Railroad Taxation Comrs.* 37 N. J. L. 228), and afterwards on appeal by the court of errors and appeals (38 N. J. L. 472), to constitute but a repealable contract. These decisions, however, were reversed by the United States Supreme Court, which held that the relevant statutory provisions, taken altogether, constituted an irrepealable contract on the subject of taxation between the state and the corporation, which the state was not at liberty to impair by subsequent legislation by the imposition of other taxes. *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352.

In consequence, the New Jersey court of errors afterwards declared that it must now necessarily be assumed by the courts of New Jersey that these acts constituted an inviolable contract of commutation and immunity; and that it was, therefore, established that any tax assessed against such road in contravention of the provisions of the charter act and its supplements is illegal. *State Board v. Morris & E. R. Co.* 49 N. J. L. 193, 7 Atl. 826.

It is further, the case that by the lease made by that railroad to the Delaware, Lackawanna, & Western Railroad Company of its property and franchises for the full term of its chartered existence, and the validation thereof by act of the legislature,—both the indenture and the statute being couched in language sufficiently broad to carry over to the lessee company the right to commute and to be otherwise exempt from taxes, though these were not specifically mentioned,—gave to the lessee company the same rights, privileges, and immunities with respect of taxation as had been enjoyed by the lessor company. *Ibid.*

In a late Minnesota case (*State ex rel. Marr v. Stearns*, 72 Minn. 200, 75 N. W. 210, Reversed in *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73) the question was up, whether certain lands in that state, originally a part of the public lands of the United States and

any further act, deed, or conveyance;" distinguishing clearly between the two previous companies—"either of the parties"—and the new company, the grantees, the "consolidated company." Fourth. The articles of incorporation themselves, on their face, declare that doubt exists as to the effect of what has been done, and conclude, most significantly: "But, whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." This is pregnant with meaning. The railroad companies knew that the only power the legislature had given was to so consolidate as to create a new corporation, and that under § 180 of the Constitution of 1890 the exemption, if any existed, would be cut off. They knew the only word used was "consolidate" in all the legislative acts, and that merger and consolidation are very dis-

tinct and different things. And yet, not conforming to the power, but seeking to carry the exemption in spite of it, they used the words "unite, merge, and consolidate," and said that "such consolidation shall be effected by uniting or merging the stock, property, and franchises of the Louisville, New Orleans, & Texas Railroad Company with and into the stock, property, and franchises of the said Yazoo & Mississippi Valley Railroad Company, without disturbing the corporate existence of the last-named company, or the formation of any new distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but, whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." Doubtless, they desired to merge; but the legislature had only authorized con-

granted by Congress to the state in trust to promote railroads, and afterwards by the state granted to certain railroad corporations, which were not used for railroad purposes, were taxable ad valorem under a statute so providing, but also providing that the railroads should continue the payment of the percentage of their gross earnings as fixed by a former statute, or whether such lands were free from ad valorem taxation by virtue of such prior legislation that the gross earnings tax should be in lieu of all other taxes upon the property of the roads. In other words, did the earlier legislation commuting taxes constitute an irrevocable contract so that the new tax act was void for impairing it, or, if there was no contract, or but a repealable one, was the new tax invalid for any other reason? The Minnesota Constitution had always provided that all taxes raised in the state should be as nearly equal as possible, and that all property on which taxes are levied should have a cash valuation equalized and uniform throughout the state; that laws should be passed taxing all money, credits, investments in bonds, stocks, joint-stock companies or otherwise, and also all real and personal property according to its true value in money; that certain kinds of property, not inclusive of railroad lands, should be exempt from taxation by general laws. By state statutes,—acts of incorporation, for change of name, and land grants,—and acts of Congress on which they were based, covering a period from 1850 to 1865 there vested in the railroads certain public lands, and the grantees were required to pay annually 3 per cent of their gross earnings "in lieu and in full of all taxation and assessments" upon the railroads, their appurtenances and appendages, and all their other property, real, personal, and mixed, including the lands granted thereby or theretofore, or so intended to be. There were provisions that when sold these lands should become taxable. In 1871 Minnesota amended her Constitution. The new instrument provided, in substance, that any amendment or repeal of any law providing for the payment of a percentage tax on railroad earnings in lieu of other taxes should, before taking effect, be submitted to, and approved by, a popular vote. The railroads paid their respective percentage taxes, their lands remained unassessed, and the validity of the commutation and exemption acts remained unchallenged in the courts and legislature for about thirty years. A statute, enacted in 1895, and approved the next year by the people, subjected the railroad lands to ad valorem taxes, while requiring their owners to continue paying, as 60 L. R. A.

before, the 3 per cent gross earnings tax. The Minnesota supreme court held (*State ex rel. Marr v. Stearns*, 72 Minn. 200, 75 N. W. 210), that the acts of commutation and exemption were when passed unconstitutional for repugnancy to the uniformity and equality of taxation clause in the state organic law, and until the amendment of the Constitution in 1871; but that the effect of that amendment was qualifiedly to vivify them, subject to the right to alter, amend, or repeal them, provided the statute exercising that right should be ratified by a popular vote. Hence, it concluded that the act of 1895, taxing the lands, impaired no contract, and that the tax imposed thereby was valid.

The United States Supreme Court was unanimous in reversing this decision, but a majority of its members did not agree upon the grounds. Brewer, J., with the concurrence of Fuller, Ch. J., Peckham and Shiras, JJ., was of the opinion that the original statutes did constitute an irrevocable contract; that, notwithstanding the state Constitution Minnesota took these lands from the United States in trust to aid railroad construction and as public lands exempt *ab initio* from taxation; that in the discharge of that trust she was competent to continue the exemption to her railroad grantees, and to fulfil the trust in any proper way. Hence he concluded there was a valid, irrevocable contract, and the tax act of 1895 was void for impairing it. White, J., with the concurrence of Harlan, Gray, and McKenna, JJ., refused to admit that the exempting and commuting statutes amounted to irrevocable contracts. He opined that they really were unconstitutional when enacted, and, so were only validated by the amendment of 1871, in virtue of which they became subject to alteration and repeal. Hence, he concluded that the tax act of 1895 was not void for impairing a contract obligation. But he held that, forasmuch as the act taxing the lands required the railroads to continue paying the 3 per cent gross earnings tax, and in the same breath took away part of the consideration, to wit, the exemption of their lands from ad valorem taxes upon which their acceptance and agreement was founded, without consent or compensation, the act was void because it deprived the companies of their property without due process of law, and denied them the equal protection of the laws. Brown, J., alone, held that the acquiescence for thirty years of the legislature and courts of Minnesota in the validity of the commutation and exemption acts, and in the investment and growth of railroad properties upon the faith of

solidation, and such consolidation as necessarily resulted in the creation of a new corporation, and they could only lawfully do what the legislature in fact authorized, not what they might wish to do. And the words "consolidate upon such terms as they might agree upon" mean that the thing done must be consolidation, but the mere administrative details of uniting the two into one new corporation were left to the companies. Names count for nothing. It is substance courts look to. Consolidation resulting in the creation of a new corporation is what the legislature authorized, is what the articles of consolidation actually effected, and it is utterly beyond the power of the railroad companies to change the essential nature of what was done by calling it "merger."

We have not adverted to all the considerations sustaining this view. The closer the

analysis of the articles of consolidation, and of the action of the authorities of the two companies, the more indisputably it appears that such consolidation as resulted in the creation of a new corporation was precisely what was effected. The notice for a meeting of the stockholders called for August 1, 1893, is a meeting of the stockholders of the Yazoo & Mississippi Valley Railroad Company. The minutes recite that it was a meeting of the stockholders of the Yazoo & Mississippi Valley Railroad Company, and give the number of shares, and names of the holders; and all this is true, also, of the meeting of stockholders of October 4, 1893. Again, on August 1, 1893, a resolution was passed "that the stock, property, and franchises of said two corporations had been merged or united in one single corporation, under the corporate name of the Yazoo &

such validity, had established a rule of property in the state that it was too late to overturn. *Stearns v. Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73.

The decision, then, is reduced to this: When a state has by statute granted lands to a railroad, and stipulated that they shall be free from taxes in consideration of the payment, instead of a gross-earnings tax, it cannot afterwards tax the lands and exact the gross-earnings tax as well. If it attempts to do so, the late act is void either because it impairs a contract or else, if there is no contract to impair, because it deprives the taxpayer of his property without due process of law, or denies him the equal protection of the laws. The act may also be void because the state has estopped itself by allowing, through long inaction, an adverse rule of property to be established.

3. The Ohio bank cases.

The Ohio bank tax cases are a group by themselves. In them was carried on, and finally decided, a great controversy over the constitutional power of a state legislature by statutory contract in an incorporation act to surrender beyond recall any part of the sovereign power of taxation. The debate engaged the Supreme Court of the United States upon one side and the supreme court of Ohio upon the other; the former affirming, against the earnest protest of some of its members, and the latter denying, with practical unanimity, the existence of any such power,—at least in the legislature of Ohio. The contesting parties were the state of Ohio and the Ohio state bank, its branches and associates, to the number of fifty. The discussion waged about three principal questions: 1. Did the statute under which the banks were chartered contain any irrevocable contract limiting taxation? 2. Has an American state legislature the power to make such a contract? 3. Supposing state legislatures in general possessed of such power, did it belong to the Ohio legislature in view of the limitations in the Constitution of the state? It is conceivable that a common ground of agreement might have been found in a negative answer to the third of these questions, but it was not very earnestly sought for, nor was the question itself throughout the entire controversy treated as one of prime importance.

The first Constitution of Ohio was adopted November 29, 1802. It contained a general grant of legislative authority to the general assembly, and (art. 8, § 28) this express declaration: "To guard against the transgression of the high powers which we have delegated, we

declare that all powers not hereby delegated remain with the people." It continued in force without change until September 1, 1851. It was the organic law of the state when the statute authorizing the incorporation of these banks was enacted,—the law relied upon as containing the contract between the state and the banks in respect of limited taxation.

The Commercial Bank of Cincinnati was incorporated by special statute February 11, 1829. Its charter provided, *inter alia*, that the state of Ohio should be entitled to receive 4 per cent on all dividends made by the bank, and that the demand and payment of that amount should be made agreeably to the provisions of the act of February 5, 1825, amendatory of the earlier act of 1816 to incorporate certain banks and extend the charters of others. The so-called amendatory act was the first law of Ohio levying in terms a tax upon banks.

The charter was afterwards amended, but in other particulars than in respect of taxation. In 1831 an act to tax banks, insurance and bridge companies at the rate of 5 per cent on dividends was enacted. This bank was within the terms of the last act, unless protected by its charter. The Ohio supreme court, in 1835, decided that the charter constituted a contract which prevented the state from exacting any higher tax than 4 per cent on the bank dividends. *State v. Commercial Bank*, 7 Ohio, pt. 1, p. 125.

The constitutional power of the legislature to make such contract was assumed in the case without discussion. The case itself was afterwards expressly, emphatically, and repeatedly overruled in the later decisions of the Ohio supreme court. February 24, 1845, the Ohio legislature passed an act to incorporate the state bank of Ohio and other banking companies. Of that act, § 60 provided: That each banking company under the act, on accepting and complying with its provisions, should semi-annually, on the days designated for declaring dividends, set off to the state 6 per cent on its profits, deducting therefrom the expenses and ascertained losses of the company for the six months next preceding, which sum or amount so set off should be in lieu of all taxes to which the company or the stock holders would otherwise be subject; the sum so set off to be paid to the treasurer on the order of the auditor of the state. About fifty banks, either branches of the Ohio state bank, or independent institutions, were organized under this act. In 1851 the legislature passed an act to tax banks and bank and other stocks the same as other property was then taxable under the laws of the

Mississippi Valley Railroad Company." Another resolution was passed, reciting that the Yazoo & Mississippi Valley Railroad Company was the "successor" or assignee of the Louisville, New Orleans, & Texas Railroad Company. Of course, the mere name, Yazoo & Mississippi Valley Railroad Company, is utterly immaterial in determining whether it is attached to the same old company known as the Yazoo & Mississippi Valley Railroad Company, or to the consolidated company,—the new company; and this action of the stockholders, as well as the articles of consolidation, pointed clearly to the same result,—consolidation, and not merger. The new company was the successor or assignee of the two old companies, and the language of Mr. Justice Brown, of the Supreme Court of the United States, in *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 309,

38 L. ed. 454, 14 Sup. Ct. Rep. 592, fits in here as if uttered for this case: "It is impossible to conceive of a corporation existing without stock or certificates representing the interests of the corporators in the organization. Now, if the act provides [the deed in the case at bar] that these certificates shall be surrendered, and certificates in another company issued in their place, what becomes of the prior companies? Who are their stockholders? Who their officers? [The deed in this case appoints an entirely new set of officers. See Charter Book, pp. 731, 732.] If the stock in the new company is sold, what interest in the prior companies passes by the sale? There can be but one answer to these questions. The property and franchises of the prior companies are gone, as much as if they had formally surrendered their charters. The new company

state. The effort to tax the banks in virtue of this act provoked strenuous resistance. In the litigations which at once followed the supreme court of the state decided that the tax was valid and must be paid. It held: (1) That § 60 of the banking act of 1845 contained no pledge by the state not to alter or change the method or rate of taxation, and had none of the elements of an irrepealable contract between the state and the banks; (2) that if that section could be construed to the contrary, it would amount to a surrender of the sovereign power of taxation, and thus be inoperative and void for want of any power in the general assembly to make it. *Debolt v. Ohio Life Ins. & T. Co.* 1 Ohio St. 563; *Mechanics' & T. Branch of State Bank v. Debolt*, 1 Ohio St. 591; *Knoup v. Piqua Branch of State Bank*, 1 Ohio St. 603; *Bank of Toledo v. Toledo*, 1 Ohio St. 622.

These cases were decided at the January term in 1853, and the opinions in them were written by four different members of the court. The corporation in the first of these cases was not organized under the act of 1845, but by an act passed several years before. It claimed the benefits of the act of 1845 by virtue of a section in its charter which read: No higher taxes shall be levied on the capital stock or dividends of the company than are or may be levied on the capital stock or dividends of incorporated banking institutions in this state. Each of the other corporations was organized under the act of 1845. In the first case, *Ranney, J.*, while intimating that the circumstances of its origin might take the corporation out of the class in which the others were, did not find it necessary in the view taken by the court of the scope and effect of the act of 1845, to enlarge upon the point. The whole case is made to depend upon whether § 60 of the act of 1845 constituted an irrepealable contract respecting taxation which the legislature enacting it had constitutional power to make. A lack of space forbids outlining the argument of the Ohio judges, even on the single question of legislative power. Many of the points made will appear before the subdivision closes, but the reader interested should consult the full reports.

The court followed and approved these cases, and reached the same conclusion, in the December term of the same year. *Exchange Bank v. Hines*, 3 Ohio St. 1.

In the meantime, the banks carried the cases to the United States Supreme Court on writs of error. The first case to be decided in that tribunal was that of the Piqua Branch Bank. It was therein held that § 60 of the act of 1845 did not merely prescribe a rule for taxing the

banks which the state might change at pleasure, but that it was a contract which could not be impaired by subsequent legislation. That the act of 1851 to tax banks and bank and other stocks the same as other property was taxable, under which the Piqua Branch Bank had been assessed upon its capital stock and contingent and surplus funds, impaired the obligation of that contract, and was void for conflict with the Federal Constitution. A state, it was said, in granting privileges to a bank with a view of affording a sound currency, or of advancing any policy connected with the public interest, exercises its sovereignty, and for a public purpose of which it is the exclusive judge. Under such circumstances, a contract made for a specific tax is binding. This tax continues although all other banks should be exempted from taxation. Having the power to make it, and rights becoming vested under it, it can no more be disregarded, nor set aside by a subsequent legislature, than can a grant of land. (*McLean, J.*) And again: Every valuable privilege given by the charter, and which conduces to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise and necessary to the business of the bank cannot, without its consent, become a subject for legislative action. *Piqua Branch of State Bank v. Knoup*, 16 How. 369, 14 L. ed. 977.

There were three dissentients from this decision.—*Catron, Daniel, and Campbell, JJ.* Mr. Justice Catron put the dissent upon three grounds: 1. That § 60 of the Ohio banking act of 1845 did not, for reasons stated by his colleague, *Campbell J.*, constitute an irrepealable contract. 2. That the taxing power is not the subject of a contract so as to be bartered away irrevocably. Each successive legislature is vested with it unimpaired and unhampered by the action of its predecessors. A legislature may grant an exemption from taxation, but only for so long a time as the needs of the state do not require its modification. (3) The Ohio Constitution was so phrased that the legislature of that state, according to the interpretation of the state supreme court, had not the power to contract away permanently the right to tax. He did not undertake to say whether this was a sound interpretation, it was conclusive because made by the highest state court concerning its own Constitution. 1864.

may doubtless receive, by transmission from its constituent companies, their property, rights, privileges, and franchises, including any immunity from taxation; but it receives them as an heir receives the estate of his ancestor, or as a grantee receives the estate of his grantor,—by inheritance, succession, or purchase. The result is not a mere union or partnership of two companies, nor the merger of the franchises of one in another, but the extinguishment of one, and the creation of another in its place. . . . It follows from this that, when the new corporation came into existence, it came precisely as if it had been organized under a charter granted at the date of the consolidation, and subject to the constitutional provisions then existing." To the same effect, also, is *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 469-475, 28 L. ed. 1056-1058, 5 Sup. Ct. Rep. 529.

The Ohio Life Insurance & Trust Company was unsuccessful in its efforts to escape the same tax. It was held that the provision in its charter that no higher taxes should be levied on its capital stock or dividends than were or might be levied upon those of other incorporated banking institutions in the state only entitled it to the same rate of taxation as was, or might be, imposed by general laws upon banks and banking institutions, and not to the benefit of any special or particular rate that might be levied pursuant to a special contract with one or more favored bodies corporate. *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 14 L. ed. 997.

The Ohio supreme court did not bow. In December, 1854, it again declared that "the Constitution of the state does not clothe the general assembly with the authority to surrender or part with any portion whatever of the taxing power by contract or sale. That the legislature of this state has not the constitutional authority, in conferring special privileges on corporations, to abridge or in any manner whatever surrender any portion of the right of taxation, has been settled by solemn adjudication, and is not now an open question in this state." *Milan & R. Pl. Road Co. v. Husted*, 3 Ohio St. 578.

In 1852 the Ohio legislature passed an act for the assessment and taxation of all property in that state, and for the levying of taxes upon the same according to its true value in money. This was in accordance with the mandate of the new Constitution of 1851. This act made it the duty of the president and cashier of every bank and banking company then or thereafter incorporated in Ohio, and authorized to issue circulating notes, annually to return on oath, under penalty, a written statement of its loans, discounts and investments, and imposed a tax thereon for the same purposes and to the same extent as personal property was or might be taxed at the place where such bank or banking company was situated. A tax was assessed under this act upon the Commercial Branch Bank of Cleveland, one of the banks organized under the act of 1845, and, its directors refusing to contest the same, one of its stockholders, not a citizen of Ohio, brought suit to enjoin the collection thereof in the circuit court of the United States for the district of Ohio. A permanent injunction having been decreed, an appeal was taken to the United States Supreme Court. After disposing of the preliminary questions concerning the jurisdiction of the court below to entertain the cause and grant the relief

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Article 2 of the articles of consolidation is as follows: "The corporate name of the said consolidated company shall be the Yazoo & Mississippi Valley Company." Articles 4 to 8, inclusive, are as follows: "Art. 4. Every holder of the stock of either of the said companies now outstanding shall be entitled to cast one vote for each share of stock held by him, in the stockholder's meetings of the consolidated company, which vote may be cast either in person or by proxy, and shall have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor; and, in case the consolidated company shall determine to issue new shares, such shares shall be exchangeable at par for the now outstanding shares of each of the constituent companies; and the remainder of the capital stock of the consolidated com-

sought and the right of a nonresident stockholder to maintain under the circumstances disclosed by the record such a suit, adversely to the contentions of the state, the court proceeded to the merits. It was admitted that the only difference between the Piqua Branch Bank Case and this case, granting that the complainant was *rectus in curia*, was that the former involved a tax assessed under a statute of 1851 enacted when the Ohio Constitution of 1802 was in force, while the latter was concerned with a tax levied under an act of 1852 passed after such Constitution had been amended in 1851. The two acts were the same in effect, and both were challenged as impairing the same statutory contract, *viz.*, § 60 of the act of 1845. These laws were intended to tax, not the profits, but the business, capital, circulation, credits, and dues of the banks. They professed an intention to equalize the tax to be paid by the banks with that required to be paid upon personal property in general. The court said they did not accomplish this result, as they really subjected the banks to a much higher rate of taxation but this circumstance was not material in the view taken of the obligatory force of the contract statute. That contract was declared to be so plain and clear that no critical examination of § 60 could make its words more exact in meaning. The words, "would otherwise be subject," contained therein, relate to the legislative power to tax, and the section was a relinquishment of that power, binding upon the legislature which enacted it, and upon succeeding legislatures as a contract not to tax the banks during their continuance more than 6 per cent upon their semiannual profits. "A change of constitution," it was declared, "cannot release a state from contracts made under a constitution which permits them to be made. The inquiry is, Is the contract permitted by the existing Constitution? If so, and that cannot be denied in this case, the sovereignty which ratified it in 1802 was the same sovereignty which made the Constitution of 1851, neither having more power than the other to impair a contract made by the state legislature with individuals. The moral obligations never die. If broken by states and nations, though the terms of reproach are not the same with which we are accustomed to designate the faithlessness of individuals, the violation of justice is not the less." The conclusion was that: This case is coincident with that of *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977, decided by this court in the year 1853. It rules this in every particular:

pany shall be issued from time to time, and upon such terms and conditions as may be prescribed by the board of directors of said company. Art. 5. All and singular, the rights, powers, privileges, immunities, and franchises, and all the railroads, real and personal estate, easements, fixtures, equipments, choses in action, and property and assets of every kind, nature, or description, belonging to either of the parties hereto, shall be vested in, and become the property of, the said consolidated company, without any further act, deed, conveyance, or assurance being required in the premises. Art. 6. The affairs of the consolidated company shall be managed by a board of directors, which shall consist of such a number of members, not less than five, as the company may determine from time to time, each of whom shall be a stockholder, and one of them a resident of the state of Mississippi,

one of Tennessee, and one of Louisiana. The members shall be divided into three equal classes, as nearly as practicable. Successors for the term of three years shall be chosen for those belonging to the first class at the first annual meeting of the stockholders held after this consolidation shall have been effected, for those who belong to the second class at the next annual meeting, and for those belonging to the third class at the next succeeding annual meeting of the stockholders. Each director successively chosen shall continue in office until his successor is elected. Vacancies in the board caused otherwise than by expiration of term for which the retiring director was chosen may be filled by a vote of a majority of the directors remaining, such appointee to continue in office until the next regular election of directors by the stockholders. The first board of directors shall be composed of the following

and to the opinion then given we have nothing to add, nor anything to take away. *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401, *Affirming* *McLean*, 142, Fed. Cas. No. 18,032.

The same dissents were filed, the views of the nonconcurring judges being formulated by Campbell, J.

At the same term, in April, 1856, the court for the same reasons and on similar facts reversed the Ohio supreme court in two other cases upon the authority of that last cited. *Mechanics' & T. Bank v. Debolt*, 18 How. 380, 15 L. ed. 458; *Mechanics' & T. Bank v. Thomas*, 18 How. 384, 15 L. ed. 460.

The Ohio supreme court began to acquiesce. At the December term, 1856, in the cases of *Matheny v. Golden*, 5 Ohio St. 361, and *Kumler v. Traber*, 5 Ohio St. 442, Bartley, Ch. J., dissenting, it held that the charters of two universities incorporated under the old Constitution created valid contracts for tax exemptions, and in *State ex rel. Morgan v. Moore*, 5 Ohio St. 444, it denied, with two dissents, the motion of the attorney general at the instance of the state auditor, for a mandamus to the Athens county auditor to assess and tax the Athens Branch Bank under the act of 1852. It based the denial upon the ground that the United States Supreme Court had held that the act of 1845, § 60, constituted an irrevocable contract with the banks, and that the tax act of 1852 was void for impairing it, and that this ruling must prevail. It made the like decision in an action for trespass in enforcing such a tax, in *Ross County Bank v. Lewis*, 5 Ohio St. 447, and it granted, again against the protest of the chief justice in an elaborate opinion, the motion to enter the mandate of reversal in *Piqua Branch of State Bank v. Knoup*, 6 Ohio St. 342.

But the Ohio supreme court had not been converted. A year later, it again decided that § 60 of the act of 1845 did not constitute an irrevocable contract with the banks organized under that law, and that the subsequent act to tax banks and bank and other stocks the same as other property was then taxable in the state was a valid act and not in conflict with the contract clause of the Federal Constitution. An additional ground for this decision was found in the Ohio law of March 7, 1842, a general statute, unrepealed when the act of 1845 was passed, which provided that all subsequent acts of incorporation should be subject to amendment or repeal in the discretion of the legislature. I am aware, said one of the judges who concurred in this decision, that the Su-

preme Court of the United States has decided the question here pending adversely to the views I have expressed. In those cases I have bowed in submission to the mandates of that court, and have concurred in ordering them to be entered on our journals. But these decisions are understood to have been made by a bare majority of that court and, as its reasoning has failed to satisfy my judgment, I am desirous that it should have an opportunity to reconsider them. *Sandusky City Bank v. Wilbur*, 7 Ohio St. 481.

The supreme court of Pennsylvania was at this time in full accord with its neighbor in Ohio. In 1858 it decided that one legislature has no power to barter away the sovereign right of taxation so as to bind a future legislature.

In that case, Lewis, Ch. J., argued thus: In general, the state courts have avoided expressing an opinion on this momentous question where the necessities of the case did not require it. The cases which have arisen have generally been disposed of by holding that exemptions are binding until repealed by subsequent legislation; that no charter or grant carries with it such exemption unless clearly expressed; that the taxing power is of vital importance, and is essential to the existence of the government; that it resides in a government as a part of itself; and that the release of power is never to be assumed. But the question has been distinctly decided against the existence of any such power, five different times, by the unanimous judgment of all the judges of the supreme court of Ohio. It is true that the Supreme Court of the United States has taken a different view of that question, and has in several cases reversed the decisions of the supreme court of Ohio. We have no hesitation in adopting the decisions of the state courts on all questions respecting the meaning of their own state Constitutions, and the extent of the powers which the people of the states have therein granted to the different departments of their own state governments. It may be added that the United States Supreme Court was divided in opinion on this question, three eminent judges of that court dissenting, while the state court was unanimous. And it is but just to say that the opinion of the state court is sustained by a course of argument which has never been satisfactorily answered in the United States Court or elsewhere. *Mott v. Pennsylvania R. Co.* 30 Pa. 9, 72 Am. Dec. 664.

Once again, in 1859, the supreme court of Ohio sustained a tax imposed under the law of 1852 upon one of the banks organized under the

members, divided into three classes, as follows: First class: Stuyvesant Fish, Adolph Schreiber, W. C. Craig, Chas. A. Peabody, Jr. Second class: John W. Auchinloss, Walther Luttgen, Edward H. Harriman, J. T. Harahan. Third class: S. V. R. Cruger, R. P. Neeley, R. C. Shepherd, John C. Welling. Art. 7. The board of directors of said consolidated company shall choose one of their number president, whose term of office shall be one year, or until his successor shall be chosen or qualified. They may also appoint such other officers and agents as they may deem necessary from time to time, and prescribe their duties and compensation, and may provide, by the by-laws to be adopted, such rules and regulations relating to the affairs and business of said company as may be necessary or proper. The said board shall also have power to appoint an execu-

tive committee, of whom the president shall be one *ex officio*, who shall possess and exercise all the powers and duties of the board of directors, when the board is not in session. Until otherwise ordered, the corporate seal of the said consolidated company shall be that of the Yazoo & Mississippi Valley Railroad Company. Art. 8. The said consolidated company shall be, and the same is hereby, authorized and empowered, in such a manner and upon such conditions as are permitted by law, to issue its bonds, and secure the same, as well as all bonds heretofore issued by either of the constituent companies, or that have been heretofore or may be hereafter issued by any other railroad company, by mortgage or deed of trust upon all or any of its railroads, rights, franchises, and property, real and personal, wherever the same may be situated, and whether

banking act of 1845. It reiterated that § 60 of the bank act did not create a contract within the meaning of the Federal Constitution prohibiting the passage of laws impairing contract obligations, and in plain terms refused to follow the decisions of the United States Supreme Court in point, and reaffirmed and followed its own decision, *contra*, in *Sandusky City Bank v. Wilbor*, 7 Ohio St. 481, with two of its five judges dissenting. *Skelly v. Jefferson Branch of State Bank*, 9 Ohio St. 608.

When this cause was reached in the United States Supreme Court, in March, 1862, the learned attorney general of Ohio admitted in his argument that the *Piqua Branch Bank Case* had decided the precise point upon which the case at bar turned, to wit, that § 60 of the bank act of 1845 constituted an irrepealable contract and, as such, was protected by the Federal Constitution, although by a bare majority of the court. But he urged the court to overrule that decision for three reasons, because: 1. The question was one of the construction of the Constitution and laws of Ohio, and the construction adopted by the supreme court of that state was conclusive. 2. The Ohio legislature lacked the power, under the state Constitution of 1802, to exempt property from taxation irrevocably. 3. When the act of 1845 was passed a general statute of Ohio was in force making all corporate charters subject to alteration, suspension, and repeal, and the act of 1845 was subject to its terms. And he closed by inviting the court to consider with care the reasoning of *Sutliff and Brinkerhoff, JJ.*, in *Sandusky City Bank v. Wilbor*, 7 Ohio St. 482, and that of *Gholson, J.*, in the case at bar. Mr. Justice Wayne answered for the court, first, that the rule respecting the binding quality of the construction of a state court of its own Constitution and laws was always subject to the exception of this identical case; second, that the court had over and over again decided in favor of the legislative power to contract for an exemption from taxation, and had three different times decided that the act here involved did constitute an inviolable contract between the state of Ohio and the banks, and that, while the reasoning of the Ohio supreme court had received respectful consideration, it was in the later decisions merely reproduced as the foundation of its judgments without other illustration than it had when first it was reviewed. The third point made by the attorney general was left unnoticed. The court evidently considered that the legislature of 1845 had chosen to make an irrepealable contract in spite of the statute of 60 L. R. A.

three years before. *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 17 L. ed. 173.

The case decided with it and reported next after it, involving the same questions, was disposed of as follows: We affirm, again, the unconstitutionality of the law of Ohio under which the tax was assessed and levied, and direct the reversal of the judgment of the supreme court of the state of Ohio now before us by a writ of error. *Franklin Branch Bank v. Ohio*, 1 Black, 474, 17 L. ed. 180.

b. When contracts do not arise.

It was settled by the decision in *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939, that the mere grant of a corporate charter lays no obligation upon the state to refrain from taxing the franchise, the capital, the stock, or the property of the grantee. The charter is a contract, but is not a contract which exempts its holder from taxation to any extent whatever, unless it contains in clear and unmistakable language an express surrender of the taxing power. If such a surrender is not found in words in the charter, it has not been made, cannot be implied, and an exemption does not exist. It is altogether unnecessary that the right to tax should be explicitly reserved.

A state, having gratuitously granted a bank charter with no express reservation in it of power to tax the franchise, may, none the less, afterwards impose a percentage tax upon its paid-in capital, payable when it declares dividends, without thereby coming in conflict with the contract clause in the Constitution of the Union. *Portland Bank v. Apthorp*, 12 Mass. 252.

Unless the right to tax a railroad corporation has been expressly relinquished, the state which chartered it may at any time lawfully impose taxes of any kind upon it. The argument that, as the power to tax is a power to tax so onerously as to destroy by laying burdens too grievous to be borne, and hence such power is inconsistent with the grant of a corporate charter, that, being a contract which may not be impaired, therefore, by necessary implication the taxing power is surrendered, is without force or merit. *People v. Detroit & P. R. Co.* 1 Mich. 458.

An exemption from a state license tax imposed upon a corporation cannot be implied because to tax a company for the privilege granted by its charter is to destroy that privilege. The corporation took its charter subject to the same right of taxation in the state that applies to all other privileges and all other property.

the same may be owned by said company at the time this consolidation is effected, or may be hereafter acquired, and may also exercise any and every other corporate right or power now vested in, or which might have been heretofore lawfully exercised by, either of said constituent companies."

It will be seen that said article 5 itself conveys all the property, rights, and franchises, etc., belonging to either constituent, to the consolidated company, without any further act, "deed, conveyance, or assurance being required in the premises," and in this regard is substantially identical with the provisions in *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 475, 28 L. ed. 1058, 5 Sup. Ct. Rep. 529, and *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 308, 38 L. ed. 454, 14 Sup. Ct. Rep. 592, both of which cases hold that a new corporation was created. It will

be noticed, also, that article 6 creates a new organization, and actually names a new set of directors for the consolidated company, who are, under article 7, to elect officers for the consolidated company. It will be noticed that article 8 authorizes the new consolidated company to "issue its bonds, and secure the same, as well as all bonds heretofore issued by either of the constituent companies," and further provides "that the consolidated company shall exercise any and every other corporate right or power now vested in, or which might have been heretofore lawfully exercised by, either of said constituent companies," clearly drawing the distinction between the two previous constituent companies and the new consolidated company; and it will further be specially noticed (and to this we direct the closest attention) that article 4 provides "that every

Memphis Gaslight Co. v. Shelby County Taxing Dist. 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205.

The mere grant to a street railway company of a franchise to lay its tracks and operate its road in city streets without consideration or agreement of exemption does not relieve the grantee from a license tax upon the business of operating a street railway. The exaction of such a tax impairs no contract. *New Orleans v. New Orleans City & L. R. Co.* 40 La. Ann. 587, 4 So. 512.

If it were permissible to abridge the legislative power of taxation by implication without a positive enactment clearly expressive of an intention to exempt a corporation from ordinary taxation, such an inference cannot be drawn from a reservation in the charter of a right to require subsequently what might have been required at the outset, namely, the payment of a bonus for the corporate franchise. *State, Trenton Water Power Co., Prosecutors, v. Parker*, 32 N. J. L. 426.

No property is beyond the reach of the taxing power of the state unless put beyond it designedly by an unequivocal sovereign act. Hence, a certificate of sale of state lands containing no stipulation or promise that the land or the vendee's interest in it shall not be taxed, issued pursuant to a statute equally silent upon the subject, does not warrant the exemption of such lands from taxation pending the final delivery of the patent upon the theory that the purchaser is entitled to a conveyance upon the sole condition that he pays the purchase money, and that any addition by way of tax impairs the obligation of the contract of sale. *Robertson v. State Land Office*, 44 Mich. 274, 6 N. W. 639.

A lease by the county authorities of public property, silent upon the subject of taxation, does not exempt the lessee from county taxation upon his interest in such property, although such lease contains general covenants for quiet enjoyment, peaceable possession, and against all claims and encumbrances. *Luttrell v. Knox County*, 89 Tenn. 253, 14 S. W. 802.

Of course, the state must be constitutionally competent to make a contract for exemption from taxation.

When a state legislature lacks constitutional power to extend an exemption from taxation to a railroad company beyond the period granted in its charter, which antedated the inhibitory Constitution, a statute professing thus to contract with the company does not confer the immunity it was its purpose to grant, 60 L. R. A.

since such statute is void. *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091.

Then, too, as in all cases, there must be a consideration moving to the state, or from the corporation, to support a contract for exemption from taxation.

A statute exempting from taxation all the real property, including ground rents, belonging and payable at the time of its enactment to a certain hospital in a named city, so long as these continue to belong to such hospital, but which imposes no duty upon the institution in consideration of the grant, which requires the hospital to do nothing, but leaves it to pursue its own course as freely as before, contains nothing that savors of contract, and the legislature has the undoubted right to repeal the act whenever the public exigencies so require. *Christ Church Hospital v. Philadelphia County*, 24 Pa. 229, Affirmed in 24 How. 300, 16 L. ed. 602.

A grant of tax immunity, unless it rests in a consideration and is made under circumstances amounting to a contract, is a mere legislative gratuity, revocable at pleasure. *Baltimore City Appeal Tax Court v. Regents of University*, 50 Md. 457.

It is competent for the legislature to contract for the relinquishment of taxation; but where there is no consideration for such a contract the grant of exemption is a mere gratuity which the legislature may revoke at will. *Baltimore City Appeal Tax Court v. Grand Lodge of Ancient F. & A. M.*, 50 Md. 421.

A provision in a corporate charter exempting the corporate property from all taxation, standing naked and alone, without any consideration to support it, either by benefits accruing to the public or obligations cast upon the corporation, is a mere legislative gratuity, revocable at any time, and not an irrevocable contract. *Washington University v. Rouse*, 42 Mo. 308.

The proposition cannot be gainsaid, although the exemption in the charter of this university was declared by the United States Supreme Court to constitute an irrevocable contract. *Vide* the case between the same parties, in 8 Wall. 439, 19 L. ed. 498.

A statute enacting that all companies or corporations formed to bore for and make salt in the state, and all individuals engaged in salt manufacture, shall be entitled to the benefits thereof, which are, first, the exemption from taxation, for any purpose, of all real and personal estate used for making salt, and second, the payment of a state bounty for each bushel

holder of the stock of either of the said companies now outstanding shall be entitled to cast one vote for each share of stock held by him, in stockholders' meetings of the consolidated company, and shall have all the rights of a stockholder of the consolidated company, as fully as if new shares of the consolidated company had been issued and exchanged therefor." Now, it is clearly admitted by both sides that the Louisville, New Orleans, & Texas Railroad Company was dissolved, and became extinct. The Louisville, New Orleans, & Texas Railroad Company had 50,000 shares of stock. The Yazoo & Mississippi Valley had 6,000 shares of stock. And, if anything is certain, it is undoubted that it is a metaphysical and legal impossibility that a corporation with 6,000 shares of stock could absorb one with 50,000 shares, and allow 1 vote to each share. It

is well said by counsel for the revenue agent: "The voting power of the latter is more than eight times that of the former, and it could absorb the former, and seven more like it; and no legislative declaration or judicial dictum could alter this fact, for it is founded in the nature of things. The deed of consolidation provides for the contingency, and says, whatever the effect, that consolidation shall stand and be effective. What is, then, effected? If the Louisville, New Orleans, & Texas Railroad Company is extinguished, and the voting power of each share of stock is equal, and extends equally over all the property, rights, operations, and franchises of the consolidated company, you may put in what name, or call it what you may, but the actual result is a complete and perfect consolidation, with the combined vot-

of salt so manufactured, does not create an irrepealable statutory contract with those accepting the act and investing capital in the enterprise upon the faith of it, but only a gratuitous offer of subsidy which the state may at any time subsequently recall. *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82, Affirmed in 13 Wall. 373, 20 L. ed. 611.

A naked provision in a state statute exempting lands of a railroad corporation from local taxation for a limited period, when no consideration moves from the company—when it is required to do and does nothing in return—is a mere gratuity, which the state may revoke, continue, or change at pleasure. The fact that one of the parties was a state, and the other a corporation, does not invest the arrangement with any higher character than, or differentiate it from, a similar transaction between individuals. *Tucker v. Ferguson*, 22 Wall. 527, 22 L. ed. 805.

When a grant is a mere gratuity from the state, without any element of contract in it, there can be no impairment of it by subsequent taxing laws. *West Wisconsin R. Co. v. Trempealeau County*, 93 U. S. 595, 598, 23 L. ed. 814, 815.

The court reaffirmed the last above-cited case, saying the points and arguments were strikingly similar and the facts substantially identical in both cases. We hold here, it said, as we held there, that the exemptions in question were gratuities offered by the state without any element of a contract. There was no assurance or intimation that they were intended to be irrevocable, or that the laws in question should not be at all times subject to modification or repeal in like manner as other legislation. The state asked for no promise from the company, and the company gave none. Each party was at liberty to take its own course. Neither party was, nor was intended to be, in any wise bound to the other. The state chose to continue the gratuity for a time, and then withdrew it. The state did what it had an unqualified right to do. *Ibid.*

The exaction by the state of a bonus for the franchise it grants does not *per se* prevent subsequent taxation of the corporation.

The Maryland court of appeals argues in one case, that the legislature, by exacting a bonus when it grants a franchise to a corporation, does not surrender its right to tax the corporate franchise in common with all other property in the state. It waved aside the argument that the power to tax at all was the power to tax so heavily as to make the fran-

chise that had been paid for worthless, by saying that the constitutional bill of rights forbade the imposition of taxes which did not equally burden every species of property in the state ad valorem. A bonus exacted, or sum collected, by the state for granting a corporate franchise, is, it declared, a purchase price demanded for a right or privilege conveyed, and which the grantee is at liberty, if he deems the price too high, to refuse to pay and go without the franchise. It is in no sense a tax, which is an imposition by the sovereign that the subject cannot evade, and which, under a constitution so providing, must ever be proportional to the value of the taxpayer's property,—his just share of the public burden borne in common with other property owners. An arbitrary exaction as the price of a franchise bears no such proportion. *Baltimore v. Baltimore & O. R. Co.* 6 Gill, 288, 48 Am. Dec. 531.

But this opinion is too broad. The views expressed are out of harmony with the case of *Gordon v. Appeal Tax Court*, 3 How. 183, 11 L. ed. 529, holding that the corporate franchise is not taxable under such circumstances.

A bonus paid the state by a foreign corporation for authority to do business and hold real estate within such state does not prevent the legislature from subsequently imposing taxes upon its net earnings, or its capital stock measured by dividends, or upon stock and earnings. *Com. v. Central Petroleum Co.* 1 Pearson (Pa.) 386.

A grant to a foreign railroad corporation of a right of way through the state, the statute providing that as soon as the road is completed and operated to a named terminus the company shall pay into the state treasury annually \$10,000 (any neglect or refusal to pay working a forfeiture of the right and privilege granted), and, in addition, that the stock of such company to an amount equal to the cost of constructing that part of its road that is within the state shall be subject to taxation by the state, in the same manner as other similar property is or may be subject; and containing no words expressive, either of a reservation of power to lay other and further taxes, or of a release therefrom, does not amount to a contract of exemption from subsequent increased taxation. A later general statute imposing upon all railroads traversing such state a tax upon freight carried does not impair any contract with such company. *Erie R. Co. v. Com.* 66 Pa. 84, 5 Am. Rep. 351; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595.

ing power of both. One cannot absorb $8\frac{1}{2}$, but 1 and $8\frac{1}{2}$ can make $9\frac{1}{2}$ —a new number."

We have thus far been discussing two things,—the purpose of the legislature in authorizing the consolidation, and what was actually done in pursuance of that authority; and it is perfectly clear that what the legislature authorized, and what was actually created in fact in pursuance of that authorization, was consolidation of such character as resulted in the creation of a new company under the name of the Yazoo & Mississippi Valley Railroad Company; that the Yazoo & Mississippi Valley Railroad Company with which we now deal is not the old Yazoo & Mississippi Valley Railroad Company, one of the constituent members, but is the new Yazoo & Mississippi Valley Railroad Company,—a new consolidated company, taking its grant of corporate

rights from date of said consolidation, October 24, 1892, some two years after the Constitution of 1890 went into effect. This leaves for solution on this branch of the case a single inquiry: Did § 180 of the Constitution of 1890 cut off the exemption claimed by the Louisville, New Orleans, & Texas Railroad Company?—conceding now, for the purpose of argument, that it ever had any such exemption. That section is in the words following: Sec. 180. "All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this Constitution shall be subject to the provisions of this article; and all such charters under which organizations shall not take place in good faith and business be commenced within one year from the adoption of this Constitution, shall thereafter have no

Ordinarily a contract does not arise out of a general statute relating to whole classes of corporations, and not an organization act. This topic, as remarked at the outset, is one apart from the present theme, but a few cases peculiarly in point have been noted.

A general act prescribing a particular rate of taxation in respect of corporations of a certain class, and which contains none of the elements of a contract, is not made a part of the charter of a subsequently organized company in such class by the idle ceremony of its directors' adopting a formal resolution accepting its provisions. A later statute, therefore, which imposes a higher tax, impairs no contract. *Holly Springs Sav. & Ins. Co. v. Marshall County*, 52 Miss. 281, 24 Am. Rep. 668.

A general law whereby all insurance companies authorized to do business under its terms are exempt from certain taxation by municipalities, and which forbids all companies from negotiating any contract of insurance until its provisions are complied with, and gives none an option to reject its application, creates no contract between a corporation complying with its terms and the state which enacted it. Hence, the state may subsequently make such company subject to municipal taxation without infringing the contract clause of the United States Constitution. *Easton City v. Northampton County F. Ins. Co.* 4 Pa. Co. Ct. 403.

The compliance by a foreign insurance company with a state law establishing an insurance department, in order that it may obtain a license to do business in the state, when the statute provides that it shall be unlawful for city, county, or municipality to impose or collect any license fee or tax upon insurance companies or their agents authorized to transact business under such act, creates no contract with such company, so as to render void for impairing its obligation a subsequent statute empowering a city wherein it establishes an agency to levy and collect, for general revenue purposes, an annual license tax on insurance companies and agencies, and to regulate the collection thereof, and a municipal ordinance passed in pursuance thereof. *Ætna F. Ins. Co. v. Reading*, 119 Pa. 417, 13 Atl. 451.

Several cases are illustrative of statutes coming short of constituting contracts for exemption from taxation.

A section of a corporate charter providing that as soon as the corporate works have advanced to a certain state toward completion a sworn statement of the cost and expenses

of establishing them shall be furnished, and then it shall be lawful, at any time afterward, to levy a tax on the company, not exceeding a stated percentage on its subscribed and paid-in capital stock, does not amount to a contract restricting the state to the specified rate and subject of taxation, or entitle the corporation to an exemption from, or an abatement of, a tax imposed under a subsequently enacted statute for the assessment and taxation of all private corporations (with certain exceptions not inclusive), at the full amount of their capital stock and accumulated surplus, although such tax act also excepts those corporations which, by virtue of any contract in their charters or of other contracts with the state, are expressly exempted from taxation. *State, Trenton Water Power Co., Prosecutors, v. Parker*, 32 N. J. L. 426.

A section in a railroad charter making it the duty of the corporation at a designated time annually to pay the state a percentage tax on the cost of the road, with a proviso that no other tax or impost shall be levied or assessed upon said company, does not amount to a contract for commuted taxation. The proviso is merely a declaration that the legislature intended that the company should not, while subject to the percentage tax, be chargeable with any tax upon its real and personal estate under the general tax law, which, but for such proviso, with plausibility might be asserted. *Little v. Bowers*, 46 N. J. L. 300, Affirmed on opinion below in 48 N. J. L. 370, 5 Atl. 178.

To the same effect is *State, Newark & S. O. Horse Car R. Co., Prosecutor, v. Clark*, 53 N. J. L. 332, 21 Atl. 302.

A clause in the charter of a domestic corporation requiring it to pay into the state treasury a bonus of a stated per cent on its capital stock or any increase thereof in three annual instalments in lieu of any tax on dividends, and the payment thereof pursuant thereto, does not exonerate the company from liability under another statute laying a percentage tax upon net earnings of all companies and corporations not paying a dividend tax under existing laws. *Jones & N. Mfg. Co. v. Com.* 69 Pa. 137.

A street railway charter requiring the corporation to pay the municipality in which it operates the same license fee per car as at the time of its enactment is charged other street railroad companies in the same city constitutes no contract that such license fee shall not thereafter be increased. *Union Pass. R. Co. v. Philadelphia*, 83 Pa. 429.

validity; and every charter or grant of corporate franchise hereafter made shall have no validity, unless an organization shall take place thereunder and business be commenced within two years from the date of such charter or grant." It is too clear for argument that the "power to consolidate is the grant of a corporate franchise." 2 Morawetz, *Priv. Corp.* § 954, p. 903; *Ashley v. Ryan*, 153 U. S. 436-446, 4 Inters. Com. Rep. 664, 38 L. ed. 773-778, 14 Sup. Ct. Rep. 865. It is not a right, but a mere license, as heretofore shown. It takes effect, not as of the date of the charter, but as of the date of the deed of consolidation. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 308, 38 L. ed. 454, 14 Sup. Ct. Rep. 592. A corporation can have no status or existence until organized. 1 Morawetz, *Priv. Corp.* p. 288. Unless, therefore, the present Yazoo & Mississippi

Valley Railroad Company had been organized at the date of the adoption of the Constitution, it is settled that it could not possibly have been legally entitled to an exemption at that time. *Planters' F. & M. Ins. Co. v. Tennessee use of Memphis*, 161 U. S. 193, 40 L. ed. 667, 16 Sup. Ct. Rep. 466. A corporate franchise is the right to exist as a corporation. It is the franchise invested in the individual stockholders before a corporation is organized, authorizing them to form such corporation by organization. This is the precise corporate franchise meant by § 180 of the Constitution. There is an exact analogy between this corporate franchise authorizing individuals to organize themselves into a corporation, and the franchise authorizing constituent corporations and artificial persons to organize themselves into a consolidated company; and

A series of statutes pursuant to which railroad corporations were formed, consolidated, acquired franchises to operate, mortgaged their properties, franchises, rights, privileges, and immunities, all of which passed upon foreclosure to purchasers, who, on acquiring them, were authorized to organize as a new corporation and thereafter own and operate the road under the original franchises, do not constitute a contract in the sense that an after-enacted law exacting from corporations in general, incorporated under either general or special acts and having capital divided into shares, a state tax of a percentage of the authorized capital as a condition precedent to the exercise of any corporate franchise whatever, can be said to be invalid in application to such reorganizing purchasers under the contract clause of the Federal Constitution. *People ex rel. Schurz v. Cook*, 47 Hun, 467, Affirmed in 110 N. Y. 443, 18 N. E. 113, Affirmed in 148 U. S. 397, 37 L. ed. 498, 13 Sup. Ct. Rep. 645.

A mere provision in a state statute authorizing the consolidation of a domestic with a foreign railroad corporation, that the company formed pursuant thereto should pay annually into the state treasury a percentage tax on its capital stock, without other language to show any legislative intent that such tax should be in lieu of other taxes, or that the consolidated company should be exempt from further taxation, does not constitute a contract with the state that the company shall not otherwise be taxed. Later legislation, therefore, taxing differently a new consolidated company formed by the union of the first with two others of adjoining states declared in the authorizing act entitled to all the rights, privileges, and immunities of each of its constituents, held and enjoyed in virtue of its charter, does not conflict with the contract clause in the Federal Constitution. *Delaware Railroad Tax*, 18 Wall. 206, *sub nom.* *Minot v. Philadelphia*, W. & B. R. Co. 21 L. ed. 888.

A municipal charter authorizing the municipality to tax all real and personal property in the city, to borrow money, and to issue bonds, does not constitute a contract between the city and the state. When the legislature, therefore, subsequently grants a railroad charter, and therein exempts from taxation all the railroad property, inclusive of land for tracks, stations, and other structures in such city, it cannot be said to have impaired any contract obligation to the municipality, in spite of the fact that the city has subscribed for sundry works of internal improvement to pay for which it 60 L. R. A.

has issued bonds, and has also incurred other expenses, all of which must be met with the proceeds of taxation. *Richmond v. Richmond & D. R. Co.* 21 Gratt. 604.

A clause in a bank charter requiring the bank annually to pay a state tax of a certain sum on each share of its subscribed for and paid-in capital stock, the first payment to be made a year after banking operations begin, does not constitute a contract that other or further taxes will not be imposed upon the bank or its stockholders. Hence, a later statute imposing a specific tax upon the profits or dividends upon money invested in stocks of any kind, or in shares of any incorporated or trading company, including bank dividends, is applicable to the stockholders in such bank when they receive dividends, and is not repugnant to the contract clause in the United States Constitution. *State v. Petway*, 55 N. C. (2 Jones Eq.) 396.

A statute increasing the amount of a privilege tax imposed upon every telegraph company operating a thousand or more miles of wire within the state for messages received, transmitted, and delivered within the state, not sent on government service, in lieu of all other except ad valorem property taxes, requires a company within its purview, and which has paid a tax at the old rate for the year in which such statute takes effect, to pay a proportionate part of the increase for the balance of that year, because a revenue tax act creates no contract between the state and the taxpayer that no additional tax of the same kind will be imposed in the same fiscal year. *Western U. Tele. Co. v. Harris* (Tenn. Ch. App.) 52 S. W. 748.

A state statute passed to prohibit the issue and circulation of bank notes of small denominations, and imposing a tax of 20 per cent upon the banks which emit and put in circulation such notes, with a proviso that a not greater tax than 5 per cent of the dividends shall be exacted of banks that expressly relinquish the right to issue and circulate small notes, creates no contract for limited taxation with the banks who surrender privileges to get the benefit of such proviso; and the state may, nevertheless, repeal the statute and tax otherwise. *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 418, 14 L. ed. 997.

A statute authorizing the establishment of a ferry, and providing that it shall be subject to the same taxes as at the time of its enactment were or afterwards might be imposed upon other ferries of the state, and under the

in the one case, as in the other, the result of the organization must be a new company. There are various other franchises which may belong to corporations, such as the right to be and operate a railroad after the corporation is organized, receive tolls, etc.; but this belongs to the corporation as an artificial person. It is clear, therefore, that the corporate franchise referred to in § 180 is the right to exist as a corporation. It is thoroughly settled by the United States Supreme Court that the effect of § 180 of the Constitution of 1890 was to cut off any exemption claimed, if it ever existed. *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 475, 28 L. ed. 1058, 5 Sup. Ct. Rep. 529; *Krook & W. R. Co. v. Missouri*, 152 U. S. 308, 38 L. ed. 454, 14 Sup. Ct. Rep. 592.

Learned counsel for the railroad companies insist that under § 181 of the Constitu-

tion, and § 279 in the schedule of the Constitution, this exemption was continued. These sections are in these words: "Sec. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this Constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters or by general laws, unless sooner repealed by the legislature." Section 279 is as follows: "Sec.

same regulations and forfeitures, creates no contract between the state and the ferry company not to tax differently, and is no impediment to the imposition of any tax the state may see fit to lay or authorize. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257.

A corporate charter containing no provision for exemption from taxation, and only a clause withdrawing the company from the operation of a general corporation law, confers no immunity from taxation, but merely protects the charter from alteration or repeal. *St. Louis v. Boatmen's Ins. & T. Co.* 47 Mo. 150.

No contract entitling a railroad to exemption from after-imposed lawful municipal license taxes arises out of city ordinances granting to it lands, rights of way, and concessions in respect of stocks and bonds to induce, and which do induce, the company to locate depots, workshops, and other buildings within the city limits. *Los Angeles v. Southern P. R. Co.* 67 Cal. 433, 7 Pac. 819.

VII. Reserved right to alter, amend, and repeal.

a. In charters.

In the famous Dartmouth College Case, Mr. Justice Story, in his concurring opinion, suggested that if a state legislature in granting a corporate charter should take pains to reserve the right to amend or repeal it, the after exercise of such right would accord with the provisions of the contract itself, and therefore could not be regarded as impairing its obligations. The states were quick to take advantage of this suggestion, and the practice speedily became general, to reserve such right in new charters. The very numerous cases in which this course was taken are not usually cited in this commentary, because of its limitation to questions of taxation only.

In the Pennsylvania College Cases, Clifford, J., remarked that cases often arise where the legislature, in passing an act of incorporation for a private purpose, either makes the duration of the charter conditional, or reserves to the state the power to alter, modify, or repeal the same at pleasure. Where such a provision is incorporated in the charter, he added, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the Constitution. 13 Wall. 190, 20 L. ed. 550. He repeated this, in substance, in *Miller v. New York*, 15 Wall. 478, 21 L. ed. 98.

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Such a reservation in a corporate charter enables a legislature to impose at any time additional taxation upon the corporation, notwithstanding a provision in the charter for complete or partial tax exemption. *State Board v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578; *Bath County v. Farmers' Bank*, 19 Ky. L. Rep. 245, 39 S. W. 1115.

An irrepealable contract right to an exemption from, or to a limited, taxation, given in a corporate charter, does not exist when the charter itself and an act extending its term both are subject to amendment, alteration, and repeal at the will of the legislature. *Louisville v. Bank of Louisville*, 174 U. S. 439, 43 L. ed. 1039, 19 Sup. Ct. Rep. 753.

A railroad charter, subject by its terms to alteration, amendment, or repeal by the legislature, does not confer upon its possessor irrepealable immunity from taxation by a clause in it subjecting the corporation to an annual specific percentage charge upon the cost of its road so soon as the net proceeds thereof equal a stated percentage, and providing that no other tax shall be levied upon the company. Therefore, the subsequent passage by the legislature of a general tax law taxing the real estate of every private corporation except such as are exempt by virtue of an irrepealable charter or other contract with the state operates to bring such a corporation under its provisions, and to make taxable its real estate. *State, Morris & E. R. Co., Prosecutors, v. Miller*, 30 N. J. L. 368, 86 Am. Dec. 188.

While the proposition stated thus is in accord with the current of authority, the case cited must be read in the light of subsequent decisions respecting the irrepealable character of the exemption given to this particular railroad by the New Jersey laws. The state supreme court held that its tax immunity had been lawfully taken away (*State, Morris & E. R. Co., Prosecutors, v. Railroad Taxation Commissioner*, 37 N. J. L. 228), and the decision was affirmed in the state court of errors and appeals (38 N. J. L. 472), but was afterwards reversed, and the exemption secured by the decision of the United States Supreme Court in *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352, and then the New Jersey courts bowed gracefully and changed their rulings in accordance with that of the United States Supreme Court. *State Board v. Morris & E. R. Co.* 49 N. J. L. 193, 7 Atl. 826.

Notwithstanding, however, the legislature has expressly reserved in a railroad charter the right to alter, amend, or repeal it, in the ab-

279. All writs, actions, causes of actions, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the state, and charters of incorporation shall continue; and all indictments which shall have been found, or which shall hereafter be found, and all prosecutions begun, or that may be begun, for any crime or offense committed before the adoption of this Constitution may be proceeded with and upon as if no change had taken place." This is a wholly mistaken view of these provisions of the Constitution. Section 181 preserves only such exemptions as corporations fully organized prior to the Constitution were legally entitled to at the adoption of the Constitution. Its meaning plainly was that, if corporations organized and existing at the date of the adoption of the Constitution should re-

tain the precise corporate existence they then had, such exemptions as they legally had should continue while their corporate organizations remained as they were. It has nothing to do with the preservation of exemption to any corporation existing at the date of the adoption of the Constitution which ceased to retain its said precise corporate existence, and became consolidated with another corporation, thereby ceasing to exist. Section 279 meant the same thing, to wit, that charters of incorporation belonging to corporations at the date of the adoption of the Constitution were not in any way to be infringed by the Constitution, so long as such corporations retained their precise previous corporate organization. This, and this only, is the whole scope of the two sections. Their plain meaning is in harmony with the whole spirit of the chapter on cor-

sence of any statute exercising such right, a clause in such charter exempting the railroad from taxation effectually protects it from taxation under a general statute subsequently enacted, especially when such statute contains expressions indicative of a purpose of the legislature not to include such company. *Petersburg R. Co. v. Northampton County*, 81 N. C. 487.

When a corporation is entitled by its charter to an exemption from taxation upon its stock, and subsequently that charter is amended so as to allow of an increase of capital, with a reserved power to the legislature to alter, amend, or repeal, and the change is accepted by the corporation, and the capital is increased as contemplated, the original capital remains exempt, and the increase becomes taxable under a later law that applies generally to all corporations of the same class. *Nichols v. New Haven & N. Co.* 42 Conn. 103. *Phelps and Carpenter, JJ.*, dissented from this conclusion because they entertained the opinion that the reserved power of alteration nullified the exemption, and that the tax law was in legal effect an amendment.

It makes no difference whether a corporation is chartered by a special act, or under a general statute. A section in either, reserving the right of alteration, amendment, or repeal, has the same effect of preserving the unhampered power to tax.

A section in a tram railway act reserving to the legislature power to alter, amend, or repeal, but providing that any such action shall not operate to change the corporate rights of companies formed under it unless so stated in the amendatory statute, whether regarded as a statutory contract between the state and the corporations thereunder formed, or a stipulation respecting the method in which legislation affecting them shall be adopted while it remains in force, or as a legislative rule for construing subsequent acts, does not, left untouched by later legislation, affect the competency of the legislature to tax corporations so formed by a different standard and in a different way than that therein provided, since the measure and method of taxation are not corporate rights within the meaning of such section. *Detroit City Street R. Co. v. Guthard*, 51 Mich. 180, 16 N. W. 328.

b. In general statutes.

Another method employed to prevent the alienation of the taxing power by improvident legislation has been the enacting of statutes 60 L. R. A.

providing that all after-granted corporate charters shall be subject to change or revocation at the will of the legislature.

In the *Pennsylvania College Cases*, 13 Wall. 190, 20 L. ed. 550, and again in *Miller v. New York*, 15 Wall. 478, 21 L. ed. 98, *Clifford, J.*, formulated the general rule as to the effect of such a piece of legislation by saying: Such a power, also,—that is, the power to alter, modify, or repeal an act of incorporation,—is frequently reserved to the state by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation.

Charters, declared the United States Supreme Court about the same time, granted after the enactment of a general statute reserving the right to alter or repeal all corporate charters, must be understood as standing just as they would if that reservation had been embodied in each charter. *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133.

The state of Massachusetts was one of those that adopted this method. The general statutes of that commonwealth (chap. 68, § 41) provided that every act of incorporation passed after the 11th day of March in the year 1831 should be subject to amendment, alteration, or repeal at the pleasure of the legislature. This statute was afterwards successfully invoked to sustain the total repeal of a subsequently granted charter of incorporation. *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 28 L. ed. 961. The statute, said the Supreme Court of the United States in that case, having been the settled law of Massachusetts, and representing her policy on an important subject for nearly fifty years before the incorporation of the company whose charter was repealed, we cannot doubt the authority of the legislature of Massachusetts to repeal that charter.

South Carolina was another state that enacted such a statute, and the United States Supreme Court afterwards had occasion to consider its effect with respect of a charter contract for immunity from taxation. The Constitution of South Carolina, adopted in 1868, declared that the property of corporations then existing or thereafter created should be subject to taxation, except in certain cases not

porations in the Constitution, and cannot be frittered or pared away by ingenuity or refinement. It was well said by Mr. Justice Brown in *Keokuk & W. R. Co. v. Missouri*, 152 U. S., at page 312, 38 L. ed., at page 455, 14 Sup. Ct. Rep., at page 596: "But the decisive answer to this objection is that the legislature had no power, in 1869, to extend to a new corporation created by the consolidation an exemption contained in an act passed in 1857, before the Constitution was adopted; and hence, that under the terms of this act we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation

contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869."

It is further clear that, if the different charters relied upon had expressly provided by the use of the word "immunity," or by direct declaration to that effect, that the alleged exemption of the Louisville, New Orleans, & Texas should pass into the consolidated company, § 180 of the Constitution of 1890 still cut off the exemption, since the Constitution is the paramount law of the land,—the consolidation having taken place some two years after its adoption. It is so expressly held in *Louisville & N. E. Co. v.*

necessary to be here noticed. Subsequent legislation was enacted in obedience to this mandate, and imposed taxes upon railroad property. The question was raised whether the act of December, 1855, amending the charter of the Northeastern Railroad Company, exempting its property from taxation, had ceased to be effective. The company was incorporated in 1851, and at that time a general law of the state passed ten years before was in existence, and provided that the charter of every corporation subsequently granted, and any renewal, amendment, or modification thereof should be subject to amendment, alteration, or repeal by the legislature, unless the act granting the charter, or renewing, amending, or modifying it, in express terms excepted it from the operation of the law. The provisions of that law were held to constitute a condition upon which every corporate charter granted after its enactment was enjoyed, and upon which every amendment was made,—to be as operative and as much a part of the charter or of any supplement thereto as if incorporated therein. As both the charter and amendment to it of the Northeastern Railroad Company were without any saving clauses, the tax exemption vanished with the change in the Constitution, and the enactment of the railroad tax law in consequence. *Tomlinson v. Jessup*, 15 Wall. 454, 21 L. ed. 204. It is true, said the court in that case, that the charter of the company constituted a contract between it and the state, and that the amendment when accepted, formed a part of the contract from that date, and was of the same obligatory character. And it may be equally true that the exemption added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. The power reserved to the state by the law of 1841 authorized any change in the contract as it originally existed or as subsequently modified, or its entire revocation. The original corporators or subsequent stockholders took their interests with knowledge of the existence of the power and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the state control over its contract with the corporators, which, without that provision, would be irrevocable, and protected from any means

affecting its obligation. Then, with respect, in particular, of that part of the contract which related to taxation, the court added: Immunity from taxation, constituting in these cases a part of the contract with the government, is by the reservation of power, such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state.

This South Carolina statute was afterwards said to have the effect to make every corporate charter subsequently granted, amended, or modified subject to repeal, amendment, or modification by the legislature, unless specially excepted from such legislative control in the act granting the charter, amendment, or modification,—a construction somewhat broader, and one giving the legislature a more extended control, than that adopted in the preceding case, but a construction to which a more careful examination of the language of the statute had led the court. The statute formed a part of new or amended charters as if originally embraced in them. It did not, of course, operate as a limitation upon the power of succeeding legislatures so as to control any repugnant legislation, but, so long as it remained unrepealed, subsequent legislation not antagonistic was ruled by it. *Hoge v. Richmond & D. R. Co.* 99 U. S. 348, 24 L. ed. 303.

A general statute of Ohio, enacted March 7, 1842, provided that all subsequent charters of incorporation should be subject to amendment and repeal at the discretion of the legislature. It stood unrepealed on the statute books at the time the banking act of 1845 was passed. The banking act contained no allusion to it whatever. Yet in but one of the Ohio bank tax cases—that of *Sandusky City Bank v. Wilbor*, 7 Ohio St. 481,—was it considered efficacious to prevent § 60 of the banking act from becoming an irrevocable contract, and as justifying the subsequent taxing act. In all the other cases it was practically ignored.

The weakness of a general law of reservation lies in the fact that any subsequent legislature may ignore it, and contract to the contrary in spite of it, if it chooses so to do. Such a statute has proved in some cases ineffectual to

Kentucky, 161 U. S. 695, 40 L. ed. 857, 16 Sup. Ct. Rep. 714, and *Pearsall v. Great Northern R. Co.* 161 U. S. 671, 40 L. ed. 846, 16 Sup. Ct. Rep. 705. And, in this view, it of course becomes immaterial whether the position of learned counsel for the railroad that the exemption passes by general law into the consolidated company without express declaration is correct or incorrect, though we understand the Supreme Court of the United States to have distinctly held that the sovereign right of taxation does not so pass unless there be either express declaration to that effect, or the use in statutes authorizing the consolidation of the word "immunity." And that court has distinctly held as "the later and best-considered view, sustained by the weight of authority," that the use of the word "franchise" or "privilege," or any other word than the word "im-

munity," is not sufficient to embrace an exemption from taxation. *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 176, 40 L. ed. 661, 16 Sup. Ct. Rep. 471; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 304, 38 L. ed. 451, 14 Sup. Ct. Rep. 608; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 586, 41 L. ed. 562, 17 Sup. Ct. Rep. 198; *Norfolk & W. R. Co. v. Pendleton*, 156 U. S. 667, 39 L. ed. 674, 15 Sup. Ct. Rep. 413; *Picard v. East Tennessee, V. & G. R. Co.* 130 U. S. 640, 32 L. ed. 1052, 9 Sup. Ct. Rep. 644; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Home Ins. & T. Co. v. Tennessee use of Memphis*, 161 U. S. 108, 40 L. ed. 669, 16 Sup. Ct. Rep. 476. On this very point Mr. Justice Peckham, in *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S. 178, 40 L. ed. 661, 16 Sup. Ct. Rep. 472, says: "The inference is

preserve to the state the power it aimed to save.

The state of New Jersey suffered in this respect. It enacted, in 1846, a general law reserving to the legislature power to alter and amend all subsequently granted charters. It was decided by the courts of that state that such statute was in legal effect incorporated in every corporate charter thereafter granted. That such charters by force of that statute all contained express provisions that they should be subject to alteration, suspension, or repeal, in the discretion of the legislature. *State, Warren R. Co., Prosecutors, v. Person*, 32 N. J. L. 134, 566.

But the statute proved worthless when the legislature afterwards ignored it, and made with the Morris & Essex Railroad Company, in defiance of it, what was finally decided to be an unchangeable contract for tax exemption. The state courts decided, as has already been mentioned, that such general statute warranted the state in taxing at a different and higher rate that railroad company from what had been provided in its charter and the acts supplementary thereto—that, as in the case last cited, the general statute became an integral part of such charter; but the United States Supreme Court disagreed with them, and held otherwise.

When a legislature makes a contract by statute with a corporation exempting it more or less from taxation without guarding the right to change, such contract may not subsequently be impaired by the imposition of other and greater taxes, notwithstanding a previous statute providing that all corporate charters granted after its enactment shall be subject to alteration, suspension, or repeal in the discretion of the legislature is in effect generally. *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352.

When, too, in an act supplementary to such a charter, it is declared that the supplemental act and the charter also may be amended or altered by the legislature, such declaration will not control or affect a further supplemental act passed by a subsequent legislature, which, in terms amounting to a statutory contract, makes a specific rate of taxation for such corporation in lieu of all other taxes, and in which there is reserved no power or right to alter or amend. *Ibid.*

The New Jersey courts have since, in two cases, adopted and applied this doctrine. *State v. Heppenheimer*, 58 N. J. L. 633, 32 L. R. A. 643, 34 Atl. 1061; *Hancock v. Slinger Mfg. Co.* 62 N. J. L. 289, 42 L. R. A. 852, 41 Atl. 846. 60 L. R. A.

But they also hold that it is not applicable to all cases. Although that statute (Act March 14, 1846, § 6) did not bind subsequent legislatures so that they could not grant irrevocable charters, it none the less did create a law furnishing a rule for determining whether or not any after-granted charter was intended to be irrevocable.

Tested by this rule, the act of February 26, 1847, chartering the Somerville & Easton Railroad Company, as amended by the supplement of March 17, 1854, of which § 8 enacted that it should be the duty of said company on a stated date annually to pay a state percentage tax upon the cost of its road as shown by its report of the previous year, with a proviso that no other tax or impost should be levied or assessed upon said company, did not make an irrevocable contract. *Little v. Bowers*, 46 N. J. L. 300, Affirmed in 48 N. J. L. 370, 5 Atl. 178.

Applying the same test, a section in the charter of a street-car company incorporated in 1865, providing that as soon as the railroad was finished a verified statement of its cost, including all expenses, should be filed with the secretary of state, and annually afterwards a sworn statement of the proceeds and expenses of the road should be made to the legislature, and immediately thereafter a like state tax should be paid, with a proviso in similar terms for exemption from any other tax or impost, did not constitute an irrevocable contract. *State, Newark & S. O. Horse Car R. Co. Prosecutor, v. Clark*, 53 N. J. L. 332, 21 Atl. 302.

Maine enacted, in 1831, a general statute declaring that any subsequent act of incorporation should at all times thereafter be liable to amendment, alteration, or repeal at the pleasure of the legislature in the same manner as if an express provision to that effect was therein contained, unless there should be inserted in the act of incorporation an express limitation to the contrary.

This statute did not authorize an imposition of taxes upon a railroad corporation when in its charter the legislature had explicitly contracted not to add any new duty, liability, or obligation to those imposed at the outset. *State v. Dexter & N. R. Co.* 69 Me. 44.

But while it did not bind any subsequent legislature that chose to disregard it, that statute, so long as it remained unrepealed, did control subsequent legislation not repugnant to it, and such subsequent legislation must be construed and enforced in connection with it. It applied with equal force to a corporation

sought to be drawn in favor of exemption if the legislature did not affirmatively grant the right to tax. We cannot assent to any such view, and we could come to no such conclusion from an examination of the general statutes cited by counsel. It is a complete overturning of the universal rule in regard to taxation. The power and the right to tax are always presumed, and the exemption is to be clearly granted. Mere silence is the same as a denial of exemption." Nothing certainly can be clearer than this. Indeed, the opinion of Mr. Justice Peckham in this case is so clear and forcible that we quote from it to adopt the following passages on this particular proposition: "In *Wilson v. Gaines*, 9 Baxt. 546, it was held by the supreme court of Tennessee that, as the state in its Constitution (Const. 1834, art. 11, § 7) used in the same

connection all the words 'rights,' 'privileges,' 'immunities,' and 'exemption,' each of these words was to be given, in statutory interpretation, a meaning so limited as not to include anything expressed by the others, and that, when any one of them is found in a statute, the legislature must be conclusively presumed to have used it in its restricted sense. This decision of the Tennessee court tends very strongly to the idea that the words 'immunity' or 'exemption' would have been required to secure the exemption to a company in a case like this. It is true that this view was not assented to by this court as being the correct one in *Tennessee v. Whitworth*, 117 U. S. 139, 146, 29 L. ed. 833, 835, 6 Sup. Ct. Rep. 649, and it is simply cited for the purpose of showing what the Tennessee court did decide in regard to the meaning of its own Constitution in reference

formed by a consolidating statute out of constituent companies holding irrepealable charters as to corporations created *de novo*. And it was potent to preserve the right of the state to tax a railroad corporation organized under a consolidation act containing no limitation upon the taxing power, although its constituent corporations enjoyed by state contracts special tax immunities. The general reservation statute became a part of the consolidation act. *State v. Maine C. R. Co.* 66 Me. 488; *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836.

A railroad corporation coming into existence in Georgia after the enactment of the statutory Code of 1863 of that state, providing, *inter alia* (§ 1061), that artificial persons called corporations, the creatures of law, are, except so far as the law forbids, subject to be changed, modified, or destroyed at the will of their creator, and (§ 1082) that in all cases of private charters hereafter granted the state reserves the right to withdraw the franchise unless such right is expressly negated in the charter, may lawfully be subjected to taxation under an act taxing its property as other property in the state, notwithstanding it was born of the consolidation of pre-existing corporations possessed of tax immunities secured by charter contracts, when the consolidation act did not in terms perpetuate the immunity. *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 25 L. ed. 185.

When, at the time a street railway company is incorporated, there is operative a general statute making the articles of incorporation, by-laws, rules, and regulations of all corporations thereafter formed or reorganized at all times subject to legislative control, and to alteration, abridgment, or annulment by statute, and providing that every franchise obtained, used, or enjoyed by any such corporation may be regulated, withheld, or conditioned whenever the general assembly shall deem necessary for the public good, the legislature is entitled to impose upon such company additional burdens in respect of special assessments for street improvements, notwithstanding a prior contractual municipal ordinance upon the faith of which capital was invested and the road constructed. *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226.

In 1856 the state of Kentucky enacted a statute providing (§ 1) that all charters and grants of or to corporations, or amendments thereof, and all other statutes, should be sub-

ject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed, with a proviso that, whilst privileges and franchises so granted might be changed or repealed, no amendment or repeal should impair other rights previously vested; and (§ 3) that the provisions of such statute should apply only to charters and acts of incorporation to be thereafter granted, and the act should take effect from its passage. The Louisville Water Company was incorporated in 1854, before this statute was passed; the exemption from taxation it possessed was not granted until 1882, and the exempting act did not express any intention to waive the right to alter, amend, or repeal it. In 1886 the legislature amended the general revenue laws of the state, and made the company subject to taxation by general comprehensive inclusion, unless its exemption continued as a contract right beyond the power of the state to impair. It was decided that the exemption statute was subject to the provisions of the general act of 1856, and therefore the subsequent taxing of the company was valid. *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346.

The act of the Kentucky general assembly of May 1, 1886, authorizing the city of Covington to acquire lands, build reservoirs, pumping stations with all necessary machinery and appliances for a municipal waterworks, and to issue and sell interest-bearing bonds to meet the cost thereof; and providing that such reservoirs, machinery, pipes, mains, and appurtenances, with the land upon which they are situated, should be and remain forever exempt from state, county, and city taxes,—did not constitute an irrepealable contract between the city and the state for immunity from taxation because at the time of its enactment the general statute of 1856 was in force and became an integral part of the grant. *Covington v. Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383.

Certain banks in Kentucky have vigorously contested their liability to taxation under the so-called Hewitt act, upon the ground that by earlier charter acts amounting to contracts they could not constitutionally be subjected to its provisions. At first they were successful. The Kentucky court of appeals twice held that they had irrepealable contracts which the state had no power to impair by subsequent taxing laws. *Franklin County Ct. v. Deposit Bank*, 87 Ky. 370, 9 S. W. 212; *Com. v. Farmers' Bank*, 97 Ky. 590, 31 S. W. 1013.

to this subject. That the legislature was, about the time in question, freely incorporating various companies, and granting them exemption from taxation with considerable liberality, is not a sufficient reason to induce this court to depart from the universal and well-established rule making a claim for exemption a matter to be proved beyond all doubt. The circumstance which we regard as very significant, and which has already been alluded to, consists in the omission of the word 'immunities' in the grant to plaintiff in error. That omission we attach great weight to, and the least that can be said of it is that it involves the question in doubt. It cannot be denied that the decisions of this court are somewhat involved in relation to this question of exemption. It is difficult in some cases to distinguish the language used in each so far that the

different results arrived at by the court can be seen to be founded upon a real difference in the real meaning of such language. The question has sometimes arisen upon the consolidation of different companies, and sometimes upon a sale under a mortgage foreclosure. Among the former is the case of *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 608, where, under the laws of Missouri (§ 4 of the act of March 2, 1869), there was a provision that the consolidated companies should be 'subject to all the liabilities and bound by all the obligations of the companies within this state,' and 'be entitled to the same franchises and privileges under the laws of this state as if the consolidation had not taken place.' The question was said to admit of doubt whether, under the name 'franchises and privileges' an immunity

But both these decisions were afterwards explicitly overruled, and the contrary decided in *Deposit Bank v. Davless County*, 102 Ky. 174, 44 L. R. A. 823, 39 S. W. 1030, and the overruling decision was affirmed by the Supreme Court of the United States in *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 630, 43 L. ed. 840, 19 Sup. Ct. Rep. 530.

That decision ran to this,—that where a bank charter provides for the payment of a specific tax in lieu of other taxation, or grants an exemption of some part of the corporate property from taxation, and in the same act the bank is expressly made subject to the terms and provisions of an earlier general law making all corporate charters subject to alteration, amendment, or repeal, at the will of the legislature, a change in the method or rate of taxation, or a discontinuance of the exemption by a later statute, in no wise impairs the obligation of the corporate contract. *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530; *Deposit Bank v. Owensboro*, 173 U. S. 662, 43 L. ed. 850, 19 Sup. Ct. Rep. 875.

The elementary rule, said White, J., for the majority in these cases, is, that if, at the time a corporation is chartered and given either a commutation or exemption from taxation, there exists a general statute reserving the legislative power to repeal, alter, or amend, the exemption or commutation from taxation may be revoked without impairing the obligations of the contract, because the reserved power deprives the contract of its irrevocable character, and submits it to legislative control. The foundation of this rule is that a general statute reserving the power to alter, repeal, or amend is by implication read into a subsequent charter, and prevents it from becoming irrevocable. *Ibid*.

As in these cases there was not alone a general act of this kind, but also one made by unambiguous language a part of the exemption act, a *fortiori* was the latter subject to change.

c. In constitutions.

When, instead of a statute, there is a provision in the Constitution of a state that all corporate charters shall be liable to alteration, amendment, or repeal by the legislature *ad libitum*, exemptions not antecedently granted may be withdrawn, and new taxes imposed at any time without infringing the contract clause of the Federal Constitution.

The effectiveness of such a constitutional provision was conceded by the United States 60 L. R. A.

Supreme Court in *New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352, in holding a general statute to the same effect worthless when the legislature declined to respect it. The case before us, said the court through Miller, J., differs from those in which, by the Constitutions of some of the states this right to alter, amend, and repeal all laws creating corporate privileges becomes an inalienable legislative power. The power thus conferred cannot be limited or bargained away by any act of the legislature, because the power itself is beyond legislative control. The right asserted in this case to amend or repeal legislative grants to corporations, being itself but the expression of the will or purpose of the legislature for one particular session or term of the state of New Jersey, cannot bind any succeeding legislature which may choose to make a grant or a contract not subject to be altered or repealed.

The subsequent decisions of the court emphasize this distinction.

If, when a railroad is incorporated and vested by the act of incorporation with the property, franchises, rights, and privileges of an older company thereby dissolved and acquired under mortgage foreclosure by the incorporators, and these can be said to include an immunity or exemption from taxation granted to and enjoyed by the mortgagor company, there is in force a constitutional provision and a general statute of the incorporating state, whereby all corporate charters are subject to alteration and repeal by the legislature,—there is no impairment of the obligation of a contract by the enactment of a later statute taxing the road. *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813.

As the court afterwards said: This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the charter of every corporation formed under the general statute providing for the formation of corporations. A legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke, the exclusive character of such privileges cannot be regarded as one impairing the obligation of the contract. The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation. *Hamilton Gaslight & Coke Co. v.*

from taxation passed to the new company. Various cases are cited in the opinion, which was delivered by Mr. Justice Brown, showing the grounds taken by this court in such cases. In *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813 (a foreclosure case), it decided that an immunity from taxation enjoyed by one railroad company did not pass to the purchaser under the foreclosure of a mortgage, although the act provided that the purchaser should forthwith become a corporation, 'and should succeed to all such franchises, rights, and privileges as would have been had by the original company but for such sale and conveyance.' The case followed that of *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860 (also a foreclosure case), where it was held that the words 'franchises, rights, and privileges' did not necessarily in-

clude a grant of exemption or immunity from taxation. See also, to same effect, *Memphis & L. R. R. Co. v. Railroad Comrs.* 112 U. S. 609, *sub nom. Memphis & L. R. R. Co. v. Berry*, 28 L. ed. 837, 5 Sup. Ct. Rep. 299. The case of *Picard v. East Tennessee, V. & G. R. Co.* 130 U. S. 637, 642, 32 L. ed. 1051, 1053, 9 Sup. Ct. Rep. 640, may also be referred to upon the point that exemption, although it might be granted, must be considered as a personal privilege, not extending beyond the immediate grantee unless otherwise so declared in express terms; and it was therein declared that such immunity would not pass merely by a conveyance of the property and franchises of a railroad company, although such company might itself hold property exempt from taxation. In that case Mr. Justice Field, speaking for the court, said: 'It is true there are some

Hamilton, 146 U. S. 271, 36 L. ed. 969, 13 Sup. Ct. Rep. 90.

If at the time a railroad charter is granted the state Constitution provides that all corporate charters may be altered, amended, or repealed at discretion by the legislature, the provision becomes a part of the charter none the less when that instrument is silent on the subject, and any subsequent legislature that so wills may change or annul it. This right and power is wholly unaffected by the circumstance that there have been substituted new Constitutions in succession, each containing a like provision. *State v. Northern C. R. Co.* 44 Md. 131.

"It is elementary that where the Constitution of a state reserves the right to repeal, alter, or amend, all charters granted by the legislature are subject to such provision, and, therefore, are wanting in that attribute of irrevocability which is essential to bring them within the intentment of the clause of the Constitution of the United States protecting contracts from impairment. The cases supporting this doctrine are so numerous that they need not be cited." *Northern C. R. Co. v. Maryland*, 187 U. S. 255, 47 L. ed. —, 23 Sup. Ct. Rep. 62, Affirming 90 Md. 449, 45 Atl. 465.

It does not matter what is the form of a piece of legislation that confers a right upon a corporation. Although it is in terms a statutory contract, and not an amendment or alteration of a charter, if the latter is its nature and effect, and it so operates, it plainly falls within the constitutional reservation, and is not irrepealable. *Ibid.*

A statute empowering a municipality to levy, assess, and collect for city uses an annual business tax of a specified amount upon the average quarterly business of certain concerns, including banks and banking institutions, and a municipal ordinance passed pursuant thereto, taxing the average quarterly discount business of banks according to their periodical statement of discounted bills and notes, imposes, to some extent, at least, a tax upon the capital of the bank, since the capital is employed in discounting. But although it does this, and by provisions of statute law operative when the bank was incorporated, and which became parts of its charter, it was declared that the capital stock should not be subject to taxation save for state purposes, yet, such municipal tax statute and ordinance are saved from the constitutional objection that they impair the obligation of a contract, by the presence in the state Constitution at the time the bank was

chartered of a provision reserving to the legislature power to revoke or annul all corporate charters whenever it deems them injurious to the citizens of the commonwealth, provided that in so doing no injustice is done to the corporations. *Iron City Bank v. Pittsburgh*, 87 Pa. 340.

If a charter provision for the payment by a street railway corporation of a specific municipal license fee per car operated can be said to amount to a contract, by implication, when there is no express language to that effect, not thereafter to increase such fee, still, an act of the legislature enlarging the charge does not impair the obligation of the contract, when at the time the road was chartered the state Constitution authorized the alteration, amendment, and repeal of all corporate charters. *Union Pass. R. Co. v. Philadelphia*, 83 Pa. 429.

Under a state Constitution reserving to the legislature the power to alter, amend, and repeal all corporate charters, a section of a general railway act, providing for the taxation of corporations formed under it by the payment annually of a percentage on their paid-in capital in lieu of all other taxes may be repealed, and a new statute, putting such corporations upon the same taxable footing with natural persons, and taxing them upon property ad valorem, may be enacted without thereby impairing any contract obligation, notwithstanding there is left unchanged in full effect another section of the general railway act that provides that no alteration, amendment, or repeal thereof shall operate to change the corporate rights of companies formed under it, unless specially named in the amendatory act. *Detroit City Street R. Co. v. Guthard*, 51 Mich. 180, 16 N. W. 328; *Detroit v. Detroit City R. Co.* 76 Mich. 421, 43 N. W. 447.

VIII. Interpretations.

a. Extent of exemptions.

1. In general.

A state having in the charter of a corporation made an unalterable contract in relation to taxation, it is, on occasion, a matter of no small difficulty to determine how far the taxing power has been surrendered. As stated at the outset, cases that merely involved a question as to whether or not a particular piece of property was exempt from taxation in virtue of a contract between the state and the owner are not treated in this note. The rule is that a general exemption of the property of a cor-

cases where the term "privileges" has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and, we think, the better, opinion is that, unless other provisions remove all doubt of the intention of the legislature to include an immunity in the term "franchise," it will not be so construed. It can have its full force by confining it to other grants to the corporation.' This language is referred to by Mr. Chief Justice Fuller in the case of *Wilmingon & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72, where, at page 297, 146 U. S., page 979, 36 L. ed., and page 77, 13 Sup. Ct. Rep. he says: 'We do not deny that an exemption from taxation may be construed as included in the word "privileges," if there are other provisions removing

all doubt of the intention of the legislature in that respect;' citing the *Picard Case*.

"Looking at the other side, we find the case of *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326, where there was a grant to a railroad company of 'all the rights, powers, and privileges' granted by the charter of another company, which exempted the property of such other company from taxation, and it was held that the property of the first company was thereby also exempted. Mr. Justice Hunt, in delivering the opinion of the court, said that 'a more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage or special exemption from a burden falling upon others.' Again, in *Tennessee v. Whitworth*, 117 U. S. 139, 29 L. ed. 833, 6 Sup. Ct. Rep. 649,

poration relieves only such property as is held for, and is necessary to the transaction of, the corporate business.

For cases involving the application of this rule, the reader is referred to previous annotations in this series. (1) The note to the case of *Yellow River Improvement Co. v. Wood* (Wis.) 17 L. R. A. 92, and (2) div. V., subdiv. d, of the note on *Taxation of corporate franchises in the United States*, to the case of *Louisville Tobacco Warehouse Co. v. Com.* (Ky.) 57 L. R. A. 33, 45-48.

A general exemption from all kinds of taxation does not confer immunity against special assessments to defray the cost of local improvement. *Illinois C. R. Co. v. Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293.

This case gives the reason for the rule and reviews several of the decisions that sustain it. The rule itself has commanded universal recognition. It was again laid down, and many authorities were cited to sustain it, in *Ford v. Delta & P. Land Co.* 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230.

It was affirmed again in *Lake Shore & M. S. R. Co. v. Grand Rapids*, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767.

The most frequent applications of the rule have been made in cases of religious, charitable, educational, and other exempt corporations of that ilk that lie outside of the scope of this note.

What is covered by an exemption from taxation of a railroad right of way? The act of Congress of July 2, 1864 (13 U. S. Stat. at L. 305, chap. 217) granted (§ 2) a right of way through the public lands to the Northern Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph to the extent of 200 feet wide on each side of the railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water stations; and provided that the right of way should be exempt from taxation within the territories of the United States. The supreme court of the territory of Montana, in 1884, held void an assessment in Custer county upon "20 miles of railroad and rolling stock" of the Northern Pacific Railroad Company because of this exemption. The court cited case after case to emphasize the difference between a private right of way used intermittently and without substantial interference with the rights of the owner of the soil, constituting a mere easement, and a railroad J. R. A.

road right of way amounting to a practical appropriation of the land for a continuous and exclusive use and such a permanent change of surface character as to constitute a virtual appropriation of the fee. *Northern P. R. Co. v. Carland*, 5 Mont. 146, 3 Pac. 134.

The act of Congress of July 27, 1866 (14 U. S. Stat. at L. 202, chap. 278), chartering the Atlantic & Pacific Railroad Company, granted to that corporation, its successors and assigns, the like right of way, only not so wide by half, through the public lands in the territories of New Mexico and Arizona. The 2d section of the act, granting the right of way, and providing for its exemption from taxation, except in the matter of dimensions, was in identical language with the grant to the Northern Pacific Railroad Company. The Arizona supreme court four years later decided that the exemption given to the Atlantic & Pacific Railroad Company in such act did not extend to superstructures, buildings, improvements, etc., on the right of way and essential to the operations of the road. It held that an assessment upon culverts, bridges, grading, cross-ties, steel and iron rails, fish plates, bolts, and spikes, steam pumps, water tanks, section and round houses, coal chutes, side tracks, blacksmith shops, and telegraph line was a valid imposit. It was insisted, in behalf of the road, that the grant of a right of way was a grant of the real estate in fee, and that, as whatever was permanently annexed to the freehold became a part of the realty, the exemption of the right of way exempted all permanent structures upon it. No one, the court replied, can question that a right of way is an interest in realty, nor that culverts, bridges, switches, depots, etc., become a part of the realty. He who has title to the right of way has title to the superstructure. The latter would pass by grant, and be subject to the laws regulating the conveyance of real estate, including the statute of frauds. But does it follow that the exemption of the right of way exempts all appurtenances afterwards attached thereto? This is the question. The court distinguished the case just cited by saying that it rightly decided to be invalid an assessment of "20 miles of railroad and rolling stock," because such an assessment of necessity included the right of way, whatever its character, and the right of way, *eo nomine*, was certainly exempt. This, it said, was as far as the authority of that decision went, and the opinion expressed in the case as to the exemption of the superstructures on the right of way is simply *dictum*. Then,

it was held that a right to have shares in its capital stock exempt from taxation within the state was conferred upon a railroad corporation by a state statute granting to it 'all the rights, powers, and privileges,' or granting it 'all the powers and privileges' conferred upon another corporation named, if the latter corporation possessed by law such right of exemption. The question in that case arose as to the meaning of certain statutes passed by the legislature of Tennessee, resulting in the consolidation of certain railroads therein mentioned. In the course of his opinion, Mr. Chief Justice Waite cites the case of *Philadelphia, W. & B. R. Co. v. Maryland*, 10 How. 376, 393, 13 L. ed. 461, 468, where Mr. Chief Justice Taney, speaking of a statute which authorized the union of two railroad companies and secured to the union company 'the property, rights, and

privileges which that law or other laws conferred on them' (the separate companies or either of them), said that such language extended to the union company the exemption from taxation contained in the charter of one of the united companies. Mr. Chief Justice Waite, continuing, in his opinion said: 'As has already been seen, the word "privilege" in its ordinary meaning, when used in this connection, includes an exemption from taxation.' The decision of this last case should be confined to the peculiar language used in the various statutes therein cited, wherein, aside from the word 'privilege,' it may be argued that, considering all the language used in those statutes, the intention of the legislature to exempt the company named from taxation may fairly well be made out. The later cases of *Picard v. East Tennessee, V. & G. R. Co.* 130 U. S. 637, 32

adverting to the well-settled doctrine that the ordinary grant of a right of way is a grant of an easement, and not of a fee, the court proceeds: How we are to conclude from these premises that the exemption of a right of way *ex vi termini* exempts from taxation the superstructure, we cannot see. It is a *non sequitur*. The principle is then invoked that taxation is the rule, exemption the exception; grants of exemption must be strictly construed,—must be limited to their barest terms, and all doubts must be resolved against the grant; and thereupon the opinion, upon this branch of the case, closes thus: It is urged with great force, skill, and ability that the grant of a right of way to a railway is *sui generis*, and is in fact a grant of the fee; and, if so, to exempt the fee so granted is to exempt the superstructure. It is said that the term "right of way" is used to describe the land granted,—that is, that these are words of description, rather than of tenure. We cannot concur with this view, and no authority can be found which so holds. We must conclude that the words are used in their common, well-known, and universally accepted legal meaning, and that it was a grant of an easement as defined by law. It was not a grant of the fee. Should the company see fit to change its line and abandon its present alignment at any point, the right of way so abandoned would revert to the grantor. *Atlantic & P. R. Co. v. Lesueur (Ariz.)* 1 L. R. A. 244, 19 Pac. 157.

It is contended, said the same court, soon afterwards, that, as the right of way of the railway company is exempt, that exemption carries with it the exemption of all the improvements attached thereto. That question has been disposed of, so far as this court is concerned, by the case just cited, and we adhere to the decision in that case. *Atlantic & P. R. Co. v. Yavapai County (Ariz.)* 21 Pac. 768.

A decade later, the Supreme Court of the United States had the same question before it upon the same charter, and without dissent reached a conclusion diametrically opposite. What is meant by the phrase "the right of way?" asks McKenna, J., opening the opinion of the court, and adds: A mere right of passage, says the appellant, while, *per contra*, the appellee contends that the fee was granted, or, if not granted, that such a tangible and corporeal property was granted that all that was attached to it became part of it and partook of its exemption from taxation. Admitting that the primary presumption is that the phrase in question was used in its technical sense, the 60 L. R. A.

learned justice says, first, that such presumption must yield to an opposing context, and to the otherwise indicated intent of Congress, and, second, that the technical meaning is not entirely restricted to the mere right of passage. As to the first point, he calls attention to the fact that the right of way granted was exactly measured as a physical thing,—not an abstract right. It was to be 200 feet wide, and carefully broadened to include grounds for superstructures indispensable to the railroad. As to the second point, he says that the phrase may mean one thing in a grant to a natural person for private purposes, and another thing in a grant to a railroad for public purposes,—may bear a meaning as different as respectively are the purposes, uses, and necessities. He quotes from *Keener v. Union P. R. Co.* 31 Fed. 128, Justice Brewer's remarks that the term "right of way" has a two-fold significance. It is sometimes used to mean the mere intangible right to cross,—a right of crossing, a right of way. It is often used otherwise, to indicate that strip which the railroad company appropriates for use and upon which it builds its roadbed. Also, from *Joy v. St. Louis*, 138 U. S. 44, 34 L. ed. 857, 11 Sup. Ct. Rep. 243, those of Justice Blatchford to the same effect, and finds further support in the case of *Missouri, K. & T. R. Co. v. Roberts*, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496, deciding that the grant to the Union Pacific Railroad Company of a right of way 200 feet wide conveyed the fee. He fortifies this by citing several decisions of state courts to the effect that a railroad right of way is much more than an easement, because it involves a continuous, permanent, and exclusive user of the land across which it runs, and concludes that the interest granted to the Atlantic & Pacific Railroad Company was real estate of a corporeal quality, and that the principles relating to real estate—one of which is the elementary one that whatever is erected thereon becomes a part of it,—apply. And, as the grant is free from ambiguity, the rule of strict construction does not come in play. *New Mexico v. United States Trust Co.* 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128. The necessary effect of this decision is to overrule the Arizona cases.

At the same time two other cases between the same parties were decided the same way upon supposedly the same state of facts (172 U. S. 180, 43 L. ed. 413, 19 Sup. Ct. Rep. 128), but, upon a material difference in the facts in one of these cases being called to the attention of the court, a reargument of that case was

L. ed. 1051, 9 Sup. Ct. Rep. 640, and *Wilmingtton & W. R. Co. v. Alsbrook*, 140 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72, show that there must be other language than the mere word 'privilege,' or other provisions in the statute removing all doubt as to the intention of the legislature, before the exemption will be admitted. The case of *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 38 L. ed. 793, 14 Sup. Ct. Rep. 968, adds nothing to the discussion on either side. The particular point was not in that case, but it seems to be cited by counsel for plaintiffs in error for the purpose of showing what was the general condition of the state at the time of the adoption of the Constitution in 1834, and what was the policy of the state in regard to internal improvements which the Constitution declared ought to be encouraged. The incorporation of an insur-

ance company would hardly come within the most liberal meaning of the term 'internal improvements.' If this were an original question, we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority as well as the better opinion, is in favor of the same conclusion which we should otherwise reach."

It is impossible for us to add to the elegance, clearness, or force of this reasoning. It will be noted, too, that the court says that the case of *Tennessee v. Whitcorth*, 117 U. S. 139, 29 L. ed. 833, 6 Sup. Ct. Rep. 649, "must be confined to the peculiar language used in the various statutes therein cited, wherein, aside from the word 'privilege,' it may be argued that, considering all the language used in those statutes, the intention

granted. After the reargument, the court decided that the exemption granted in the charter was an exemption only of the right of way granted by Congress through the public lands, and not an exemption of the entire right of way of the road. The rule of strict construction did apply in that case, and the tax assessed, so far as the right of way through lands acquired from private owners was concerned, was held a valid one. *New Mexico v. United States Trust Co.* 174 U. S. 545, 43 L. ed. 1079, 19 Sup. Ct. Rep. 784.

A very similar question was decided by the supreme court of Alabama in November, 1900. The Montana, Arizona, and United States Supreme Court decisions, just referred to, were not cited or discussed, so far as the report shows, by either counsel or the court. The question in the case was whether, under the Alabama statutory scheme for assessing railroads by a state board, the local assessors were still entitled to assess as ordinary real estate necessary structures, such as passenger and water stations, freight houses, etc., built on the right of way. The jurisdiction of the state board was confined to assessing right of way, roadbed, main and side tracks, rolling stock, and supplies carried on cars for employees. The local assessors were empowered to assess the other real estate, fixtures, machinery, tools, and property of railroad companies in their respective localities as other property of like kinds owned by private citizens. It was held that, upon consideration of the context and policy of the statute, the legislature meant by right of way only the easement of the railroad in the lands over which it had a right of way not occupied by roadbed and sidings, and that the other structures on the right of way were assessable by the local assessors, and not by the state board. *Nashville & D. R. Co. v. State*, 129 Ala. 142, 30 So. 619. The case, of course, does no more than construe the Alabama statutes respecting railroad taxation.

An exemption of its property from taxation for a term of years, granted to a railroad corporation, does not extend to lands it has leased for 1,000 years at an annual rental equal to 5 per cent of the price paid by the lessor, with a covenant to pay, in addition, all taxes and charges on the land, although the lessor bought such land for the use of the railroad. *Com. use of Greenup County v. Chesapeake & O. R. Co.* 94 Ky. 16, 21 S. W. 342.

A provision in the charter of a railroad corporation for the payment of a percentage tax upon its capital stock, in consideration of

which its property and effects, whether real, personal, or mixed, are to be exempt from all and every other charge or exaction by virtue of any law of the state, is a special privilege of the corporation itself, and does not extend to the property of other lines of railroad leased and operated by such company. *Lake Shore & M. S. R. Co. v. Grand Rapids*, 102 Mich. 374, 20 L. R. A. 193, 60 N. W. 767.

A corporation exempted by its charter from paying dividend taxes, in consideration of paying a bonus into the state treasury, is liable when, after the enactment of a general statute for taxing the net earnings of corporations, it increases the amount of its capital stock, to the net earnings tax upon the increase; but it still remains exempt on the original capital. *Com. v. Columbia Oil Co.* 1 Pearson (Pa.) 377.

A corporate charter providing for the payment of a bonus to the commonwealth of a stated percentage on the capital stock in lieu of any tax on dividends does not exempt the company from taxation thereafter imposed upon its capital stock. *Com. v. Jacobus & N. Mfg. Co.* 1 Dauphin Co. Rep. 82.

A section in a corporate charter providing that the company shall be "taxable only on the proportion of dividends on its capital stock, and upon net earnings or income only in proportion to the amount actually carried by it within the state," does not exonerate it from paying a bonus upon an increase of its capital, exacted under a statute applying to all domestic corporations with certain noninclusive exceptions. *International Nav. Co. v. Com.* 104 Pa. 38.

Provisions in a railroad charter and land-grant statute, exempting from, or commuting the payment of, state taxes, do not limit the sovereign power to subject the corporation and its property to local taxation. *State use of Pacific R. Co. v. Dulla*, 48 Mo. 282.

A railroad company whose charter exempts its capital stock from all state and county taxes, and which has, by accepting a land grant from the state, only become bound to pay the state annually a sum equal to the amount of the state tax on other real and personal property of like value upon the actual cash value of all its property *in specie*, still retains an exemption from both state and county taxes upon its capital stock *eo nomine*, and, although subject to state taxes, is exempt from county taxes, no matter how designated, upon its tangible property *in specie*. A statute, therefore, subjecting to taxation for past years property which, although liable, has escaped paying

of the legislature to exempt the company named from taxation may fairly well be made out." *Tennessee v. Whitworth* seems fairly to be shaken as authority by the later decisions of the Supreme Court of the United States; and whether it is sound or unsound cuts no figure in this case, since in that case no new constitution intervened. The material fact that in this case a new constitution does intervene, constitutes the decisive difference between this case and *Tennessee v. Whitworth*, and makes this case fall within the principle of *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 304, 38 L. ed. 451, 14 Sup. Ct. Rep. 608, and *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 475, 28 L. ed. 1058, 5 Sup. Ct. Rep. 529. See also *Morgan v. Louisiana*, 93 U. S. 223, 23 L. ed. 861; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 186, 29 L. ed. 124, 5 Sup. Ct. Rep. 813. We

therefore reach the conclusion that the consolidation of the Louisville, New Orleans, & Texas with the Yazoo & Mississippi Valley Railroad Company resulted in the creation of a new corporation, the present Yazoo & Mississippi Valley Railroad Company, and, that consolidation having been effected October 24, 1892, some two years after the Constitution of 1890 went into effect, § 180 of that Constitution effectually cut off the exemption claimed. We entertain no doubt whatever of the entire correctness of this view, but, if the doubt existed, the same result must follow in accordance with the well-settled principle that all doubt must be resolved in favor of the taxing power. This principle has never been more emphatically declared than in *Yazoo & M. Valley R. Co. v. Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68, in the following clear-

taxes, does not make such railroad company liable for any county tax. *State ex rel. Love v. Hannibal & St. J. R. Co.* 101 Mo. 120, 13 S. W. 406.

A provision in a corporate charter that the real and personal property of the company shall be subject to the same taxes, to be assessed and collected in the same way, that the real and personal property of individual citizens is assessed and taxed, and not otherwise, followed by the enactment of a later statute making a part of such charter an act to encourage manufactures, which declared that the state would exempt, for ten years, from taxation all such companies, does not relieve the corporation from taxation upon its capital stock in virtue of a later general statute aptly phrased for the purpose. *State v. Simmons*, 70 Miss. 485, 12 So. 477.

A bank charter providing that, in consideration of the cession to the state of valuable rights, or the payment, in lieu thereof, of \$500,000, the corporation shall be exempt during its life from all taxes to the state, or to any parish or corporation created by the state, in its capital and property acquired by virtue of the act of incorporation; and which further provides that all profits of the bank shall be added to and made a part of the capital, except such part thereof as may remain at stated periods after the redemption of a series of outstanding bonds,—exempts everything which enters into and makes part of the bank's capital; and, by consequence, the accumulated profits held for bond redemption are exempt, when there is no excess for dividends to the stockholders. *Citizens' Bank v. Bouny*, 32 La. Ann. 239.

It does not, however, exempt the bank from paying taxes upon land acquired by it upon foreclosure of mortgages given to secure subscriptions to its stock, when the state Constitution prohibits corporations from taking and holding longer than ten years any real estate not necessary to their legitimate business, and the bank has become subject to such limitation by accepting an act of the legislature having such effect. *State ex rel. Citizens' Bank v. Board of Assessors*, 48 La. Ann. 35, 18 So. 753. Affirmed in 167 U. S. 407, 42 L. ed. 215, 17 Sup. Ct. Rep. 1000.

Neither does such chartered immunity from taxation upon its capital excuse the bank from license taxes upon its occupation or business. A license tax upon the business of banking is no tax upon the capital employed therein. 60 L. R. A.

State v. Citizens' Bank, 52 La. Ann. 1086, 27 So. 709.

The Supreme Court of the United States, in affirming in part and in part reversing the circuit court for the eastern district of Louisiana, in the case of *Citizens' Bank v. Orleans*, 54 Fed. 73, decided that, under this charter, the bank (1) was exempt from state, municipal, and parochial taxes upon its capital stock, its banking house, and furniture acquired and used in its banking business; (2) could not be compelled to pay any tax assessed *ex nomine* upon its shareholders; and (3) was taxable upon real estate acquired by it under mortgage foreclosure. It declined to decide whether or not the stockholders were exempt from taxes on their shares if the bank was charged with no obligation to pay such taxes, but expressly left that question open to debate by the shareholders themselves in case the state later should impose such a tax. It also left open, without prejudice either to the public authorities or the bank, the question of the right of the state and city to lay a license tax upon the bank. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 906.

A section in a railroad charter that the capital stock of the company shall be forever exempt from taxation, and the road with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road and no longer, makes the road and appurtenances, buildings, and rolling stock subject to taxation after the lapse of the twenty-year period, irrespective of the meaning given to the term "capital stock," and without regard to the fact that the capital stock has all been invested in the property of the railroad. *Memphis & C. R. Co. v. Gaines*, 3 Tenn. Ch. 604.

The property is taxable if the capital stock *per se* is exempt. *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091.

A somewhat similar provision of exemption in another railroad charter was held not to confer exemption upon lands granted by Congress through the state to the company. *St. Louis, I. M. & S. R. Co. v. Loftin*, 98 U. S. 559, 25 L. ed. 222.

This decision was followed in *Memphis & St. L. R. Co. v. Loftin*, 105 U. S. 258, 26 L. ed. 1042.

In the latter case the rule that all exemptions from taxation are to be strictly construed, and every doubt resolved in favor of the state, was applied in giving a construction to a law

cut language: "Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirements of the language used, construed *strictissimi juris*." It necessarily follows from these views that, on this ground alone, standing by itself, apart from all other considerations in this case, we must and do hold the railroad company not entitled to the exemption claimed except in the particular hereinafter to be mentioned, and this independent ground of decision disposes of the case regardless of all other grounds. It will be observed that we have, in reaching this conclusion, treated consolidation, not as in itself meaning necessarily that a new corporation must be created, but have allowed it the latitude of definition sometimes given it, very loosely and

improperly, as we think, according to which "consolidation" may mean "merger," the absorption of one corporation by another. Taking the word even in that sense, as we have done thus far throughout this discussion, we have nevertheless found that the purpose of the legislature was such consolidation as meant, not merger, but the creation of a new corporation, and that the articles of consolidation, together with the action of the stockholders and directors of the two companies, show that what was actually effected was the creation of a new corporation. It is not necessary, therefore, to say that the term "consolidation" *ex vi termini* imports a creation of a new corporation, though, in our judgment, such is its true meaning, as shown by the best-considered cases. The loose phrase "consolidation by merger" is too vague and confusing to sig-

declaring that swamp and overflowed lands should be exempted from taxation for the term of ten years, or until they were reclaimed. The contention, on the one side, was that the exemption continued for ten years absolutely and thereafter until reclamation, and, on the other, that it continued until reclamation only, and in no event beyond a decade. The latter contention was upheld, the more readily because the state court had so ruled over twenty years before.

The exaction by a municipality of a specific fixed sum as a bonus or privilege tax, payable annually, in ordinances granting to a street railway corporation the right to build and operate its line in designated streets and highways, does not bar the city from levying, nor exonerate the company from paying, an ad valorem municipal tax upon its franchise, despite the fact that in one or more of such ordinances the bonus was expressly called a franchise tax. The reason is that, without legislative authority, a city cannot grant an exemption from, nor contract to commute, taxes upon property legally assessable. *Dallas v. Dallas Consol. Electric Street R. Co. (Tex.)* 66 S. W. 886.

The company submitted in this case to a general ad valorem tax upon its tangible property. It contested a \$2,865 tax on what was called its franchise to operate and maintain lines of street railway over certain streets. The ordinances granting the franchises required the company to carry policemen and firemen when on duty free of charge, and to pave and repair the streets it operated in (this cost \$8,000 in two years, one of these the tax year), and to pay annually fixed sums, called in some instances a bonus, in others a franchise tax, and in others still left unnamed, amounting in all to over \$2,600 a year. The court, while of the opinion that, in the absence of any express statement that these annual exactions were in lieu of ad valorem taxes upon any part of the property of the road, and that the language used evinced no clear purpose to create a contract of exemption there was no contract, really rested its decision on the ground that a city had no power to exempt or commute where the legislature had not expressly conferred it by statute.

A series of railroad cases in North Carolina are in point here.

The charter of the Raleigh & Gaston Railroad Company provided that the road and all engines, etc., and all property and profits of the company, should be exempt from any pub-

lic charge or tax whatsoever for the term of fifteen years, after which the legislature might impose a tax not exceeding 25 cents annually on each share of the capital stock held by individuals whenever the annual profits should exceed 8 per cent. The state court held that this did not constitute a contract preventing the taxation of the franchises, lands, and appurtenances and rolling stock of the company after fifteen years. In its view, the express reservation of a right to tax the shares after such time had elapsed did not by implication exclude the right to tax the property of the company. *Raleigh & G. R. Co. v. Reid*, 64 N. C. 155.

The United States Supreme Court, however, reversed this decision (13 Wall. 269, 20 L. ed. 570) on the authority of the like case of *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568.

The state court afterwards followed these decisions. *Worth v. Wilmington & W. R. Co.* 89 N. C. 291, 45 Am. Rep. 679; *Worth v. Raleigh & G. R. Co.* 89 N. C. 301.

A conditional exemption from taxation of the real estate of a railroad company, given in its charter, until its dividends of profits shall exceed 6 per cent per annum, is not satisfied, so as to authorize the imposition of taxes, by the payment during the Civil War of a larger dividend in confederate currency. *Richmond & D. R. Co. N. C. Div. v. Brogden*, 74 N. C. 707.

Nor is such condition satisfied by the payment of 6½ per cent per annum rental upon its capital stock by its lessee, when more than the fraction is consumed in paying interest and for other necessary expenses, and in creating and augmenting a sinking fund. *Ibid.*

But such an exemption does not exempt the corporate franchises from taxation. *Ibid.*

A railroad charter declaring that all machines, wagons, vehicles, and carriages purchased with the funds of the company, and all its works constructed by authority of the incorporating act, and all profits which shall accrue from the same, shall be vested in the respective shareholders, deemed personal estate, and exempt from any public charge or tax whatever, saves the corporation from liability to pay a tax upon its gross receipts, and also from a percentage tax upon the actual cash value of every share of its capital stock, and from a privilege tax in lieu thereof according to mileage imposed by a subsequent statute, because the later legislation is repugnant to the contract clause in the United States Constitution. *Worth v. Petersburg R. Co.* 89 N. C.

nify anything clearly. One might as well say "merger by consolidation," and that equivalency of phrase would give us the equation "consolidation = merger," which, manifestly, is nonsense. The term "consolidation" where such phrase as "consolidation by merger" occurs, has, as it seems to us, been carelessly confounded with the term "amalgamation" as used in England. Amalgamation, in the English sense, probably means about what merger does with us, but it is not consolidation in any proper sense of the term. It is in the interest of clearness of definition that consolidation should be limited to signify such union of two or more corporations as necessarily results in the creation of a third new corporation, and, as we understand the decisions, this is what is known as the American doctrine, and the better view. Thus, in Green's

Brice, *Ultra Vires*, p. 631, Mr. Green says, summing up in a most learned note: "The term 'amalgamation' is seldom applied to corporations in this country. That which takes its place as much as any is 'consolidation.' But, though it is difficult accurately to define amalgamation as commonly used in English law, it certainly has a wider meaning than consolidation has with us. Consolidation would, *e. g.*, be inapplicable to a union of two or more companies in such a way that one of the original corporations only was continued in existence, while the others were merged or absorbed in it. The absorption of one corporation by another would, according to some of the decisions, be an amalgamation in England; but it would not be a consolidation here. In *Mo-Mahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418, a case frequently cited with ap-

301; *Worth v. Seaboard & R. R. Co.* 89 N. C. 510.

The same court had occasion afterwards to consider once more the extent of the exemption given the Wilmington & Weldon Railroad Company, and, admitting the controlling authority of the case of that road against Reid (13 Wall. 264, 20 L. ed. 568), held that the exemption did not cover an additional road afterwards acquired as a branch line. *Wilmington & W. R. Co. v. Alsbrook*, 110 N. C. 137, 14 S. E. 652.

In *Pacific R. Co. v. Maguire*, 20 Wall. 36, 22 L. ed. 282, and *Bailey v. Maguire*, 22 Wall. 215, 22 L. ed. 850, there were involved the exemptions of the Pacific Railroad Company under the Missouri act of December 25, 1852, § 12. The section provided in substance, that such road and the Southwestern Branch Railroad each should be exempt from taxation until it declared a dividend, when the roadbed, buildings, machinery, rolling stock, and other property of the completed road at the actual cash value thereof should be subject to taxation at the rate assessed by the state on other real and personal property of like value. To this end, it was made the duty of the president of the road, every 1st of February after it was finished and put in operation and had declared a dividend, to furnish the state auditor a sworn statement of the actual value of the roadbed, buildings, machinery, engines, cars, and other property pertaining to the completed road: the state auditor was thereupon to assess the road on the basis of such statement, and, if the company omitted to pay the tax assessed in thirty days, it was penalized at the rate of 10 per cent a month. The default of the president in making the statement subjected him to a penalty of \$10,000. Both tax and penalties were recoverable in an ordinary action at law by the state. The section ended with a proviso that if either company should, for two years after completing its road and putting it in operation, fail to declare a dividend, the exemptions should cease. The first of these cases decided (Clifford and Miller, JJ., dissenting) that the section created a contract between the state and the railroad company exempting the road from taxation until it was completed and for two years afterwards if it did not sooner pay a dividend. The other case decided that it did not exempt the road from other than state taxes after the two years had expired; nor did it preclude the state from adopting a different method of valuation and assessment for state taxes.

The charter of the Hannibal & St. Joseph 60 L. R. A.

Railroad Company granted by Missouri in 1849, contained a section (§ 49) declaring that every person who should cease to be a stockholder should also cease to be a member of said company, and the stock of said company should be exempt from all state and county taxes. This section was in the same language as one afterwards considered in *State ex rel. Guffey v. Chicago, B. & K. C. R. Co.* 89 Mo. 523, 14 S. W. 522, affirmed in 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. Rep. 693, rehearing denied in 122 U. S. 561, 30 L. ed. 1135, 7 Sup. Ct. Rep. 1300, and of which the state court said that it might be conceded to exempt, not only the stock of the corporation, but also the property it represented. By an act passed in 1852 this company was given the benefit of the congressional donation of public lands. The act was, in substance, the same as the statute involved in *Pacific R. Co. v. Maguire*, 20 Wall. 36, 22 L. ed. 282; *Bailey v. Maguire*, 22 Wall. 215, 22 L. ed. 850. The Missouri supreme court ruled, in respect of the Hannibal & St. Joseph Railroad Company, that the act of 1852, upon acceptance by the company, modified and replaced the charter provisions concerning taxation, and although less explicit than the Pacific Railroad acts, did, by necessary implication, exempt the capital stock from taxation, except in the manner and at the time therein specified. And it held that a subsequent act taxing all property owned by incorporated companies ever and above their capital stock did not warrant the taxing of the roadbed, depots, cars, and locomotives, and other real and personal property needful to operate the road, because all these were parts of the capital stock. *Hannibal & St. J. R. Co. v. Shacklett*, 30 Mo. 550.

The Missouri act of March 21, 1868, to aid in the building of branch railroads in the state, passed after the adoption of the Constitution of 1865 prohibiting the exemption from taxation of all except governmental and public-school property in the state, did not give to railroads built according to its provisions any exemption from taxation, although built by railroad corporations empowered originally to build branches and holding irrevocable charters containing exemption clauses granted before such Constitution, because such act did not contain any exemption, and, if it had, it would have been unconstitutional. *Chicago, B. & K. C. R. Co. v. Guffey*, 120 U. S. 569, *sub nom.* *Chicago, B. & K. C. R. Co. v. Missouri ex rel. Guffey*, 30 L. ed. 732, 7 Sup. Ct. Rep. 693, rehearing denied in 122 U. S. 561, 30 L. ed.

proval in the later decisions, it was said that the effect of the consolidation 'was a dissolution of the three corporations named, and, at the same instant, the creation of a new corporation, with property, liabilities, and stockholders, derived from those then passing out of existence.' Similarly, in *State ex rel. Brown v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405, consolidation is said to amount to 'a surrender of the old charters by the companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new.' . . . Where, by the terms of the statute and deed, the first corporation was extinguished, the second only continued in existence, this was held not to be 'an amalgamation or consolidation of the two corporations into one.' *Powell v. North Missouri R. Co.* 42 Mo. 63. . . . In the

American view, therefore, it would seem that the dissolution of all the old corporations and the creation of one new one are, as a rule, involved in consolidation." Mr. Chief Justice Fuller in *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72, clearly has this view of consolidation. He says: "And although the transaction was described by the legislature, in the act of 1875, as a consolidation, it amounted rather to a merger, or an amalgamation, and need not be held to have resulted in a new corporation,"—clearly distinguishing between consolidation on the one hand and merger, or amalgamation, on the other hand as two things in their essential nature wholly different from each other, as undoubtedly they are. So the supreme court of Arkansas distinctly holds in *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark., at page

1135, 7 Sup. Ct. Rep. 1300, affirming 89 Mo. 523, 14 S. W. 522.

The word "impost," in a corporate charter providing that on the corporation's investing and keeping invested \$500,000 in real estate in the state its real and personal property outside of it and the stock held or owned in it by any of its stockholders shall not be liable to any tax or impost whatsoever, includes every kind of enforced contribution to the public treasury. *State v. Heppenheimer*, 58 N. J. L. 633, 32 L. R. A. 643, 34 Atl. 1061; *Hancock v. Singer Mfg. Co.* 62 N. J. L. 289, 42 L. R. A. 852, 41 Atl. 846.

Such a charter precludes the state's levying, after granting it, a franchise tax upon the capital of the corporation. *Ibid.*

A clause in an amended charter providing that the corporation shall be exempt from the payment of any state, county, or municipal tax or license for transacting business in the state gives the company immunity from all taxation, and not merely from license fees or privilege taxes for carrying on business. *Bowling Green v. Kentucky Masonic Mut. L. Ins. Co.* 5 Ky. L. Rep. 697.

A railroad charter declaring that the capital stock of the company and all other property belonging to or connected with the railroad shall be exempt from taxation until eight years after such road shall be put in operation prohibits the legislature from levying a tax designated as a privilege tax upon the corporation before the stated period expires. *Grand Bluff & P. G. R. Co. v. Buck*, 53 Miss. 246.

An exemption in a railroad charter of the company, its stock, its railroad and appurtenances, and all of its property in the state necessary or incidental to the full exercise of its chartered powers includes immunity from privilege as well as from ad valorem, taxes; and, under a state constitution, in force when the charter was granted, containing a section making the property of all corporations for pecuniary profit subject to taxation, the exemption falls for want of legislative power to grant any exemption; the immunity from privilege taxes falls with the loss of exemption from ad valorem taxes. *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

Ad valorem taxation and privilege taxation are different matters having no necessary connection. The same person may be subject to both or to one and not the other. Subjection to one does not mean subjection to the other, nor does exemption from one include exemption from the other. Whether or not a corporation,

conceded to be exempt from ad valorem taxes, is also exempt from privilege taxes, depends wholly upon the scope of the exemption clause. *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115.

The case accordingly held that a contract in a railroad charter that the capital stock, the dividends thereon, the road, fixtures, depots, workshops, warehouses, and rolling stock of such corporation should be forever exempt from taxation, and that it should not be lawful for the state, or any political division thereof, to impose any tax upon such stock, dividends, property, or estate, except that, when the dividends should exceed legal interest, these might be taxed in common with and at the same rate as money at interest, provided the tax did not go so far as to reduce the dividends below the legal rate of interest,—exempted only such property as was particularly mentioned; hence, by omitting to name them, left open to ad valorem taxation the corporate franchise and surplus, if any, and, *a fortiori*, did not exempt from privilege taxation. *Ibid.*

This case was followed in *Harkreader v. Lebanon & N. Turnp. Co.* 101 Tenn. 680, 49 S. W. 751, which the court deemed identical in principle.

Under the operation of the principles heretofore mentioned (*supra*, III. a), a provision in a corporate charter, that, in consideration of certain property vesting in the state after a limited time, the stock of the corporation should be exempt from taxation by the state, or by any parish or body politic under its authority for the whole term of the charter, confers no immunity from the payment of a municipal license tax. *New Orleans v. New Orleans Canal & Bkg. Co.* 32 La. Ann. 104.

A clause in a railroad charter exempting the capital stock forever, and the road with all its fixtures and appurtenances, including workshops, warehouses, and vehicles for transportation, for twenty years, from taxation, confers no exemption of the franchise, which is a distinct species of property, not included. *Atlantic, T. & O. R. Co. v. Mecklenberg County*, 87 N. C. 129.

A municipal ordinance, providing that, in consideration of a reduction of fares by a street railway line, and the substitution of electric for horse traction, the company is released from any and all obligations to keep in repair any part of the streets occupied by its tracks in the municipality; from the payment of car licenses, except as specifically stated; and from the payment of taxes of any and every kind upon its real estate and personal property,—

518, afterwards affirmed by the United States Supreme Court (113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529), saying: "And, in the absence of a contrary intention, clearly expressed in the law authorizing it, the legal effect of a consolidation is to extinguish the constituent companies, and to create a new corporation with property, liabilities, and stockholders derived from those then passing out of existence;" citing *McMahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42, 72 Am. Dec. 685; *Clearwater v. Meredith*, 1 Wall. 25, *sub nom. Ferguson v. Meredith*, 17 L. ed. 604; *Shields v. State*, 26 Ohio St. 86, same case on error, 95 U. S. 319, 24 L. ed. 357; *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757; *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836; *Atlantic & G. R. Co. v. Georgia*, 98 U.

S. 359, 25 L. ed. 185. Mr. Justice Strong says in *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 360, 25 L. ed. 186, that this view of consolidation accords with sound reason. And to the same effect are *Arkansas Midland R. Co. v. Berry*, 44 Ark. 22, and *Atlanta & C. Air-Line R. Co. v. State*, 63 Ga. 486. As before remarked, however, it is not necessary for us to hold that the true definition of the word "consolidation" is such union of two or more corporations as necessarily results in the creation of a new corporation. We merely remark upon what we think the true definition of the word should be held to be, in the interest of clearness and definiteness in legal phraseology, adding the authorities which restrict its signification as indicated above. But it is most earnestly insisted by learned counsel for the railroad company that the case of *Natchez, J. & O.*

goes no further than to exempt the company from the payment of a license tax or fee proper; that is, a specific tax without regard to value. The corporation remains liable, as before, to a tax upon its franchise *ad valorem* as property. *South Covington & C. Street R. Co. v. Bellevue*, 20 Ky. L. Rep. 1184, 57 L. R. A. 50, 49 S. W. 23.

A railroad charter providing for a commutation tax, and that no further or other tax or impost shall be levied or assessed upon the company, does not exempt the franchises and privileges of the corporation alone, but it also exempts the company generally from all other taxation to which its property, in common with the property of individuals, would have been subject without such special exemption. *State v. Berry*, 17 N. J. L. 80; *Camden & A. R. Co. v. Hilligan*, 18 N. J. L. 11.

There are, said Chief Justice Waite in one case in the Supreme Court of the United States, undoubtedly many cases in this and other courts where it has been held that an exemption of the capital stock of a corporation from taxation is equivalent to an exemption of the property into which the capital has been converted. But in all these cases we think it will be found that the question turned upon the effect to be given to the term "capital" or "capital stock" as used in the particular charter under consideration, and that, when property has been exempted, it has been because, taking the whole charter together, it was apparent that the legislature so intended. Thus, the capital stock of a bank usually consists of money paid in to be used in banking, and an exemption of such capital stock from taxation must always necessarily mean an exemption of the securities into which the money has been converted in the regular course of a banking business. And, in general, an exemption of capital stock, without more, may, with great propriety, be considered, under ordinary circumstances, as exempting that which in the legitimate operations of the corporation comes to represent the capital. But here, while the capital stock is exempt forever, the "road with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation," becomes taxable after a limited time. Clearly, under such circumstances, it could not have been understood that the enumerated property was to represent the capital for the purposes of taxation. *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091.

While, in the absence of any words showing a different intent, an exemption of the capital

stock of a corporation may imply and carry with it an exemption of the property in which such stock is invested, yet, if the legislature uses language at variance with such intention, the courts, which never presume a purpose to exempt any property from its just share of the public burdens, will construe any doubts which may arise as to the proper interpretation of the charter against the exemption. *Central R. & Bkg. Co. v. Wright*, 164 U. S. 327, 41 L. ed. 454, 17 Sup. Ct. Rep. 80.

Thus, under a clause in a corporate charter, providing that the railroad and the appurtenances of the company thereby incorporated shall not be taxed higher than a stated percentage upon the annual net income of the corporation, and that no municipal or other corporation shall have power to tax the "stock" of the said company, but may tax its property, real and personal, within the local jurisdiction in the ratio of taxation of other like property in the locality, the right of municipalities to tax the railroad property within their several jurisdictions is not restricted to such property as is not embraced in the phrase "railroad and appurtenances," nor is the property represented by the corporate "stock" exempt from municipal taxation beyond the percentage named in the charter; but the municipalities have a right to tax all the real and personal property of the corporation within their respective limits in the same ratio that they tax other similar property. *Ibid.*

The word "stock," in such a charter, ordinarily includes the property of the corporation represented by its stock; but this is only true when the context does not require a different construction, nor show that the word was used in a different sense. *Ibid.*

It is, says Brown, J., in that case, contended that the prohibition of the taxation of the stock applies equally to the property represented by the stock. In support of this contention, we are cited to decisions holding that a tax upon the property is a tax upon the stock. In examining these cases, it will be found that the words "stock," or "capital stock," were used in the sense of the capital, the plant, or property of the company, and not in the sense of stock or shares of stock as distinguished from the property of the company. *Ibid.*

A general exemption of the capital stock of a corporation without any qualifying words exempts the corporate property in which the capital stands invested. *Rome R. Co. v. Rome*.

R. Co. v. Lambert, 70 Miss. 781, 13 So. 33, is *res judicata* of this entire controversy. Except in the single particular to be hereinafter mentioned, this position is wholly untenable. The rule laid down by Mr. Justice Field of the United States Supreme Court in *Cromwell v. Sac County*, 94 U. S. 351, 24 L. ed. 195, Reaffirmed in *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 304, 38 L. ed. 451, 14 Sup. Ct. Rep. 608, and in *New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905, and in *Southern P. R. Co. v. United States*, 168 U. S. at page 48, 42 L. ed. at page 376, 18 Sup. Ct. Rep. 18, is this: That where the parties are the same, and the subject-matter and cause of action are the same, the estoppel extends, not only to what was decided, but to all that might have been decided, in that case; but where the parties are substantially

the same, but the cause of action different, it only extends to what was necessarily involved and was actually decided in the first suit,—which is the doctrine laid down in the *Duchess of Kingston's Case* [20 How. St. Tr. 355]. The parties in the *Lambert Case* were the Natchez, Jackson, & Columbus Railroad Company and the sheriff of Adams county, and the subject-matter or cause of action was the tax, state and county, on the part of the Natchez, Jackson, & Columbus Railroad within Adams county. The exemption asserted was under the charter of the Natchez, Jackson, & Columbus Railroad Company. In this case the parties are the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company on the one hand and the state revenue agent on the other, and the subject-matter is state and county taxes of an entirely dif-

14 Ga. 275; *Connersville v. Bank of the State*, 16 Ind. 105.

A section in a railroad charter providing that whenever any portion of the road shall be completed through the state, and is paying an interest of 8 per cent per annum on its cost, and not before, such portion may be taxed the same percentage, and no more, upon the capital expended in the construction thereof as lands in the state shall be taxed, is susceptible of no other construction than that the corporation is to be exempt from all taxation until by its earnings it shall pay an annual interest of 8 per cent upon that part of its road within the state, after which the road becomes subject to taxation at the rate per cent that lands are taxed by the general revenue laws of the state then in force. If, said the court, the language employed seems awkward, it is not for us, by verbal refinements, to strip it of its manifest meaning and intention. That such exemption from taxation, contained in the charter of a corporation organized under it, is irrevocable and inviolable, is too well settled to need elucidation or citation of authorities. No principle has been more repeatedly, or more violently, assailed; none has more successfully withstood the shock of every assault. It is believed that no good purpose can be subserved by an extended discussion of it. *Mobile & O. R. Co. v. Moseley*, 52 Miss. 127.

A railroad charter containing a section, reading: "The stock of said company shall be exempt from taxation for the period of twenty years after its completion,"—exempts the property represented by the stock. *Scotland County v. Missouri*, 1. & N. R. Co. 65 Mo. 123.

In accordance, said the court in that case, with the decision of this court in the case of *Hannibal & St. J. R. Co. v. Shacklett*, 30 Mo. 550, supported as it is by numerous decisions in other states, it is clear that a tax on the property represented by the stock is substantially a tax on the stock. It is simply respectful to the legislature to assume that a valuable privilege was designed to be conferred by this section; but, if the exemption of the stock did not extend to the property which the stock represents, the section was purely illusory. *Ibid.*

The Maryland court of appeals entertains—at least, did at one time entertain—similar views. It decided, in one set of cases, that, as the stock represents the property of a company, the exemption of the one must be considered the exemption of both, unless the exemption is made on the ground of selection to show which 60 L. R. A.

is intended to be taxed to the exclusion of the other. *Tax Cases*, 12 Gill & J. 117.

And in another case it declared that it is perfectly understood that the stock of a bank is the representative of its whole property; and, when a tax has been laid on the stock in the hands of the shareholders, the real and personal estate of the corporation becomes exempt from taxation. To tax both the real and personal property and the stock would be a double tax, and therefore illegal and unjust. *Gordon v. Baltimore*, 5 Gill, 236.

And in a third it held that a charter provision that the shares of stock of the company shall be personal property, and exempt from the imposition of any tax or burden, exempted the company, as well as the stock, from taxation. *Baltimore v. Baltimore & O. R. Co.* 6 Gill, 288, 48 Am. Dec. 531. In this case the decision was that, as the shares of the capital stock of a corporation embraced all its property, tangible and intangible, and its franchise, a declaration in the act incorporating the Baltimore & Ohio Railroad Company, that, in consideration of the payment annually of 6 per cent on \$3,000,000 of state construction bonds, the shares of its capital stock should be deemed personal estate and be exempt from any tax or burden, gave immunity from taxation to everything which constituted the stock and gave it value. That it not only saved the company from all state taxes, but also from taxation by any local government within whose jurisdiction the company might have either real or personal property. A right the state does not possess, she cannot delegate to her subordinates.

In *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. ed. 529, the Supreme Court of the United States held that an exemption from taxation, given in these terms: That, upon any of the aforesaid banks accepting and complying with the terms and conditions of this act, the faith of the state is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act,—carried exemption from taxation to the shares of stock in such banks held by the stockholders.

In New Jersey the same view was adopted. A section of the charter of a transportation company, enacting that from and after the completion of the works it should be the duty of the corporate treasurer, quarterly, to make sworn returns of the number of passengers and tons of freight carried on the line, and to pay the state treasurer 10 cents for each passenger and 15 cents for each ton of merchandise

ferent railroad, the Louisville, New Orleans, & Texas Railroad, and an exemption is claimed under the charter of the Louisville, New Orleans, & Texas Railroad Company, an entirely different charter. It is perfectly manifest, therefore, that neither the parties nor the subject-matter are the same, except in the particular to be hereafter mentioned. The thing adjudged in the *Lambert Case* was that state and county taxes were not due on that part of the Natchez, Jackson, & Columbus Railroad Company lying within Adams county. It is true, the principle of the decision would extend to the exemption of the whole property of the Natchez, Jackson, & Columbus Railroad Company, but that was not the thing adjudged, and that feature of the decision is persuasive under the doctrine of *stare decisis*, and not binding as an estoppel under the doctrine of *res*

judicata. It is also true that to claim the benefit of *res judicata* as estoppel, in the strict and technical sense, it must be pleaded or offered in evidence. It is further to be remarked that it is not the reason which a court gives for its decision which constitutes estoppel, but the thing it adjudges. This is well settled in *Buckner v. Calcoate*, 28 Miss. 432. The property adjudged by a court to a litigant is his thenceforward under the doctrine of *res judicata* as a rule of property as against the parties in that same litigation; but the reasons which the court may give for the decision are thereafter simply persuasive under the doctrine of *stare decisis*, and not in themselves to be invoked as the estoppel. It is a mere confusion of thought to blend these two wholly different principles underlying these legal doctrines, and thus practically treating them as the

transported, and that no other tax or impost should be levied or assessed upon the said company, extends the granted exemption to the interest of the individual stockholders in the property of the corporation. *State, Fish, Prosecutor, v. Branin*, 23 N. J. L. 484.

The court said in that case that the principle must be considered as settled that an exemption of the corporation exempts also the stockholder from taxation upon his individual stock. *Ibid.*

But, while so deciding in respect of the charter contract of exemption, the court also held that a bank stockholder is taxable on his stock notwithstanding his bank is also taxed at the same time upon its capital. This is taxing the same thing twice, it is oppressive, unequal, and unjust, but the legislature has the power to do just this thing. *Ibid.*

Sections in railroad charters, enacting that, as soon as the net proceeds of operation shall amount to a stated percentage upon the cost of the roads, the corporations shall pay a state tax annually of a certain other percentage upon such cost, and that no other tax or impost shall be levied or assessed upon said companies, include the stockholders in the roads, and exempt them from taxation upon their stock. *State, Vall, Prosecutor, v. Bentley*, 23 N. J. L. 532.

And, citing these two cases, *Green, Ch. J.*, afterwards said: The principle has been repeatedly recognised, and must be considered as clearly settled, that, when an incorporated company is by its charter exempt from taxation, the stock of the company in the hands of the stockholders is also exempt. *State, Colt, Prosecutor, v. Powers*, 24 N. J. L. 400.

It has long been the accepted law of New Jersey that an enactment which exempts a corporation or its property from taxation exempts also the shares of its stock held by individuals. The reasoning of the court upon which that conclusion was rested was that, as the entire burden of taxes levied upon a corporation ultimately fell upon the shares of stock, it must have been the intention of the legislature, in exempting the former, to relieve the latter. The converse of this, it seems, must be conceded, so that an express exemption of the shares from taxation will also exempt the company; otherwise the exemption is in fact not an exemption, for every burden cast upon the property of the company is a burden upon the shares which represent that property. *State, Singer Mfg. Co., Prosecutor, v. Heppenheimer*, 58 N. J. L. 633, 32 L. R. A. 643, 34 Atl. 1061.

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There was no dissent in this case, but, when the controversy in it was renewed, later, *Dixon, J.*, dissented. He had, in the interim, seen a new light. He admitted that the past decisions in his state had been to the effect just stated, but thought a contrary doctrine had been established by the decisions of the Supreme Court of the United States, and that the older view was unsound. *Hancock v. Singer Mfg. Co.* 62 N. J. L. 289, 42 L. R. A. 852, 41 Atl. 846.

A railroad charter providing that all machines, wagons, vehicles, and carriages purchased with the funds of the company, and all works constructed under the authority of the charter, and all profits which should accrue therefrom should be vested in the several shareholders forever in proportion to their respective shares, and should be deemed personal estate and be exempt from any public charge or tax whatsoever,—exempts, not only the shares of stock of the corporation from taxation, but the property and earnings thereof as well. *Com. v. Richmond & P. R. Co.* 81 Va. 355.

The case followed in this respect the earlier one of *Richmond v. Richmond & D. R. Co.* 21 Gratt. 604, which involved a substantially like charter provision,—a little less "wordy and emphatic," but one "importing precisely the same thing."

A section in the charter of a bank making it the cashier's duty, on a named day, annually, to pay into the state treasury 25 cents on each \$100 of stock held and paid for in such bank in full of all tax or bonus, with a proviso that the legislature might increase or diminish the same, but at no time should the tax exceed double that rate, is a limitation on the legislative power to tax the stock. It is a contract between the stockholders and the state, inviolable so far as it is intended to operate. The power reserved to augment the tax is a power to tax the corporation only, to burden equally all the stockholders, residents and non-residents, alike. There is no power reserved or resulting to tax an individual stockholder, although a resident. The object of the section is to secure the stockholders against unlimited and capricious taxation of their stock. *Johnson v. Com.* 7 Dana, 342.

A section in the charter of a railroad corporation declaring that the capital stock of the company shall be forever exempt from taxation, and that the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transportation, shall be exempt from taxation for the period of twenty

same. Nor are the taxes of any one year the same cause of action as the taxes of any other year, in the only proper technical signification to be given to the term *res judicata*. It is so held by the United States Supreme Court in *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 304, 38 L. ed. 451, 14 Sup. Ct. Rep. 608, and in *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S., at page 186, 40 L. ed. at page 664, 16 Sup. Ct. Rep. 471. A decision for the taxes of any one year may be invoked under the doctrine of *stare decisis*, where the taxes of any other year are involved under the same claim; but certainly never, on any clear thinking or correct reasoning, under the doctrine of *res judicata*. On this very subject the supreme court of Iowa said, in *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 639, 640: "Each year's taxes constitute a distinct and sepa-

rate cause of action, and the determination of the matters involved in the injunction reached no further than the taxes for the years then in question. The cases are unlike those where two causes of action (as two promissory notes) forming the subject-matter of successive actions between the same parties, both growing out of the same transaction, in which a defense set up in the first suit, and held good, will conclude the parties in the second. . . . But the taxes of separate years do not, in any just sense, grow out of the same transaction. They are like distinct claims on two different promissory notes, made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same

years from the completion of the road, exempts the shares of stock. *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645.

But Waite, Ch. J., in that case says: It is, no doubt, true that the legislature may make a difference, for the purposes of taxation, between the capital stock of a corporation in the hands of the corporation itself and the shares of the same capital stock in the hands of the individual stockholders. That has often been done; and the cases are numerous where the exemption of shares from taxation has been claimed because of a charter exemption of capital stock. *Ibid*.

A provision in a corporate charter that 3,000 shares of the stock of the corporation, or whatever amount of the same is found to be requisite for the construction of its works, shall be exempt from all taxation whatever, except that when the net annual income from said works exceeds 6 per cent on the cost thereof the excess shall be taxable for state purposes only at the same rates as are imposed on bank dividends for such purposes, does not exempt the capital stock of the corporation, but only the shares in the hands of the stockholders,—two different things in the taxing statutes of Pennsylvania. *Com. v. Minersville Water Co.* 13 Pa. Co. Ct. 17.

A clause in a railroad charter declaring that all the real estate held by the company for right of way, for station places of any kind, and for workshop locations shall be exempt from taxation until the dividends of profits exceed 6 per cent annually, does not exempt the stockholders from taxation upon their shares of the capital stock. *Belo v. Forsyth County*, 82 N. C. 415, 33 Am. Rep. 688.

A provision in a corporate charter imposing a state tax of a certain percentage upon the amount of capital actually paid in is one laying a tax upon the capital stock of the corporation, and amounts to a contract for the exemption thereof from further taxes; but it does not prevent the state from thereafter taxing the stockholders ad valorem on their shares of stock, as the subject-matters of the two taxes are separate and distinct. *Memphis v. Home Ins. Co.* 91 Tenn. 558, 19 S. W. 1042.

The doctrine that the exemption of the capital of a corporation does not of necessity include the exemption of the shareholders is said to be now too well settled to be questioned. *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

Apart from the Tennessee bank cases about 60 L. R. A.

to be noticed, several cases here pertinent have been reviewed in previous notes in this series, and need not be discussed further. The reader should consult div. V., d. of the note on the *Taxation of corporate franchisees in the United States*, to *Louisville Tobacco Warehouse Co. v. Com. (Ky.)* 57 L. R. A. 33, and div. VIII. of that on the *Taxation of capital stock of corporations in the United States*, to *State Bd. of Equalization v. People, ex rel. Goggin (Ill.)* 58 L. R. A. 513, for further information.

2. The Tennessee bank cases.

As early as 1836 it was decided in Tennessee that an act incorporating a bank, providing that, in consideration of the grant of its rights and privileges, such bank should pay the state annually $\frac{1}{2}$ of 1 per cent on the amount of capital stock paid in by all the stockholders except the state itself, constituted a contract which could not be impaired by a subsequent law, nor even by a constitutional amendment subjecting such bank stock to another and a higher tax. It followed, and was so held, that a constitutional amendment and a statute passed pursuant thereto, postdating the charter, and providing for the taxation of bank stock, did not apply to such bank, except as to such of its shares as were in the hands of resident stockholders, and its property other than the powers and privileges conferred in its charter, one of which was the right to employ its entire capital, undiminished by any tax, in its legitimate banking business. The court distinguished the capital stock of the bank from the capital stock held in shares by the stockholders,—the one corporate and the other individual property; and considered, also, that the banking house had no immediate connection with the banking franchise. Its thought was that a tax on the capital stock was one upon the franchise, and the right to lay this had been bargained away; but that the state could still tax shares owned by residents and the banking house and other assets in which the capital had been invested. *Union Bank v. State*, 9 Yerg. 490.

In the decade following 1850 the Tennessee legislature granted several corporate charters in which were commutations of taxes, and out of which grew the litigations now to be noted.

The Home Insurance Company was incorporated March 2, 1854, and § 30 of its charter provided that there should be a state tax of $\frac{1}{2}$ of 1 per cent upon the amount of capital actually paid in. But that charter contained

parties. In support of these views, see the following cases,"—citing twelve cases. Mr. Justice White says in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905, that this was practically overruled in *Goodenow v. Litchfield*, 59 Iowa, 226, 9 N. W. 107, 13 N. W. 86. But Seever, Ch. J., in that case says (at p. 236, 59 Iowa, 9 N. W. 107, and 13 N. W. 86) that the cases are not in conflict. And Rothrock, J., in delivering the opinion of the court in the *Goodenow Case*, says, at page 234, 59 Iowa, and page 110, 9 N. W.: "That [the case in 38 Iowa] was a direct proceeding by the taxing power to collect its revenue, and it may well be questioned whether any decree could operate upon future assessments and levies,"—the very principle announced in *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

no statement that such tax should be in lieu of other taxation.

February 29, 1856, an act was passed chartering the Chattanooga Savings Institution, and § 3 of that charter provided, among other things, that the corporation should pay to the state an annual tax of $\frac{1}{2}$ of 1 per cent on each share of capital stock, which should be in lieu of all other taxes. Successive after-enacted statutes authorized the corporation to remove to Memphis, and to change its name, first to the Savings Bank of Memphis, and later to the Bank of Commerce.

On March 20, 1858, the legislature incorporated the De Soto Insurance & Trust Company to do a fire and life insurance business with a capital stock not exceeding \$300,000. Section 10 of that charter was identical in respect of taxation with the one last mentioned. In 1869, the legislature authorized the corporation to discontinue the insurance business, and undertake that of banking under the name of the Union & Planters' Bank of Memphis, and to increase its capital up to \$1,000,000, and to retain all its rights, privileges, and immunities, excepting only that of insurance.

Other charters were granted about the same time with exemptions and commutations expressed in like terms.

In a case decided at the April term, 1873, the first in point in the order of the state reports, Freeman, J., opens the opinion of the supreme court of Tennessee by saying: It is admitted that a tax has been levied properly on the shares of the stock if the shares of stock are liable for such a tax. We need not further discuss this question, as the principles announced in the other cases settle it. But he does not cite the other cases to which he refers; neither does he restate the principles announced in them; nor does he say whether, in the case at bar, the tax levied on the shares was or was not sustained. He, however, proceeds to say: But the city has levied a tax on the bank building and ground. This is claimed to be, also, exempt, under the clause in the charter which provides that the institution shall pay an annual tax of $\frac{1}{2}$ of 1 per cent on each share of capital stock, which shall be in lieu of all other taxes whatever. And the conclusion adopted was that so much of the banking house as was used and occupied in the business of the bank was exempt, while the rest leased to others was taxable. *De Soto Bank v. Memphis*, 6 Baxt. 415, 32 Am. Rep. 530.

The next case arose over the tax upon the

It will, however, be distinctly observed, and we direct emphatic attention to this statement, that whether the decision for taxes of one year is *res judicata* as to taxes for another year, preferred under the same claims, as held in *New Orleans v. Citizens' Bank*, 167 U. S. 397, 42 L. ed. 211, 17 Sup. Ct. Rep. 905, is wholly immaterial here, since the parties to this litigation are not the same with the parties to the litigation in the *Lambert Case*, except, perhaps, as hereafter indicated. There is, therefore, no *res judicata* arising out of the *Lambert Case*, except as will be indicated; and that exception is this: Perhaps the state revenue agent as to the taxes, state and county, on the property of the Natchez, Jackson, & Columbus Railroad Company in Adams county for the year 1892 may be regarded properly and substantially as the same party with the sheriff of Adams county, and the Nat-

shares held by a stockholder in the Union & Planters' Bank, who claimed immunity by force of the above-mentioned charter provision. The state court held this did not exonerate him; that the stockholders of this bank were taxable upon their shares therein under the general revenue law of the state declaring that no tax should thereafter be assessed on bank capital, but that stockholders should be assessed and taxed upon the value of their shares. It was held that corporate capital stock in the aggregate, and share stock in severalty held individually, were two different and distinct things, each a separate subject of taxation. *Memphis v. Farrington*, 8 Baxt. 539.

The case was carried to the Supreme Court of the United States, and there the judgment was reversed. That tribunal held that the pertinent clause in the bank's charter constituted a contract between the state and the bank, the obligation of which prevented the imposition of a tax on the shares of its stockholders. Three of the justices, Strong, Clifford, and Field, JJ., dissented on the ground that the exemption in the charter was given to the bank, and not to its stockholders. *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 538.

The next case in the state court involved the question decided in *De Soto Bank v. Memphis*, 6 Baxt. 415, 32 Am. Rep. 530, as to the taxability of the banking house of the Bank of Commerce, which in part was rented out for other purposes, and the former decision was followed. In the course of the opinion in this case it was said: There is nothing in conflict with this view, as the learned counsel for the complainant seems to think, in the decision of the Supreme Court of the United States in *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 538. It was there held that the provision in a bank charter like the one before us is a contract, and will protect the shares of the stockholders from additional taxation. We recognize the controlling authority of that court in such cases, and yield to its decisions. The provisions in question will, therefore, protect the capital stock and the shares of the stockholders from additional taxation. *Bank of Commerce v. McGowan*, 6 Lea, 703, Affirmed in 104 U. S. 493, 26 L. ed. 810.

The city of Memphis having assessed the banking house of the Union & Planters' Bank for the years 1874 to 1878 inclusive, the state court, in 1884, again held the bank exempt by

chez, Jackson, & Columbus Railroad Company as to the same taxes on the same part of its property may properly be regarded as substantially the same party with the Yazoo & Mississippi Valley Railroad Company, into which the property of the Natchez, Jackson, & Columbus Railroad Company has been integrated. Substantially, in this small particular, as to the state and county taxes for the year 1892 on that part of the property of the Natchez, Jackson, & Columbus Railroad Company, lying in Adams county, the parties may be said to be the same, and the cause of action the same; and we hold, accordingly, that as to that the railroad company is entitled to claim the exemption under the *Lambert Case* as *res judicata*. Except as to this alone there is clearly, as we think, no right to invoke the *Lambert Case* as *res judicata*,

for the reason that the parties are not the same, without reference to other considerations. And let it be further specially noted that the *Lambert Case* went off on demurrer, and the evidence in this case was not before the court. It is well said by the Supreme Court of the United States in *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 313, 38 L. ed. 455, 14 Sup. Ct. Rep. 592, in an opinion of unusual clearness and power, that "it is not to be tolerated that the state should be forever debarred of its taxes by an erroneous decision." Page 316, 152 U. S., page 456, 38 L. ed. and page 597, 14 Sup. Ct. Rep. But it is said, if the *Lambert Case* is not *res judicata*, it should control this case under the doctrine of *stare decisis*. There is one view of the *Lambert Case* which authorizes the appeal to the doctrine of *stare decisis*. It did distinctly decide that what

virtue of this clause in the charter, Freeman, J., dissenting. *State v. Butler*, 13 Lea, 407.

In that case, the court stated its understanding of the Farrington decision, thus: In the case of *Memphis v. Farrington*, 8 Baxt. 539, Farrington was the owner of a number of shares of stock in this Identical Union & Planters' Bank, upon which the state assessed taxes the payment of which was resisted upon the ground that the shares of stock were exempt under the above-cited provisions of the charter. In the opinion of this court delivered in that case it was conceded that, under the provisions of the charter, the payment of $\frac{1}{2}$ of 1 per cent had the effect to relieve or exempt the capital stock of the bank from the payment of any other taxes. But it was held that there was a distinction between the capital stock of the bank and the shares of stock owned and held by individuals; that it was not the purpose of the legislature to exempt both, and hence the individual shares of stock owned by Farrington were subject to taxation. The cause was taken to the Supreme Court of the United States, where it was held that the charter was a contract between the state and the bank, and the tax of $\frac{1}{2}$ of 1 per cent of the capital stock was in lieu of all other taxes, and hence the shares of said capital stock were not subject to any additional tax in the hands of the holder. Hence, the judgment of this court was reversed with directions to enter a decree in favor of the stockholder. *Ibid*.

Four years afterwards the court decided against the validity of an assessment by the city of Memphis for five years' taxes, between 1872 and 1879, on the capital stock and the banking house and lot of the Bank of Commerce. The right of this bank, granting no fatal defect in the original organization, or other extrinsic circumstance, neither of which, as the court found on examination, existed, to an exemption from all other taxes upon its capital stock and property necessary to the conduct of its business upon payment of the commuted tax prescribed in its charter, was held to be beyond debate. *State use of Memphis v. Butler*, 86 Tenn. 614, 8 S. W. 586.

In 1892 the state court decided that exemption and commutation clauses in corporate charters in the language above given entitled the corporations to immunity against privilege taxes imposed upon the right to carry on business under their franchises. And it declared that such corporations could be subjected, neither to ad valorem taxes upon their capital stock, nor, in the alternative, to taxes upon

their shares in the hands of their stockholders. And that, whether the attempt to tax one or the other be made by later constitutional or statutory law, it must fail, because of contract exemption from both kinds of taxation, which the state could not impair. The court held the shares exempt on the authority of the decisions of the United States Supreme Court in *Farrington v. Tennessee*, 95 U. S. 879, 24 L. ed. 558, and *Tennessee v. Whitworth*, 117 U. S. 130, 29 L. ed. 832, 6 Sup. Ct. Rep. 645, and the capital stock of the corporation likewise exempt upon the authority of its own previous decisions. *Memphis v. Union & P. Bank*, 91 Tenn. 546, 19 S. W. 758.

Immediately afterward the same court had to interpret the clause concerning a commuted tax in the charter of the Home Insurance Company. That clause did not state that the tax prescribed was in lieu of other taxation of any kind. Manifestly, said the court, this charter tax was laid upon the capital stock, and was by the legislature intended to operate as an exemption of the corporation from further taxation on that stock. Though not expressed in so many words, the exemption results by necessary implication from the language employed. The prescribed tax is the full pecuniary consideration to be paid by the corporation for the franchises granted by the state. Among those franchises is that of owning and using the capital stock for the purposes contemplated in the charter. To exact an additional tax upon the company's capital stock is to exact an additional consideration for the thing, or one of the things, granted in the first instance. That cannot lawfully be done. The charter is a contract whose obligation the state cannot impair by tax laws or otherwise. This decides but half the case, however, and it remains to inquire whether the charter exemption extends to the "shares of stock." Capital stock and shares of stock are different things, and form different subjects of taxation. A tax upon the one is not a tax upon the other, nor is an exemption of the one an exemption of the other. In the case at bar it has been seen that the charter tax is laid upon the capital stock, and that by implication that subject of taxation is to be exempted from further assessment. That tax is laid upon the one subject of taxation only; and the implication arising therefrom can by no fair construction be held to have greater scope. The implied exemption cannot be broader than the express tax. It becomes perfectly clear that the shares of stock in the Home Insurance Company are subject to ad

occurred between these companies was merger, and not consolidation, and that no new corporation was created thereby, applying the principles of *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. ed. 836, to the facts of this case, which are, in our judgment, wholly different from the facts in the *Maine Case*. It did not decide, of course,—holding that the case was one of merger,—whether § 180 of the Constitution of 1890 would have cut off the exemption had there been a consolidation creating a new corporation. Holding that it was a case of mere merger, the court very naturally held that § 181 of the Constitution of 1890 had no effect on the exemption claimed, in that view. The court most emphatically did not decide that, had there been a consolidation resulting in the creation of a new corporation after the Constitution of 1890 went into effect, such

new corporation could claim that an exemption belonging to one of its constituents prior to that Constitution, as the property of the absorbed company alone, was continued by virtue of § 181. There is no process of interpretation by which the decision in the *Lambert Case* can be so distorted as to mean any such thing. The court proceeded throughout upon the proposition that, it being a mere case of merger, the Yazoo & Mississippi Valley Railroad Company absorbing the Louisville, New Orleans, & Texas Railroad, § 181 had no effect upon the exemption, and that such exemption passed to the Yazoo & Mississippi Valley Company so far as the property of the Natchez, Jackson, & Columbus Railroad Company was concerned. If it had been a mere case of merger, as held by the court, we think it clear, as hereinbefore pointed

valorem taxation in such manner as the state may by proper statute prescribe. *State v. Home Ins. Co.* 91 Tenn. 558, 19 S. W. 1042.

The next case to be decided in the Tennessee supreme court was the state's action in behalf of the city of Memphis to recover from the Memphis City Bank, and from its stockholders respectively, certain ad valorem taxes alleged to be due on capital stock and on shares of stock. It was defended upon the ground that § 17 of the charter of the Memphis City Fire & General Insurance Company, the original corporation, in substance the same as those already noticed, gave exemption. The court, assuming, argumentatively, that the bank was entitled to the immunity given by that section, held that the tax prescribed in it was a pecuniary consideration paid for the franchise,—a tax laid expressly on the capital stock, and intended obviously to be in lieu of all other taxes and assessments on that particular subject. That such capital stock could not be taxed, either by the state, or by any county or municipality thereof. This was a contract the state could not impair. But the shares of stock are a different subject of taxation. The charter contract did not protect them. The exemption of the capital stock was not an exemption of the shares, nor the taxation of the former the taxation of the latter. But the case went on to hold that, because the original corporation had, by subsequent legislation, been converted from an insurance company into a bank, and such transmutation had taken place after a new Constitution became operative, that took power away from the legislature to grant or perpetuate immunity from taxation by force of a command that all property should be taxed, even the exemption of the corporation on its capital stock had not survived. *State v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1045.

The case was affirmed by the United States Supreme Court, 161 U. S. 186, 40 L. ed. 664, 16 Sup. Ct. Rep. 468.

In 1895 the state court decided that such commutation and exemption clause did not prevent the taxation of the surplus and undivided profits of the Bank of Commerce. It protected nothing but capital stock, and surplus and profits were not to be so classed. *State v. Bank of Commerce*, 95 Tenn. 221, 31 S. W. 993.

It was also held in that case that the provision in this bank's charter, that the bank should have a lien on the stock for debts due it by its stockholders before and in preference

to other creditors except the state for taxes, and should pay to the state an annual tax of $\frac{1}{2}$ of 1 per cent on each share of capital stock, which should be in lieu of all other taxes, was a contract limiting the power of the state to tax the capital stock of the corporation, but one that still left the shares of stock belonging to the stockholders subject to general taxation; the subjects being distinct, and both not being exempt. *Ibid.*

To reach the latter conclusion, the court refused to follow, and essayed to distinguish, the *Farrington Case*. It was constrained to this course, because in a footnote to that case, and in the cognate case of *Wicks v. Tennessee*, 95 U. S. 690, 24 L. ed. 561, a case involving the identical charter then before it, but technically not *res judicata* because of involving taxes for a different year, the United States Supreme Court had said that it was disposed of by the opinion in the *Farrington Case*; that the questions were substantially the same, and the result must be the same. In attempting to distinguish the *Farrington Case*, the state court said that the language of the two charters in question was materially different and that the correct text of the charter in the case at bar was not in the record in the United States Supreme Court. *Ibid.* Two members of the court, Snodgrass, Ch. J., and McAllister, J., dissented.

In the United States Supreme Court it was held that this bank was taxable on its surplus. *Bank of Commerce v. Tennessee* use of Memphis, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456.

And it was declared that the statement had been many times repeated, and was not longer disputed by any, that the capital stock of a corporation, and the shares into which such stock may be divided and held by individual stockholders, are two distinct pieces of property. It is not double taxation to tax both. One may be exempted without exempting the other. *Ibid.* The *Farrington Case* was followed, and it was again held that the shares of stock in the hands of the stockholders were exempt under this charter. Mr. Justice Peckham, who wrote for the court, thought the difference in verbiage between the two charters not material, and said that, as the whole charter had been before the court, the point made on this difference could not have been overlooked.

A reargument of this case was had, and on the rehearing it was decided that while the provision in the charter for a commuted annual

out, that that exemption did not pass, and that the court was in error in so holding, because of the well-settled proposition hereinbefore stated, and supported by the authorities, that under the general law alone, without reference to the Constitution, an exemption will not pass in a case of merger to the absorbing company which attached to the property of the company merged alone, unless the legislation authorizing in such case merger either expressly declared that the exemption shall pass, or used the word "immunity," or an equivalent word. It was correct, in fact, to say that the exemption of the property of the Natchez, Jackson, & Columbus Railroad Company passed to the Louisville, New Orleans, & Texas Company by virtue of the word "immunities," used in the act of 1890, authorizing a sale or consolidation of the Natchez,

Jackson, & Columbus Railroad Company with the Louisville, New Orleans, & Texas Railroad (Laws 1890, p. 675), provided, always, that exemption was legal in its origin, the validity of which exemption was not contested, but conceded, in the *Lambert Case*, but which was clearly invalid, as we shall show later in this opinion. The power of the word "immunities" in said act to pass such exemption to the Louisville, New Orleans, & Texas Railroad under said act of 1890 was exhausted by that consolidation, and had no virtue to carry that exemption into the new company, the present Yazoo & Mississippi Valley Railroad Company, resulting from the consolidation, even had § 180 of the Constitution of 1890 not been adopted. We have most carefully considered the *Lambert Case*. Giving all due weight to the doctrine of *stare decisis*, and

tax of $\frac{1}{2}$ of 1 per cent on each share of the capital stock in lieu of all other taxes constituted a contract exempting the shares of stock from taxation beyond that rate, yet, where no limit had been put on the amount of capital the bank might have, and the charter gave each depositor to the amount of the par value of the shares a right to convert his deposit into a share of stock, the state had a right at any time to make shares afterwards issued taxable at any rate, and was under no obligation to exempt future shares as past ones were. Hence, when a Constitution was adopted making bank stock taxable, after-issued shares became subject to taxation, but antecedent issues retained their exemption. *Bank of Commerce v. Tennessee* use of Memphis, 163 U. S. 416, 41 L. ed. 211, 16 Sup. Ct. Rep. 1113.

In 1896 the United States Supreme Court had again before it the commutation and exemption clause in the charter of the Union & Planters' Bank. Mr. Justice Peckham, writing of the decision in the *Farrington Case*, says: The whole court was of one opinion upon the subject that there was no substantial difference in the extent of the exemption contained in the several charters, although there was some difference in their phraseology. But the question was, Which of the parties was to receive the benefit of the exemption? Was it to be the corporation, or was it intended for the individual stockholder? It was upon that question that the court divided, those in the minority believing that the exemption was intended in each case for the corporation, while the case as actually decided holds that the individual shareholder was entitled to the benefit of the exemption, and there is no adjudication that the exemption extended also to the corporation and its property. Thereupon the court decided that the commutation and exemption clause amounted to a contract which freed from taxes the shares of stock belonging to the stockholders, but gave no exemption to the corporation from taxes upon its capital stock, its accumulated surplus, or its other property; and therefore, that taxing the Union & Planters' Bank upon its capital and surplus did not impair the obligation of its charter contract. *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558.

This decision necessarily overruled the line of decisions above cited of the Tennessee supreme court, that the capital stock and landed property essential to the business of the corporations were exempt from taxation in virtue of these charter contracts.

This result was recognized by the state court in 1898, in a case deciding that, inasmuch as a section of a bank charter providing that the bank shall pay to the state an annual tax of $\frac{1}{2}$ of 1 per cent on each share of stock subscribed in lieu of all other taxes has been finally construed by the United States Supreme Court to exempt from taxation the shares of stock in the hands of the stockholders, and not the capital stock of the bank, contrary to the construction adopted by the supreme court of Tennessee in a line of cases, the state courts are compelled to reverse their previous rulings. It follows that the cases holding that such a section gives immunity from privilege taxes as a corollary to the immunity from taxes on the capital stock must also be overruled; that is, the immunity on capital stock having disappeared, immunity from privilege taxes falls, too. In spite, therefore, of such a clause in its charter, a bank, although protected by an independent statute from taxation on its capital stock, is liable to a privilege tax by the city and county in which it is located. *Union & Planters' Bank v. Memphis*, 101 Tenn. 154, 46 S. W. 557.

The latest reported phase of the controversy to the date of writing was the effort, in the Federal court of the Union & Planters' Bank to restrain the city of Memphis from collecting taxes and imposing future taxes upon its capital stock ad valorem under the Tennessee revenue acts of 1897 and 1899. The jurisdiction of the court to entertain the cause was denied by the city, but it was decided that a Federal court has jurisdiction of a suit in equity for injunctive relief, between a domestic banking and a municipal corporation created by the same state, to restrain the collection of a tax assessed at a greater sum than \$2,000, upon allegations that it was imposed under statutes that were unconstitutional for impairing the obligation of a contract of commutation and exemption in the charter of the bank, because thereby a Federal question was raised independent of diverse citizenship. The bank relied upon two propositions: (1) that it had a charter exemption, and the imposition of the tax was invalid under the contract clause of the Constitution of the Union; (2) that the city was estopped by the previous judgments of the supreme court of Tennessee that the bank was exempt by its charter from taxes of this kind. Upon the first proposition, it was decided that the charter provision *sub judice* created no contract exempting the bank from capital stock taxation, but one merely exempt-

as to the two propositions that what occurred here was merger, and not consolidation creating a new corporation, and that the exemption, consequently, of the Natchez, Jackson, & Columbus Railroad properly passed to the Yazoo & Mississippi Valley Railroad Company, even in the view of merger, under the legislation alone, we hereby expressly overrule the *Lambert Case*. Exemptions, where proper, should be expressly granted,—not stealthily referenced in.

2. We turn now to a second ground of decision, wholly independent of, and disconnected from, all that we have said in the first ground, from which we think the same result must follow. The exemption asserted here is that contained in the 21st section of the Mobile & Northwestern Railroad Company's charter, which is as follows: "Sec. 21. Be it further enacted, that in considera-

tion of the construction of the railroads provided for herein, and of the great benefit which the state will receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the state, thus enabling the state to greatly increase its revenue without additional and burdensome taxation upon the people, the state hereby agrees with said company (and which agreement is irrevocable), that all taxes to which said company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied to the payment of debts and liabilities which the said company may have incurred in the construction of said road, or for money borrowed by said company upon lands or otherwise, to be used

ing its stockholders from taxes upon their shares; therefore, the tax complained of was valid and constitutional. The bank's contention to support the second proposition was that, granting the course of decisions in the Supreme Court of the United States had settled the law generally that a clause for commuted taxation and exemption in the terms contained in its charter exempted from taxation stockholders upon their shares, but did not exempt the bank from taxation upon its capital stock, surplus, and undivided profits, nevertheless, as the supreme court of the state, in a controversy between the same parties over taxes of the same kind levied in previous years, had solemnly decided that this bank was exempt by virtue of the provision in its charter, that decision was *res judicata*, and conclusively estopped the city from imposing again in future years the same taxes on the same bank. It was insisted that a Federal court was imperatively bound to so hold under the decision in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396-398, 42 L. ed. 202, 210, 211, 17 Sup. Ct. Rep. 905. This was replied to by saying that the contrary rule prevailed in Tennessee. That in that state, unlike Louisiana a dispute over a tax imposed one year was over a different subject-matter, and a decision of the one dispute was not the thing adjudged when the other came to be settled. As this was not a Federal question, the courts of the United States would give in respect thereto the same force and effect to the judgments of the state courts thereon that the state courts gave to their own judgments, and they would give no greater force or effect thereto.

It was accordingly held that the decisions relied on were not *res judicata*, and hence that Memphis was not estopped from taxing the bank in the way and manner and upon the subject contested. *Union & Planters' Bank v. Memphis*, 49 C. C. A. 455, 111 Fed. 561.

b. Miscellaneous.

A section in a railroad consolidation act (one of the constituent companies being exempt from ordinary taxation) providing that a statement of the actual cost of the road shall be filed with the secretary of state, and that whenever the net earnings of the consolidated company over expenses and interest amount to 6 per cent per annum upon its capital stock, it shall pay a tax annually to the state of a specified percentage upon the cost, and such other state tax as may be assessed from time to time by a general law, applicable to all rail-

roads that the legislature shall have power to tax at the time of enacting such law or laws,—exempts the company from all taxes until both mentioned contingencies happen, and from other taxation after the earnings bring it under the percentage tax until the legislature passes a law applying to all railroads. *State, Camden & B. R. Co., Prosecutor, v. Cook*, 32 N. J. L. 338.

Although a municipal ordinance imposing an annual license fee for each car run in the city by street railway companies may not apply to, or be enforced against, two of such companies in consequence of prior contract obligations between them and the city, this does not affect its validity as to another such company whose charter expressly makes it subject to such a license fee. *New York v. Broadway & S. Ave. R. Co.* 97 N. Y. 275.

Provisions in corporate charters, one that so much of the real estate of the corporation as is occupied for hospital purposes, and all of its personal property, shall be exempt from taxation, and the other that the real and personal property of the corporation to the extent that it is by its act of incorporation authorized to hold the same, is hereby exempted from taxation, exempt both of such corporations from the payment upon legacies to them of any tax under a collateral inheritance tax act which exempts from its operation societies, corporations, and institutions exempted by law from taxation. To entitle a corporation to the benefit of this exception, it is not necessary that it should have complete immunity from taxation upon all property which it has or may acquire. *Re Vassar*, 127 N. Y. 1, 27 N. E. 394, Reversing 58 Hun, 378, 12 N. Y. Supp. 203, and Overruling *Re Keech*, 26 N. Y. S. R. 433, 7 N. Y. Supp. 331, 32 N. Y. S. R. 227, 11 N. Y. Supp. 265; *Re Lenox*, 31 N. Y. S. R. 959, 9 N. Y. Supp. 895; *Re Vanderbilt*, 2 Connolly, 319, 10 N. Y. Supp. 239-242.

No such exemption accrues to a foreign corporation, nor obtains by virtue of a statute conferring a limited privilege to take and hold property in the state. *Re Prime*, 136 N. Y. 347, 18 L. R. A. 713, 32 N. E. 1091.

A statute amendatory of an act incorporating an omnibus company, which enables it to construct and operate a street railway in a city on obtaining the consent of the municipal authorities, and which provides that if such consent be given it shall be subject to all the restrictions, limitations, and conditions prescribed in another statute passed to authorize such authorities to grant the privilege of con-

in constructing the same; and it shall be the duty of the tax collector in every county, in each and every year, to give to said company a receipt in full for the amount of said taxes upon receiving from said company an affidavit, made by the president or cashier of said company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, state, and municipal, to which said company shall be subject: Provided, however, that whenever the profits of said company shall enable it to declare and pay to the stockholders an annual dividend of 8 per cent upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes

aforesaid shall cease, and said taxes shall be paid by said company to the tax collector, to be by him paid over as required by law." That act was passed in 1870, after the Constitution of 1869 (§ 13, art. 12, and § 20, art. 12) had been adopted; and it is expressly decided in *Lambert's Case*, 70 Miss. 786, 789, 13 So. 33, that this was "a thin disguise to evade constitutional restraint apprehended to be contained in the section . . . [§ 13, article 12, of said Constitution];" and the *Lambert Case* further declares—what is manifest—that the pretended exemption was irrepealable on the face of said section. Unquestionably, said 21st section did provide for an irrepealable exemption on its face, and we hold it, therefore, to have been in violation of § 13, art. 12, and § 20, art. 12, Const. 1869.

The case of *Mississippi Mills v. Cook*, 56

structing street railways within the city (such other statute providing for the imposition of a specific tax on the gross earnings of such railways in lieu and in full of all city taxes and impositions of every nature upon such railways, their equipments, stock, and appendages),—does not confer any right or benefit to such restricted, limited, or substituted taxation. *Dauphin & L. Streets R. Co. v. Kennerly*, 74 Ala. 583.

A railroad charter subjecting the grantee to liability for an annual municipal license fee for each car run, the same as those paid, at the time it was granted, by other railways operating in the streets of the same city, when a number of similar companies in that city pay a stated sum, and one such company a much less sum, and a few others nothing, must be construed as making the grantee of such charter liable for the highest license fee paid by any similar company in such city; because of the well-settled rule that any ambiguity in a public grant must be resolved against the grantee and in favor of the public, and because, too, any different construction would exempt the corporation altogether. *New York v. Broadway & S. Ave. R. Co.* 97 N. Y. 275.

Under statutes for the incorporation and consolidation of railroad companies, the first providing that all chattels purchased with the corporate funds, and all the works constructed and property acquired under the charter, shall be vested in the stockholders forever in proportion to their respective shares, and deemed personal estate, and for fifteen years be exempt from any public charge or tax whatever, after which the legislature shall be at liberty to impose a tax not greater than 25 cents a share annually whenever the annual profits exceed 6 per cent; and the second providing that the stockholders of a railroad chartered by an adjoining state, thereby merged in the domestic corporation, are by such act constituted stockholders in the domestic company, with the same rights, powers, privileges, and franchises in proportion to the number of shares as if original subscribers to stock in the domestic company,—the legislature has reserved by contract the right to tax, after fifteen years, the consolidated road up to 25 cents a share annually, not only upon the original stock of the domestic company, or in proportion to the mileage of the consolidated company within the state, but also upon the whole number of shares in the consolidated corporation, whether owned by residents or non-residents, as the right so to tax rests in con- 60 L. R. A.

tract, and not upon the taxing power. *State ex rel. Bain v. Seaboard & R. R. Co.* 52 Fed. 450.

When, by a statute passed to create a new contract with a consolidated railroad corporation to take the place of the charter of one of its constituents, whereby the state had bound itself to issue state bonds at the rate of \$10,000 a mile as fast as certain sections of the road were completed (an obligation it had not met), it is provided that, in lieu of such bond issues, there is granted to the consolidated railroad certain plats of the public lands for each mile of road already completed or subsequently to be constructed according to the charter; and that such lands and the certificates issued therefor shall be exempted from all state, county, municipal, and other taxes for twenty-five years; and, also, that the consolidated railroad company, its successors, and its and their capital stock, rights, franchises, railroads built and to be built, rolling stock, and all other property then or thereafter owned or possessed by said company or its successors shall be exempted from all state, county, municipal, and other taxes for the same period (except county and municipal taxes in such counties, cities, and towns as have donated their bonds to aid in the construction of said railroad), with a proviso that the exemptions shall not apply to the lands or railroads of the other constituent, or to the franchise, roadbed, rolling stock, or any property acquired from such other constituent,—a county which has donated its bonds to aid the construction of the second constituent road, but not that of the one which held the charter superseded by the statute, nor yet the consolidated road, is not within the exception, and not entitled to tax the road. *International & G. N. R. Co. v. Anderson County*, 59 Tex. 654.

And money in the hands of a receiver of such road, earnings of the second constituent only, is not exempt, as it is within the terms of such proviso. *Campbell v. Wiggins*, 85 Tex. 424, 21 S. W. 599, *Affirming* 2 Tex. Civ. App. 1, 20 S. W. 730.

An exemption given by a railroad charter of the capital stock of the corporation from all state and county taxes gives immunity from road taxes, in Missouri. *State ex rel. Love v. Hannibal & St. J. R. Co.* 101 Mo. 120, 13 S. W. 406.

And such a charter exemption, so far as county taxes are concerned, was not impaired nor affected by a subsequent law granting lands to such railroad company, and providing that

Miss. 40, expressly held that the legislature had no power to grant an irrevocable exemption, and, under that decision, the exemption claimed under this section is manifestly unconstitutional. Section 13, art. 12, Const. 1869, is in these words: "The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals." Section 20 is in these words: "Taxation shall be equal and uniform throughout the state; all property shall be taxed in proportion to its value, to be ascertained as directed by law." *Mississippi Mills v. Cook* decided that the property of private corporations for pecuniary profit was and should remain subject to taxation. It expressly held that, while an exemption might be granted, yet it might at any time be repealed by the legislature, and, further, that no exemption could be granted to any private corporation for pecuniary

profit by a special act extending a special exemption to that special corporation alone; but that, in order to make any such exemption valid, it must be extended to all corporations for pecuniary profit of the same class and in the same situation. And the precise exemption asserted in that case was asserted distinctly under the acts of April 1, 1872, and of April 17, 1873, amendatory thereof, set out at pages 42 and 43 of 56 Miss. The Mississippi Mills did not claim that it had a valid exemption by virtue of a special act granting such special exemption to the Mississippi Mills alone, but that it had such exemption in common with all other factories similarly situated by virtue of said general law. The exemption set up here under the 21st section of the Mobile & Northwestern charter is wholly different. The claim here is that this particular railroad is entitled to this special

such company should pay into the state treasury a sum of money equal to the state tax upon other real and personal property of like value for that year, upon the actual value of the roadbed and other property of the company. *State ex rel. Trammel v. Hannibal & St. J. R. Co.* 101 Mo. 136, 13 S. W. 505.

c. Implied repeals.

It is the well-settled doctrine derived from all the authorities, that laws special and local in their application are not deemed repealed by general legislation, except upon the clearest manifestation of a purpose by the legislature thus to effect their repeal; and, ordinarily, an express repeal by some intelligible reference to the special act is necessary to accomplish that result.

This doctrine has been invoked and applied to negative the implied repeal of corporate charter tax exemption provisions by subsequently enacted general revenue laws. *Com. v. Richmond & P. R. Co.* 81 Va. 355; *State v. Nashville Sav. Bank*, 16 Lea, 111; *Com. v. Pottsville Water Co.* 94 Pa. 516; *Com. v. Philadelphia & E. R. Co.* 164 Pa. 252, 30 Atl. 145.

A condition in a railroad consolidation act granting immunity to the amalgamated corporation from taxation save such tax as may be assessed from time to time by a general law applying to all railroads over which the legislature shall have power for that purpose at the time it enacts such law or laws is not satisfied by a general revenue tax law enacting that all private corporations of the state, except banks and others expressly exempted from taxation by their charters or other contracts with the state, shall be taxed at the full amount of their paid-in capital stock and accumulated surplus. *State, Camden & B. R. Co., Prosecutor, v. Cook*, 32 N. J. L. 338.

And a provision in the charter of a street railroad company, that as soon as it declares dividends equal to 7 per cent per annum, and so long as it pays such dividends, it shall pay the state annually a tax of 1 per cent upon the cost of its road, and that no other tax or impost shall be levied or raised from such company by virtue of any law of the state, saves such company from all taxation under a law applying to all corporations except those expressly exempted from taxation by virtue of their charters or of other contracts with the state. *Douglass v. State*, 34 N. J. L. 485.

But while the undoubted rules of statutory construction are that implied repeals are not favored, and are only given effect when, by 60 L. R. A.

reason of manifest inconsistency, the two acts cannot both stand; and that a general act does not repeal a special one upon the same subject, even where the inconsistency between them is manifest and considerable,—in Pennsylvania both of these rules are to be read in the light of a line of cases concerned with taxation, holding that a general taxing statute does repeal by implication a special one upon the same subject. The rules are relaxed and modified by two principles of state policy, *viz.*: (1) That the state cannot permanently surrender, although temporarily it may suspend or limit, the taxing power in particular instances; and (2) that such power may be, and is, resumed by a general statute insufficiently apt inclusive words, even if it lacks repealing language. All, provided, of course, that no specific constitutional provision or definite contract intervenes to control. *Com. v. Delaware & H. Canal Co.* 1 Dauphin Co. Rep. 257.

The authorities cited to sustain this were all cases decided anterior to *Com. v. Pottsville Water Co.* 94 Pa. 516, and *Com. v. Philadelphia & E. R. Co.* 164 Pa. 252, 30 Atl. 145, which reaffirmed the general rule, and none of them involved an irrevocable contract. It is not necessary to discuss them at length.

As a general statute requiring foreign insurance companies to report semiannually the premiums they receive within the enacting state, and at the same time pay a percentage thereof into the state treasury in lieu of all other taxes, unlike a corporate charter containing a similar provision, does not constitute an irrevocable contract, therefore, the enactment of a subsequent statute levying a direct tax of \$200 annually upon the privilege of establishing an insurance agency in a given taxing district for foreign insurance companies repeals, without express verbiage, the clause in the earlier act making the payment required in lieu of all other taxes. *Home Ins. Co. v. Shelby County Taxing Dist.* 4 Lea, 644. *Freeman, J.*, dissented upon the ground that the doctrine of implied repeal did not exist in Tennessee, because the state Constitution required all repealing acts to recite in their caption the title or substance of the law repealed.

d. Acts that impair.

In the case of a mere gratuitous exemption of a corporation from taxation there is only a suspension of the sovereign right to tax all property, which the state may at will resume, and which it does resume whenever it seems fit to impose a tax upon the property. But, where

exemption, which it is conceded is not now, and never was, extended to all other railroads similarly situated in this state. And, further, this exemption is irrevocable on its face, and the *Mississippi Mills Case* decided that no irrevocable exemption was constitutional. It is certainly obvious from these considerations alone that *Mississippi Mills v. Cook* is no authority to sustain the exemption set up here. It is further clear that the constitutionality, under the Constitution of 1869, of a legislative grant of exemption to private corporations for pecuniary profit if it embraced all of the same class—the property of individuals being at the same time taxed—was not argued, considered, or decided in *Mississippi Mills v. Cook*, but was conceded by the attorney general and the judges who wrote the majority opinions. One of the vices of the decision

in *Mississippi Mills v. Cook* is that it did not hold that all the property of private corporations for pecuniary profit was required to be taxed by the terms of the Constitution (art. 12, §§ 13, 20) just as and when the property of individuals was. Instead of doing this, the court decided that all such property was free from taxation, unless the legislature expressly subjected it to taxation, even though the property of private individuals was taxed, inverting the rule of the Constitution. It was certainly an idle performance to declare, as the court did declare, that the whole effect of the constitutional provision was to render the property of private corporations for pecuniary profit liable to taxation. That everybody knew, and to so limit the constitutional declaration was to emasculate it. More than thirty-five years had intervened between the

the exemption is given upon a valuable consideration fixed and accepted by the state, there is a contract between the state and the corporation. If the legislature has the constitutional power to make it, and the corporation acquires vested rights which may not be impaired or violated. *Citizens' Bank v. Bouny*, 32 La. Ann. 239.

When a railroad holds an irrevocable charter giving it a special rate and subject of taxation, and expressly providing that no other or further tax or imposition shall be levied or imposed upon said company, it cannot be subjected to taxation under a subsequent general railroad tax law applying to all railroads in the state, and designed as a substitute for all existing methods of taxation, commuted or otherwise, until and unless it is by its own action and consent brought within the terms of a section in such statute which provides that corporations having such irrevocable rights may, within a stated time and in a specified manner, surrender their claims to exemption, and accept the provisions of the new law. Pending affirmative action upon its part, such railroad must be taxed as theretofore. *State, United R. & Canal Co., Prosecutors, v. Railroad Taxation Comrs.* 37 N. J. L. 240.

When a railroad charter provides that the road, with all the works, improvements, and profits, and all the machinery of transportation, are vested in the company and its successors forever, and that the shares of its capital stock are to be deemed and considered personal estate and exempt from the imposition of any tax or burden; and there has been reserved to the legislature by Constitution or statute no right to alter or repeal such charter; nor is there any limitation or restriction upon the power of the legislature to grant exemptions from taxation.—a statute laying a tax upon the gross receipts of such railroad, whether regarded as one imposing a tax upon property or a franchise tax, in so far as such receipts are derived from the operation of the road and business or property necessary thereto, is invalid by virtue of the contract clause of the Federal Constitution. *State v. Baltimore & O. R. Co.* 48 Md. 49.

When a state legislature has, in the charter of a railroad corporation, plainly declared in unambiguous terms that if the corporation would complete the internal improvement it was organized to make, its property and the shares of its stockholders should be forever exempt from taxation, subsequent laws imposing taxes upon the franchise and rolling stock of 60 L. R. A.

the company, and upon real estate appurtenant to and forming part of its general property necessary to be used in the successful operation of its business, impair the obligation of the contract in the charter, and are, for that reason, unconstitutional. *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568.

This is followed by a like decision in a case of kindred character, the same in essential features; the only difference being in the extent of the exemption. *Raleigh & G. R. Co. v. Reid*, 13 Wall. 269, 20 L. ed. 570.

A statute imposing a tax upon the gross receipts of such a railroad is unconstitutional and void for impairing the obligation of such a charter contract. *Worth v. Wilmington & W. R. Co.* 89 N. C. 291, 45 Am. Rep. 679; *Worth v. Raleigh & G. R. Co.* 89 N. C. 301.

A state statute enacted after the creation of a railroad debt and the issue of interest bearing bonds evidencing the same, which requires the debtor railroad (in common with many other corporations), before paying the stipulated interest upon such bonds, to withhold from the bondholders 5 per cent of such interest and pay it over to the state, is, so far as such bonds are held by nonresident aliens, and so far as such interest is payable to citizens of other states,—at least, when both the principal and interest of such bonds are payable outside of the taxing state,—an impairment of the contract between the debtor and creditor, and therefore unconstitutional and void. *State Tax on Foreign-held Bonds*, 15 Wall. 300, *sub nom.* *Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179.

In the case immediately following this,—*Pittsburg, Ft. W. & C. R. Co. v. Pennsylvania*, 15 Wall. 326, note, 21 L. ed. 189,—*Davis, Clifford, Miller, and Hunt, JJ.*, dissented. In their opinion the tax was valid and bound both the railroads and their creditors, because the supreme court of Pennsylvania, in the case of *Maltby v. Reading & C. R. Co.* 52 Pa. 140, had held of an earlier statute (1844) that it authorized the taxation of railroad bonded debts, and, inasmuch as that statute was in force when the bonds of the railroads then before the court were issued, its provisions were to be regarded, by implication of law, as a part and parcel of the contract embodied in the bonds and their coupons; and when the state could reach any property within its borders there was no constitutional restraint upon its power to tax it, although it was owned by foreigners.

The state of Missouri, in 1865, adopted a new Constitution, and, in connection with it,

previous Constitution of the state and the Constitution of 1869. When that previous Constitution was adopted—in 1832—the state was young, and had had little experience with the grasping demands of corporations for grants of exclusive privileges; but the experience of more than thirty-five years had taught it wisdom in this regard,—wisdom learned long prior by older commonwealths like California and Iowa, from the Constitution of which latter state the provisions of the Constitution of 1869 in question were doubtless borrowed; and so § 13 of article 12 was put in the organic law of the land, beyond the reach of legislative control, for the express purpose of formulating a fundamentally great line of public policy prohibiting any difference in the exercise of the taxing power between the property of individuals and the property of private cor-

porations for pecuniary profit. The court in *Mississippi Mills v. Cook*, 56 Miss., at pages 51, 52, looked too narrowly at the mere word "subject." It should have taken broadly the whole section into view, and deduced from all its terms the meaning of the provision. Judge Campbell in *Beek v. Allen*, 58 Miss. 177, most wisely said: "Subtlety and refinement and astuteness are not admissible to explain away an expression of the sovereign will. . . . The framers of the Constitution and the people who adopted it must be understood to have intended the words employed in that sense most likely to arise from them on first reading them." This is the doctrine announced by Cooley and Story, and our construction of the meaning of § 13, to wit, that it required the property of private corporations for pecuniary profit to be taxed just as—

an ordinance relating to railroads. This ordinance provided, in substance, that there should be levied and collected from the Pacific Railroad Company, the North Missouri Railroad Company, and the St. Louis & Iron Mountain Railroad Company, an annual tax of 10 per cent for two years, and afterwards one of 15 per cent, of all their gross receipts from freights and fares, to be assessed and collected in St. Louis in the same manner as other state taxes were assessed and collected. This tax was devoted to the payment of the principal and interest of bonds issued or guaranteed by the state for the construction of the roads, and was restricted to such end, and was to cease when the bonds were retired. It was payable in cash or in other bonds or obligations of the state. And if the companies defaulted in paying, or refused to pay, such tax, the legislature was directed to enact a law providing for the sale of their franchises, roads, and property to satisfy the claims of the state. The railroads contested the constitutionality of this ordinance. It was, first, a question whether the ordinance was an exercise of the taxing power; second, whether it impaired the obligation of a contract between the state and the railroads contained in a previous statute, whereby, when the roads were unfinished, and in order to bring about their completion, a large additional bond issue was authorized to be secured by a first-mortgage lien, and which provided for the appointment of a state commissioner to receive the gross earnings and apply them, (1) to the operating expenses, (2) to his own salary, (3) to the new bonds, and afterward to other classes, of which the 6th was the state bonds, issued or guaranteed, and mentioned in the ordinance. The state supreme court held that the ordinance was an exercise of the taxing power, and that, although the statute authorizing the new bond issue and appointment of a commissioner to take and apply the gross receipts was a contract, it was one that did not affect the taxing power. *North Missouri R. Co. v. Maguire*, 49 Mo. 490, 8 Am. Rep. 141.

The Pacific Railroad Company set up the additional claim that the Missouri statute of December 25, 1852, § 12 of which exempted that road from taxation for two years after it was completed and in operation, unless it should before that period elapsed declare a dividend, constituted a special contract with it which the constitutional ordinance impaired. The state court held that there was no difference in principle between this case and the

other, and that, for the reasons given in the other, the same judgment must follow. *Pacific R. Co. v. Maguire*, 51 Mo. 142.

The cases were taken to the Supreme Court of the United States, where, by a divided court, the last-cited case was reversed, while the other was affirmed. Hunt, J., writing for the majority, held that the act of December 25, 1852, § 12, constituted a contract between the state and the Pacific Railroad Company, exempting the road for two years beyond its completion, unless it should sooner declare a dividend; and, as the time limit had not expired, nor the contingency happened, the constitutional ordinance could not be enforced, because it impaired the obligation of that contract. He replied to the argument that the ordinance was not so much a taxing act as a law for the collection of a debt due the state from the railroads, with vigor. The ordinance, he said, was either the imposition of a tax, or it was an act of high-handed violence; a forcible seizure of private property without law or authority; an act which, if committed by an individual, would amount to robbery. Waite, Ch. J., concurred in the conclusion of the majority for the reason that, if the ordinance really imposed a tax, it was an impairment of the contract made by the act of 1852 with the Pacific Railroad Company, but he leaned to the debt-collection theory, notwithstanding his colleague's contemptuous and wrathful denunciation, and that even on that theory the ordinance must fall, because it impaired the contract the state had made in the act of 1864 authorizing the new bond issue and postponing its own claims. Clifford and Miller, JJ., dissented upon the ground that the asserted contracts were not broad enough to protect the road against the exaction commanded by the ordinance. *Pacific R. Co. v. Maguire*, 20 Wall. 36, 22 L. ed. 282.

The North Missouri Railroad Company had no special contract with the state for its particular exemption, and a majority of the court (Waite, Ch. J., dissenting) agreed in affirming its liability to pay according to the terms of the constitutional ordinance. *North Missouri R. Co. v. Maguire*, 20 Wall. 46, 22 L. ed. 287.

Whatever immunity the St. Louis & Iron Mountain Railroad Company had disappeared on foreclosure. *Trask v. Maguire*, 18 Wall. 391, 21 L. ed. 938.

The attitude of the chief justice in these cases commands respect. Whether the constitutional ordinance of Missouri be regarded as

"the same as"—the property of individuals, so that one would not be exempt and the other taxed, is the identical construction placed upon the same words by the Supreme Court of the United States, and the supreme courts of Alabama, Arkansas, California, Florida, and Iowa. We prefer now to distinctly align ourselves with the Supreme Court of the United States on this important question, and overrule *Mississippi Mills v. Cook* in so far as it held that the property of private corporations for pecuniary profit was not, by Const. 1869, art. 12, §§ 13, 20, expressly directed to be taxed just as the property of individuals. The decisions of the United States Supreme Court to which we refer are as follows: *Louisville & N. R. Co. v. Palmes*, 109 U. S. 248, 27 L. ed. 924, 3 Sup. Ct. Rep. 193; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 475,

28 L. ed. 1058, 5 Sup. Ct. Rep. 529; *New York ex rel. Schurz v. Cook*, 148 U. S. 408, 37 L. ed. 502, 13 Sup. Ct. Rep. 645; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 303, 310-312, 38 L. ed. 451, 454, 455, 14 Sup. Ct. Rep. 592.

The decisions of the state supreme courts to which we have referred are as follows: *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 635; *People v. McCreery*, 34 Cal. 432; *Fletcher v. Oliver*, 25 Ark. 289; *Palmes v. Louisville & N. R. Co.* 19 Fla. 231 (which collates the Constitutions of Wisconsin, Missouri, Illinois, Kansas, Mississippi, Alabama, Arkansas, and Louisiana). In *Mobile v. Stonecall Ins. Co.* 53 Ala. 570, Judge Brickell in a most masterly opinion says: "The constitutional provision supposed to have been offended by the enactments under which the appellee claims immunity from

a tax act, or as a law to collect the claims of the state in advance of other creditors, it was none the less an act of perfidy to those who invested in the new bonds upon its pledged faith that the gross earnings of the railroads next above the operating expenses and salary of the state receiver should be applied to repay their loans before the state touched the receipts for itself.

A state law imposing taxes for past years upon a railroad, which was not, although liable to be, assessed during that time, cannot be enforced against property which the road then had, that has in the meantime passed by sale and purchase to a new owner without any lien upon it for taxes having been reserved. The legislature has no power thus to impair the contract between vendor and vendee, nor to take the property of one to pay the debt of another. *State v. St. Louis, K. C. & N. R. Co.* 77 Mo. 203.

When the legislature in chartering a bank, fixes a price to be paid by the corporation to the state for the franchise, in the form of an annual tax upon its capital, and reserves no right to vary it, a subsequent statute imposing another and different tax upon the corporate franchise is unconstitutional as impairing the obligation of a contract. *Atty. Gen. v. Bank of Charlotte*, 57 N. C. (4 Jones Eq.) 287.

It having been settled by repeated adjudications, both of the state courts, and of the United States Supreme Court, that statutes attempting to tax a bank upon the shares of its capital stock either as a corporation directly liable or with a remedy over by claim for reimbursement from its stockholders, are void for impairing the obligation of the contract in a corporate charter, expressed by the words: "And the capital of said bank shall be exempt from any tax laid by the state, or by any parish or body politic under the authority of the state, during the continuance of its charter,"—so as to be no longer an open question,—declared the Louisiana supreme court in 1901,—the latest attempt to tax the shares of such a bank, embodied in a statute of that state, enacting that, in the event that any national or state bank, banking firm, or company, is, by the decisions of the courts, held not liable to pay taxes on the shares of its shareholders, then the taxes shall be collected from and paid by each shareholder on the share or shares held by him; and each shareholder failing to pay the same may be proceeded against by a rule to produce, and by all other proceedings provided for to collect taxes on movable property,—must fall for 60 L. R. A.

the same reason. *Penrose v. Chaffraix*, 106 La. 250, 30 So. 718.

A municipal ordinance imposing a penalty of \$50 upon the proprietor of every passenger railroad car running within stated limits in the city, who should not procure a license from the mayor for each car and pay annually therefor a fee of the same amount; and which lays no duty upon the railroads except to pay the money; and which applies to lines already enfranchised to operate in the city under municipal grants not reserving power to exact such penalty or require such license,—is a revenue measure, and not a police regulation,—a tax, not a license; and as such is void for contravening the constitutional prohibition against impairing contracts. *New York v. Second Ave. R. Co.* 32 N. Y. 261.

Such an exaction is not an exercise of the power of municipal regulation reserved in the franchise grant, but is in derogation of contract rights,—is simply an attempt by one party to revoke a provision inserted for the benefit of the other. *New York v. Third Ave. R. Co.* 33 N. Y. 42.

When a city has by ordinance granted a telegraph company permission to erect its poles and string its wires in the city streets, in consideration of furnishing the city with certain free telephonic communications and facilities, it cannot, after the company has accepted and installed an expensive and valuable plant, exact an additional consideration for the privileges enjoyed; and an ordinance requiring such company annually to pay, in addition to taxes on its property and license taxes on its business, a specific sum for each pole set up or used in a designated district for the privilege of entering upon, using, and permanently occupying the streets, ways, and places of the city, under penalty of removal of the poles if such payment is not made, is in violation of its contract, and void. *New Orleans v. Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41, 3 So. 533.

A case without a parallel, here in point, divided the supreme court of Iowa in 1874. Each of the four members of the court differed with all his colleagues. The action was brought by the city of Dubuque to recover of the Illinois Central Railroad Company, taxes for the year 1871 upon the railroad track, right of way, certain real estate owned and used, rolling stock, coal, oil, and other supplies belonging to the railroad and located or kept within the city limits. By the judgment below the railroad was charged with all these taxes, except

the taxation the appellant seeks to recover has a history which must be consulted in determining its just interpretation. . . . Its purpose was not an adaptation only of the organic law to the changed political condition of the people, and to conform it to the new relations springing from the amendments of the Federal Constitution, and the conditions imposed by congressional enactment. It was intended also to cure defects time had developed in former Constitutions, —to narrow and restrain legislative power in the instances experience had shown it most liable to abuse. Under former Constitutions the taxing power was not defined, qualified, or restrained by any other provision than the simple declaration: 'All lands liable to taxation in this state shall be taxed in proportion to their value.' . . . There cannot be a just interpreta-

tion (an interpretation which will consummate the intent of the people in the adoption of these and other constitutional provisions) which is not deduced, not only from their language, but from their history,—from the causes to which they owe origin and the mischief they were intended to remedy. In respect to the Constitution of the United States, it is said 'the safest rule of interpretation is to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aid of contemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed.' . . . In the creation of the greater part, if not all, of the private moneyed or commercial corporations which were created prior to 1861, a commutation

those upon its passenger station and rolling stock, and both parties appealed. The judgment was affirmed, as against the railroad, by the concurrence of three judges, and as against the city, because the judges stood two and two. It had previously been decided that railroad property, like all other property in the city, was liable to municipal taxation; whereupon the legislature enacted a statute providing that every railroad company which had paid all taxes on gross earnings under a former law should be released from all other taxes which may have been levied upon its roadbed, right of way, rolling stock, and necessary buildings, and forbidding the collection of any such taxes for prior years, for state, county, municipal, or any other purpose. This statute was enacted after the taxes sued for had been assessed, levied, and become due, and the railroad relied upon it as a complete defense to the action. Beck, J., argued that the taxes had become a debt the railroad was under obligation to pay, a chose in action, a piece of property belonging to the city, entitled to the same protection as other property, and the legislature had no power to take it away. The statute in question, in his opinion, deprived the city of Dubuque of its property without due process of law, and it impaired the obligation of the contract which the law implied upon the part of a taxpayer to pay taxes legally assessed and due. He concluded, therefore, that the statute was unconstitutional and void. Miller, Ch. J., was of the opinion that the statute was unconstitutional because it violated a section of the state Constitution which declared that the property of all corporations for pecuniary profit should be subject to taxation the same as that of individuals. He refused, deeming it unnecessary, to express an opinion upon the question whether the city had such a vested interest in the taxes levied upon the railroad at the time the act of release passed that the legislature could not constitutionally enact such law. Cole, J., dissented all along the line, because he held that the former decisions holding the railroads liable at all to municipal taxes were unsound; and that the provision in the earlier statute imposing the gross-earnings tax, that it should be in lieu of all taxes for any and all purposes, had been wrongly limited to taxes for state and county purposes alone. He had protested against such a construction at the time, and he protested still. The legislation *sub judice* merely corrected a mistake, either of the legislature in the former act, or of the court in construing 60 L. R. A.

it. This could not be unconstitutional. He denied that a municipal corporation had any vested right in an uncollected tax laid by general law for a general public purpose, which would or could prevent the legislature from altering or repealing that law or abolishing the tax. He insisted that the provision in the state Constitution, that corporate property should be subject to taxation the same as that of individuals, was not equivalent to a command that it should be actually taxed. Day, J., concurred generally with Beck, J., in his conclusions, but expressed no opinion upon the proposition that the city had a vested right in the taxes. *Dubuque v. Illinois C. R. Co.* 39 Iowa, 56.

e. Acts that do not impair.

Mr. Justice Holmes, who has but just taken his seat in the United States Supreme Court, takes occasion to remark, in a very recent case decided by that tribunal (*Blackstone v. Miller*, 188 U. S. 180, 47 L. ed. —, 23 Sup. Ct. Rep. 277, Affirming 171 N. Y. 682, 64 N. E. 1118, 69 App. Div. 127, 74 N. Y. Supp. 508), sustaining a tax imposed under the New York collateral inheritance tax act, laid upon money deposited temporarily in a trust company by a nonresident and remaining on deposit at the time of his death, which occurred without the state, that, "in the case at bar the law imposing the tax was in force before the deposit was made, and it did not impair the obligation of the contract, if a tax otherwise lawful ever can be said to have that effect." Doubtless, this language was not intended to be taken in its broad and literal sense, although one does not readily perceive in the context any limitation upon the natural import of the words. The discussion thus far has shown to how great an extent the remark needs qualifying.

A contract in the charter of a corporation is not impaired, in the constitutional sense, when the corporate property and franchise are condemned and taken upon due compensation in the exercise of the power of eminent domain. *West River Bridge Co. v. Dix*, 6 How. 507, 12 L. ed. 535.

Unless a corporate charter contains an express contract against taxation, the company takes it subject to the same right in the state to tax the privileges granted and the corporate property that applies to all other privileges and property. *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 939; *Nashville, M. & S. Turnp. Co. v. White*, 92 Tenn. 369, 22 S. W. 75; *New*

of taxation was a prominent feature of the charter. . . . Entire or partial exemption from taxation temporarily has been frequently granted corporations formed to pursue branches of industry, the encouragement of which it was believed a wise public policy required. All exemptions from taxation necessarily increase the burdens imposed on the property not exempt, and are directly injurious to the taxpayer. The incidental benefits which it is supposed may result to him, in common with the community at large, are speculative, and not often a compensation for the immediate injury sustained. Invidious exemptions or discriminations, by which the property of an individual, or of a corporation, is relieved from bearing a just proportion of the common burden taxation is intended to discharge, are violative of the equality of right of the citi-

zen, which is a fundamental principle of our institutions. To prevent any exemption or discrimination in favor of corporations, to subject their property to the same rate of taxation to which the property of individuals of the same kind is subject, is the purpose of the constitutional provision clearly expressed: 'The property of corporations now existing, or hereafter created, shall forever be subject to taxation, the same as property of individuals,' etc. The argument of appellee that it was intended only to reserve to the legislature the power of subjecting corporate property to the taxation imposed on individuals, and to avoid the introduction into charters of irrepealable exemptions or discriminations, cannot be supported. . . . Reading these constitutional provisions in the light of their history, and with a due regard to the words in

Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406.

A foreign insurance company, licensed by a state to do business therein, and paying the state for the privilege a percentage of the gross amount of premiums it receives in the state, and, also, paying a city in which it does business, pursuant to an ordinance thereof, another percentage tax upon its receipts in such city, may, nevertheless, when the state and the city have not stipulated not to impose other taxes, be subjected to a further and an additional license tax of a specific sum fixed by municipal ordinance without the latter exaction being repugnant to the contract clause in the Federal Constitution. *Home Ins. Co. v. Augusta*, 93 U. S. 116, 23 L. ed. 825.

The assessment by the authorities of a city of a street railway for state and county taxes is not vitiated by its being nontaxable for city purposes by virtue of a contract with the city to pay, in lieu thereof, a percentage of its gross earnings. *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809.

The fact that a street railway corporation has been granted a franchise to operate its road upon certain streets of a city by municipal ordinance does not relieve it from paying a municipal license tax subsequently imposed by city ordinance upon the business of street railroads, nor its manager from the penalty incurred by its failure to pay. *Wyandotte v. Corrigan*, 35 Kan. 21, 10 Pac. 99.

Municipal bonds are taxable as a part of the personal property of a resident taxpayer for local, as well as state, purposes, and by the city assessors the same as all other property within their jurisdiction, whether belonging to corporate or individual owners, and without in anywise impairing the obligation of the city upon its contract with the bondholders. *People ex rel. Niagara F. Ins. Co. v. New York City & County Tax & A. Comrs.* 76 N. Y. 64.

This case is to be distinguished from that of *Murray v. Charleston*, 96 U. S. 432, 24 L. ed. 760, which involved a special tax laid by municipal ordinance upon city bonds, to be deducted from the interest accruing thereon, and which in effect reduced such interest by a third.

A statute passed several years after a foreign building and loan association has done business in the enacting state, and has outstanding a great number of contracts with members, whereby it is required to pay annually into the state treasury 2 per cent of its gross receipts from business within the state, is 60 L. R. A.

not objectionable upon the ground that it impairs the obligation of such contracts. *Southern Bldg. & L. Assn. v. Norman*, 98 Ky. 204, 31 L. R. A. 41, 32 S. W. 952.

Inasmuch as all contracts are inherently subject to the paramount power of the sovereign to exact from the fruits thereof such sums by way of taxation as may properly be collected for public purposes, a law taxing the gross earnings of a railroad which has leased its line to another company for a stipulated rental, and which requires the lessee company to withhold such tax from the rent and pay it over to the state, is not a law impairing the obligation of the contract contained in the lease. *Vermont & C. R. Co. v. Vermont C. R. Co.* 63 Vt. 1, 10 L. R. A. 562; 3 Inters. Com. Rep. 488, 21 Atl. 262, 731.

A state law requiring a domestic corporation, when paying interest on its bonded debt, to withhold from the bondholders and pay over to the state a specific state tax, does not impair the obligation of the contract between the corporation and its bond creditors, in so far, at least, as the bond holders reside and the bonds are actually held within the state. *Com. v. Lehigh Valley R. Co.* 129 Pa. 429, 18 Atl. 406, 410.

Nor is a state law of that character open to such an objection when it applies to all corporations, but exacts the tax only from interest payments to the resident holders of scrip, bonds, or certificates representing the funded debt. *Com. v. New York, L. E. & W. R. Co.* 150 Pa. 234, 24 Atl. 609; *Com. v. Delaware & H. Canal Co.* 150 Pa. 245, 24 Atl. 599.

Neither does such a law, in application to a railroad corporation chartered by another state and operating a part of its line in the taxing state, being neither empowered by its charter nor commanded thereby to act as an assessor or tax collector, impair the obligation of the contract between its home state and such foreign railroad corporation expressed in its charter. *Com. v. New York, L. E. & W. R. Co.* 150 Pa. 234, 24 Atl. 609.

A statute providing for the taxation of mortgages to the mortgagee, and for deducting the par value of mortgages from the value of the land on which they rest in assessing the mortgagor or landowner, is not invalid by bond impairment of the contract evidenced by bond and mortgage executed before its enactment and at a time when the landowner was subjected to the whole tax. *Dundee Mortg. Trust Investment Co. v. School Dist. No. 1*, 10 Sawy. 52, 19 Fed. 359.

which they are expressed, it is impossible for us to doubt that it was not competent for the general assembly, in the imposition of taxes, to distinguish or discriminate in favor of corporate property subject to taxation. If property of a particular kind is subjected to taxation, and owned by a corporation, it must bear the rate of taxation imposed on individuals. While the Constitution inhibits the exemption or discrimination in favor of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burden, which is natural, right, and equity, is secured alike to the corporation and to the citizen. The Constitution of Iowa contains a provision identical in meaning, if not in words, with the provision of the Constitution of 1868, under consideration. It reads: 'The property of all corporations for pecuniary profit shall

be subject to taxation, the same as that of individuals.' [Iowa Const. art. 8, § 2.] In *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 635, it was the subject of construction, and was declared mandatory, requiring the legislature to provide for taxation of the property of corporations for pecuniary profit the same as that of individuals. A statute releasing railroad companies from certain taxation to which individuals were subject was declared violative of it. The court says: 'What are we to understand to be intended by the language, "the same as that of individuals?" We need not determine whether this language requires that corporate property shall be taxed in the same manner as that of natural persons. It seems, however, quite clear that it was intended by this language to require the legislature to impose the burdens of taxation

In *Com. v. Western U. Teleg. Co.* 2 Dauphin Co. Rep. 40, it is said that a tax upon the capital stock of a foreign transportation company doing business in Pennsylvania, apportioned by the mileage method, does not violate the clause of the Federal Constitution forbidding any state to pass a law impairing the obligation of contracts; but the report leaves one altogether in the dark as to why it should have been supposed that it did, or as to what contract was supposed to be impaired by such a tax.

A tax upon the shares of stock of stockholders in a corporation, resting upon a different subject and another personality from a tax upon the capital of the corporation, is not a tax upon exempt state and municipal bonds in which a part of the corporate capital has been invested, and so the failure of the assessors to make deductions proportionate to the amount of such bonds does not render the tax obnoxious to the contract clause in the United States Constitution. *Parker v. Sun Ins. Co.* 42 La. Ann. 1172, 8 So. 618.

A corporation whose charter exempts from all taxation whatever 3,000 shares of its stock, or whatever part thereof is required to construct its works, except that when its net annual income exceeds 6 per cent the excess may be taxed for state purposes, is taxable when its income above operating expenses is more than 6 per cent on the cost of its works, although a part of the excess has been consumed in making needed repairs and the rest in enlarging and extending the plant. The expense of current repairs is part of and may be deducted with operating expenses. The cost of additions and betterments is not, and cannot be deducted. Yet, when the corporation does not discriminate between the two sets of disbursements, and offers no proof of the cost of repairs, the tax officers are warranted in considering the outlay therefor as not sufficient to reduce below 6 per cent the net income on the cost of the works; hence, the exaction of the tax does not impair the obligation of the contract of exemption. *Com. v. Minersville Water Co.* 13 Pa. Co. Ct. 17.

IX. Transfers and survivals.

a. In general.

A general rule, deducible from all the authorities, is that an exemption from, or a right to, a limited taxation belonging to a corporation is a privilege altogether personal to the grantee, incapable of transference to another save by a specific enabling law couched in ex-60 L. R. A.

phlet language apt to the purpose. *Philadelphia & W. R. Co. v. Maryland*, 10 How. 376, 13 L. ed. 461; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189; *Delaware Railroad Tax*, 18 Wall. 206, *sub nom.* *Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Trask v. Maguire*, 18 Wall. 391, 21 L. ed. 938; *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860; *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359, 26 L. ed. 185; *East Tennessee, V. & G. R. Co. v. Hamblen County*, 102 U. S. 273, 26 L. ed. 152; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813; *Pickard v. East Tennessee, V. & G. R. Co.* 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 278, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592; *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26; *State v. Maine C. R. Co.* 66 Me. 488; *Baltimore, C. & A. R. Co. v. Ocean City*, 59 Md. 89, 42 Atl. 922; *Alexandria Canal, R. & Bridge Co. v. District of Columbia*, 1 Mackey, 217; *Com. v. Chesapeake & O. R. Co.* 27 Gratt. 344; *Petersburg v. Petersburg R. Co.* 29 Gratt. 773; *Evansville, H. & N. R. Co. v. Com.* 9 Bush. 438; *Kentucky C. R. Co. v. Com.* 87 Ky. 661, 10 S. W. 269; *Com. v. Nashville, C. & St. L. R. Co.* 93 Ky. 430, 20 S. W. 383; *Nashville, C. & St. L. R. Co. v. Com.* 97 Ky. 162, 30 S. W. 200; *Memphis v. Phoenix Ins. Co.* 91 Tenn. 566, 19 S. W. 1044; *Wallace v. Cornersville & L. Turnp. Co.* 92 Tenn. 369, 22 S. W. 75; *Bloxham v. Florida C. & P. R. Co.* 35 Fla. 625, 17 So. 902; *International & G. N. R. Co. v. Smith County*, 65 Tex. 21; *Memphis & L. R. R. Co. v. Berry*, 41 Ark. 436, Affirmed in 112 U. S. 609, 28 L. ed. 837, 5 Sup. Ct. Rep. 299; *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 509, Affirmed in 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529; *Arkansas Midland R. Co. v. Berry*, 44 Ark. 17; *State ex rel. Guffey v. Chicago, B. & K. C. R. Co.* 89 Mo. 523, 14 S. W. 522; *First Div. of St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297, Gil. 224.

b. Grants to one corporation of the rights, privileges, etc., of another.

As to what language used in a corporate charter granting the rights and privileges of an existent corporation invests the new company with the same right to, or exemption

upon the property of corporations for pecuniary profit, the same as, or equally with, that of individuals; . . . that each shall be taxed for the same objects, and in the same degree, so that individuals shall not be required to pay any taxes on their property which are not also assessed and laid upon the property of corporations of the class named, nor in any greater proportion. When the legislature provides for taxing the property of individuals, this clause of the Constitution requires it to tax the property of corporations for pecuniary profit to the same extent and for the same purposes. If the property of individuals be taxed for state, county, school, and municipal purposes, the property of this class of corporations must be subjected to the same taxes, and at the same rates. The one cannot be exempt, and the other liable."

from, taxation possessed by the old one, the courts are not agreed. In some jurisdictions, and under some circumstances, certain words and phrases are deemed sufficient to clothe the grantee with the same immunity that the older corporation enjoys, while in other jurisdictions under circumstances varying only slightly, if at all, equivalent, not to say identical, language is held to work no such result.

A grant of "all the rights, powers, and privileges" of the old corporation carries its exemption over to the new one. *Humphrey v. Pegues*, 16 Wall. 244, 21 L. ed. 326.

A clause in a railroad charter investing the company thereby incorporated "for the purpose of making and using its road" with all the "powers, rights, and privileges" of another railroad, grants only such powers, rights, and privileges as are necessary for the stated purpose; and, as immunity from taxation is not one of these, it is not conferred. *Memphis & C. R. Co. v. Gaines*, 97 U. S. 697, 24 L. ed. 1091.

An act of incorporation, investing a railroad company with all the rights and powers necessary to construct and maintain its road, and declaring that for such purpose it may have and use all the powers and privileges of, and be subject to the same obligations imposed upon, another railroad in its charter, confers no immunity from taxation such as the other road had. *Annapolis & E. R. R. Co. v. Anne Arundel County*, 103 U. S. 1, 26 L. ed. 359.

A grant to branch roads of a railroad corporation of all the powers, rights, and privileges the company enjoy with respect of its main line in the construction, use, and preservation of the branches, does not include the tax exemption of the main road. *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

A statute subrogating a new railroad corporation to all the rights and privileges of an old one does not carry over an immunity from taxation. But this result is more certainly due to the Constitution having taken away the legislative power to confer exemption prior to the passage of the law. *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26.

Although a corporation granted "all the rights, privileges, and immunities" of a pre-existing corporation may be invested thereby with an immunity from taxation given to the first company in its charter, such immunity does not pass over to a third corporation granted no more than the "rights and privi-

leges" of the second one. *Memphis v. Phoenix F. & M. Ins. Co.* 91 Tenn. 566, 19 S. W. 1044. Affirmed in 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471.

It will thus be seen that on the particular holding of *Mississippi Mills v. Cook*, which we now overrule, this court stood absolutely alone, its decision in direct conflict with all the decisions we have just above cited. So much for the mere inaccuracy of that holding.

We turn now to the proposition that the overruling of *Mississippi Mills v. Cook*, as to the holding which we have particularized, overturns a rule of property and destroys a vested right on which the railroad company has a right to rely. The alleged vested right is this: That the 21st section of the Mobile & Northwestern charter containing this alleged exemption has been declared repeatedly in this state by *Mississippi Mills v. Cook* and other cases, down to and including the *Lambert Case*, not to have been violative of the Constitution of 1869. This

Nor does an act investing a corporation with all the "powers, rights, reservations, restrictions, and liabilities" of another corporation confer the latter's tax immunity. *Home Ins. & T. Co. v. Tennessee* use of Memphis, 161 U. S. 198, 200, 40 L. ed. 669, 670, 16 Sup. Ct. Rep. 476.

Some of the Tennessee bank cases (*vide* VIII. a, 2, *supra*) are pertinent upon this topic.

A provision in a corporate charter that the company chartered shall have all the powers allowed, perform all the duties required, and have and enjoy, subject to the same conditions, limitations, and restrictions, all the rights, powers, and privileges of another corporation therein named does not carry over to the new company an exemption from taxation belonging to the old one, so as to exonerate it from a privilege tax. *Wallace v. Cornersville & L. Turnp. Co.* 92 Tenn. 369, 22 S. W. 75.

The recital, in an act incorporating a railroad company, of a charter granted it by another state into which its line was projected, followed by enactment sections providing that such railroad shall be a domestic body corporate with all the powers and privileges given by its foreign charter, invests the company thus created with the same exemption from taxation that the other state gave it. *Atlantic, T. & O. R. Co. v. Mecklenberg County*, 87 N. C. 129.

A foreign corporation purchasing a domestic railroad, and afterwards incorporated in the same state with "all the rights, privileges, and powers" of its vendor, is not thereby invested with the tax immunity of the original company. *Nashville, C. & St. L. R. Co. v. Com.* 97 Ky. 162, 30 S. W. 200.

When the charter of a railroad corporation gives it immunity, to a certain extent and under certain circumstances, from taxation, and also extends to it, "as fully as if the same had been inserted" therein, "all the rights, privileges, immunities, and franchises" of another railroad not inconsistent with its own charter, its immunity from taxation is not enlarged by reference to the other charter, which gives the other company a right to commute and be exempt from taxes by provisions fundamentally different from those upon the same subject in the last charter. *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 509, Affirmed in 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529.

statement is wholly inaccurate, and is the result alone of a careless study of the decisions of this court. There are some primary rules on the subject of *stare decisis* to which we shall first call attention. They are formulated by the Supreme Court of the United States as follows: (1) The court is not bound by expressions in former decisions on points which were not contested. *Cross v. Burke*, 146 U. S. 86, 36 L. ed. 898, 13 Sup. Ct. Rep. 22. (2) The doctrine of *stare decisis* cannot be invoked in favor of decisions on former statutes which were more similar to, but not identical with, the one under review. *Wood v. Brady*, 150 U. S. 20, 37 L. ed. 982, 14 Sup. Ct. Rep. 6. This rule was relied upon by the Supreme Court of the United States in the celebrated *Income-Tax Case* (*Pollock v. Farmers' Loan & T. Co.* 157 U. S. 574, 39

L. ed. 816, 15 Sup. Ct. Rep. 673); the court pointing out that, while the language of former decisions was sometimes very broad, yet the exact points involved in all former decisions were different. (3) It is expressly held that a decision that a statute constitutes a contract, and that an act repealing it is void, is not an estoppel to a subsequent decision holding that the former statute itself is unconstitutional, and this is the exact case now before us. *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302.

Keeping these principles steadily in mind, a review of the decisions of this court will show that no charter identical with that of the Natchez, Jackson, & Columbus Railroad was ever passed on in this state until January, 1891, a period subsequent to the purchase of that road by the Louisville, New Orleans, & Texas Railroad Company; from

When the state makes an agreement with parties for the leasing of a state railroad, and confers on such road in such agreement the same "exemptions, privileges, immunities, rights, and guaranties," and imposes the same "liabilities, disabilities, and public burdens, and no more," as are possessed by and rest upon certain named and previously chartered railroads which are severally exempt from taxation beyond a stated percentage of their net incomes, and requires the lessees to incorporate, the new corporation and leased road cannot be subjected to a higher rate of taxation, or a different tax, notwithstanding an antecedent outstanding general statute enacting that every private charter thereafter granted shall be subject to the right of the state to withdraw the franchise, unless such right is expressly surrendered in such charter. *Western & A. R. Co. v. State*, 54 Ga. 428.

c. Consolidations.

An exemption from, or right to, a limited taxation, given to a corporation, does not survive a consolidation with another corporation in the absence of words in the corporate charter expressly authorizing its transfer, or of a new grant in the consolidating law. *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 509, Affirmed in 113 U. S. 465, 28 L. ed. 1055, 5 Sup. Ct. Rep. 529.

In the numerous cases which have arisen in this court, says Mr. Justice Brown, speaking for the Supreme Court of the United States, not long since, as to the effect of a consolidation upon the existence and status of constituent corporations, it has been held that the question of the dissolution of such corporations depended upon the language of the statute under which the consolidation took place,—the presumption in each case being that each of the two lines of road will be held respectively to the privileges and burdens originally attaching thereto. If, upon the one hand, the identity of the prior corporations is preserved, an exemption from taxation which one of them possessed falls to that portion of the new corporation to which, under its former name, it had been attached. If, on the other hand, the consolidation worked a dissolution of the prior corporations, their former privileges and franchises also ceased to exist. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592. (That case was in the latter category.)

In the earliest of the cases to which Mr. Justice Brown referred—that growing out of 60 L. R. A.

the consolidation of the Baltimore & Port Deposit road with the Delaware & Maryland—the consolidated corporation was deemed rather a merger of the constituents than a new body, and retained the immunity which one constituent had before the union upon the same part of the line, neither losing that, nor gaining aught beyond. *Philadelphia & W. R. Co. v. Maryland*, 10 How. 376, 13 L. ed. 461.

In the next case, an exemption of one constituent in a consolidated railroad was held to have survived the consolidation to the extent of contribution to the common property and effects, where the law authorizing the union did not make taxation a condition thereof, and did provide that the consolidated company should have all the rights and privileges of its constituents, although an exemption which the other road in the combination at one time had, had ceased to exist. *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189.

The Delaware Railroad Tax Case decided that a provision in a state statute authorizing a consolidation of domestic and foreign railroads,—the corporation to be formed pursuant thereto to constitute one company and be entitled to all the rights, privileges, and immunities which each and all of the constituents possessed, had, and enjoyed in virtue of their respective charters; together with a provision in a previous statute under which one of such constituents had been formed by the consolidation of a domestic railroad with another road in an adjoining state, that the two companies should, when united, hold and possess all the property rights and privileges which either or both had by the laws of either state,—did not entitle the domestic company entering into such successive consolidations, nor the successive consolidated companies in the same state, to an exemption from taxation therein upon the property, effects, or other attributes brought to the consolidated company by such domestic corporation, although the foreign railroads, or one of them, in the combination enjoyed such an exemption at home. 18 Wall. 206, 21 L. ed. 888.

When the state does not reserve a right to tax differently in a statute authorizing the consolidation of a road enjoying by contract a limited taxation with another without any immunity, as a condition of their union, she may not afterwards tax at a higher rate the road built under the charter of the commuting constituent. *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665, 23 L. ed. 757.

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which it necessarily follows that that purchase could not have been made on the faith of that decision rendered in 1891. It will further be seen that the question whether the 21st section of the charter of the Mobile & Northwestern Railroad Company violated the Constitution of 1869, as we hold it did, has never been passed on in this state up to this time. The cases in this state relied on to show the opposite of these facts are as follows: *Mississippi Mills v. Cook*, 56 Miss. 40, decided at the April term, 1878, where the sole question was, according to the opinion, whether exemption under general law was repealable or irrepealable; the constitutionality of the exemption was not argued or decided. But much more than this is to be said about *Mississippi Mills v. Cook*. An examination of the original record in *Mississippi Mills v. Cook* shows that

it was a bill for injunction by the Mississippi Mills against Cook, tax collector, averring the establishment of its factory after and on the faith of the acts of 1872 and 1873 granting an exemption in consideration of the construction of factories, etc., and that Cook was willing to accept the affidavit for the taxes of the mill proper, but refused to accept the affidavit for taxes on outlying land; and the bill prayed an injunction against Cook prohibiting the sale of its property for these taxes assessed on outlying lands, on the ground that they were essentially part of the mill property, for wood, etc. The bill averred that under the act of 1877 Cook himself insisted on collecting these taxes on these lands. There was a general demurrer to the bill, sustained by the court below, and the bill was dismissed, and an appeal taken to the supreme court.

pany whose track connects with the road of an adjoining state is authorized to agree with such connecting road for the consolidation of the stock of both, making one company of the two, upon approval of a majority of the stockholders of each, with provisions for calling in the old stock and issuing in the place of it stock in the new company, and for filing the consolidation agreement and the name adopted for the new company with the secretary of state to be conclusive evidence of the consolidation and new corporate name,—works, when complied with, a dissolution of the domestic constituent company and the extinguishment of an exemption from taxation granted to it, and creates a new corporation without such immunity. *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592.

A consolidated railroad corporation formed of separate railroads, each of them, by its charter, subject to special and limited taxation and immune from all other taxes, is not entitled to the commutations or exemptions of its constituents when the consolidating statute merely gave it in general terms their rights, franchises, and interest, their property powers, privileges, and immunities, and made it subject to all their legal obligations. *State v. Maine C. R. Co.* 66 Me. 488.

The New Jersey court of errors and appeals, according to *Depue, J.*, in *State Board v. Morris & E. R. Co.* 49 N. J. L. 193, 7 Atl. 826 (and the case he cites fully sustains him), "has also held that the words 'franchises, privileges, and immunities,' in a statute creating a corporation by the consolidation of two existing corporations, were sufficient to grant to the new corporation an exemption from taxation contained in the charters of the other companies."

The authority for this proposition is the case of *Cook v. State*, Camden & B. C. R. Co., Prosecutors, 33 N. J. L. 474.

An exemption was held, in Maryland, not to have survived a consolidation, because the consolidating statute was to be regarded as a new charter to a new corporation, and an intermediate change in the state Constitution had shorn the legislature of power to perpetuate such an exemption. *Alvey, J.*, dissented upon the ground that the consolidating act was a mere merger leaving the companies with unimpaired exemptions. *State v. Northern C. R. Co.* 44 Md. 131.

The views of the majority, however, have prevailed. *Northern C. R. Co. v. Maryland*, 187 U. S. 238, 47 L. ed. —, 23 Sup. Ct. Rep. 62, affirming 90 Md. 449, 45 Atl. 465 60 L. R. A.

The Maryland court of appeals decided that the successive consolidations which finally evolved the Philadelphia, Wilmington, & Baltimore Railroad Company had not in that state extinguished the exemption originally given to the Maryland constituent, although the statutes of consolidation were not broader in terms and scope than many held elsewhere to have had the opposite effect. *Philadelphia, W. & B. R. Co. v. Bayless*, 2 Gill, 355; *State v. Philadelphia, W. & B. R. Co.* 45 Md. 361, 24 Am. Rep. 511.

A railroad charter containing an exemption from any tax whatever, but expressly subject to alteration, modification, or amendment by any future legislature, except in respect of rates of transportation, and if property rights are not taken away or impaired, is in effect repealed, and the exemption conferred terminated, by a consolidation under a statute declaring that in no event shall the property within the state, of either of the united companies, be exempt from taxation. *Petersburg v. Petersburg R. Co.* 29 Gratt. 773.

D. Mortgage foreclosures.

Nor can a right to commuted taxation, or to an exemption from taxation, be acquired through a mortgage foreclosure of the franchises, property, rights, and privileges of a corporation, unless the statute in point in clear language distinctly authorizes the immunity to continue, and the decrees follow the statute. *Arkansas Midland R. Co. v. Berry*, 44 Ark. 17.

A grant by the state to a railroad corporation of all the rights, franchises, privileges, and immunities which were enjoyed under its charter and the laws amendatory thereof by an older railroad company acquired by the state upon mortgage foreclosure, when the old company had an exemption from taxation resting in an irrepealable contract, does not carry over to the grantee such exemption, especially after a new Constitution prohibiting all exemptions has in the meantime come into operation. *Trask v. Maguire*, 18 Wall. 391, 21 L. ed. 938.

The franchises of a railroad do not include all its rights, privileges, and immunities, but such only as are essential to the operation of the road and without which it would be of little value, such as the right to run cars, take tolls, appropriate earth and gravel for roadbed, take water for engines, etc., etc.; hence the sale of the road, its property and franchises, upon mortgage foreclosure does not convey to the purchaser the exemption from taxation given by the charter of the company. Such an ex-

The sole question involved, therefore, as thus clearly shown by the record itself, arose under the general exemption law applicable to all the factories of the class described, and not to a special grant of a special exemption to a particular corporation. All, therefore, that appears in the opinion, beyond what would relate to the right to collect these taxes on outlying land, is mere *dictum*; for, in determining what has been adjudged, courts look to the decree and the record, and are not controlled by the mere opinion. *Herman, Estoppel, & Res Adjudicata*, p. 470. Another striking difference between the exemption claimed in that case and in this is that the act of 1872, under which that exemption was asserted, did not attempt to preserve exemptions granted to corporations or individuals establishing factories under its provision from legislative

repeal; whereas, in the act of 1870, this 21st section is declared in the *Lambert Case* a miserable attempt to evade the Constitution of 1869, and secure an irrevocable grant of exemption, and that, too, to a particular corporation. The next case is *McCulloch v. Stone* (1886) 64 Miss. 378, 8 So. 236, in which the only question involved was whether outlying lands of a railroad company were embraced in an exemption contained in that charter, the court holding that they were not. The next case is *Yazoo & M. Valley R. Co. v. Thomas* (1888) 65 Miss. 553, 5 So. 108, in which the only question involved was whether the property was exempt before completion of the railroad to the Mississippi river. The charter provided for a twenty-years exemption after such completion, the court holding that it was not exempt. The next case is *Vicksburg*

emption, if not a mere personal privilege not transferable to a third party, can in any event only pass by express and definite terms of conveyance. *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860.

Immunity from taxation does not pass to the purchaser of a railroad upon the sale thereof under a decree foreclosing the lien of the state reserved to secure its bonds, even where the purchaser stipulates for a full and perfect title to the road with its franchises and privileges. *East Tennessee, V. & G. R. Co. v. Hamblen County*, 102 U. S. 273, 26 L. ed. 152; *Pickard v. East Tennessee, V. & G. R. Co.* 130 U. S. 637, 32 L. ed. 1051, 9 Sup. Ct. Rep. 640.

To the same effect is *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176, 29 L. ed. 121, 5 Sup. Ct. Rep. 813.

In *Tennessee*, however, it was held that the sale of a railroad upon foreclosure of the lien of the state thereon by a decree in chancery adjudging by the direct authority of an enabling statute that not only the property, but all the rights, franchises, privileges, and immunities, pass to the purchaser, carried over to a new railroad corporation which purchased the line at the judicial sale the right of tax exemption enjoyed and belonging to the delinquent company, although by an intervening amendment of the state Constitution the legislature might not have power to grant *de novo* a like exemption to a new corporation. *Knoxville & O. R. Co. v. Hicks*, 9 Baxt. 442.

The court distinguished the cases of *Trask v. Maguire*, 18 Wall. 301, 21 L. ed. 938, and *Morgan v. Louisiana*, 93 U. S. 217, 23 L. ed. 860, by saying that the exemptions involved in those cases were less broad than that in the case at bar, where the road as a whole, with all its appurtenances and franchises as an entirety, was exempt. It thought such an exemption more than a mere personal privilege; that it was an integral part of the franchises.

Of that decision, *Waite, Ch. J.*, afterwards said that it "distinctly adjudged that not only the property of the old company, but all its rights, franchises, privileges, and immunities, as defined by the charter and laws and the decree in the cause, passed to and vested in the new company;" whence, it followed that the tax immunity was included and also passed. *East Tennessee, V. & G. R. Co. v. Hamblen County*, 102 U. S. 273, 26 L. ed. 152.

The same state court took a similar view of another railroad foreclosure a little later. *State v. Nashville, C. & St. L. R. Co.* 12 Lea, 583.

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And in *Texas* it was also said that, while it was true, as a general proposition, that an exemption from taxation held by a railroad corporation in virtue of its charter or other contract law would not pass to a purchaser upon foreclosure of its property and franchises by mere force of the decree of sale, but was extinguished, yet, when such an exemption arose under a statute declaring in express terms that the said railroad company and its successors and their capital stock, rights, franchises, railroads constructed and to be constructed, rolling stock, and all other property then or thereafter owned or possessed by said company or its successors were exempted and released from all state, county, town, city, municipal, and other taxes; closing with a further declaration that such statute shall be held to constitute an irrevocable contract between the state and the said company, its successors and assigns,—the case is taken out of the general rule. *International & G. N. R. Co. v. Smith County*, 65 Tex. 21; *International & G. N. R. Co. v. Anderson County*, 59 Tex. 654.

While, perhaps, in general, a total or partial exemption from taxation of a railroad corporation is a personal privilege which ordinarily does not pass upon a mortgage foreclosure sale of its rights, privileges, franchises, and immunities, yet, when such privilege has been expressly permitted by constitutional amendment to be made the subject of a mortgage, and the state acquires and conveys it after foreclosure to another company, it must be held to have inured to the new corporation. *First Div. of St. Paul & P. R. Co. v. Parcher*, 14 Minn. 297, Gil. 224.

e. Other successions.

It does not greatly matter what form the succession of one corporation to the property, privileges, rights, and franchises takes; the same general principles noted *ubi supra* apply. An assignee of railroad property exempt from taxation in the hands of the assignor gets it without the immunity, unless some statute expressly preserves it, and the Constitution does not prevent its continuance.

When a railroad corporation acquires by purchase pursuant to an enabling statute the right to hold, use, enjoy, and employ an earlier railroad, and all the property and effects of every nature and kind thereof, with all the rights, franchises, privileges, and immunities granted to and conferred upon it by the states in which it operated, "in as ample a manner as the legislature of this state can confer them, subject

Bank v. Worrell (1889) 67 Miss. 47, 7 So. 219, where the legislature had provided for what the court calls a privilege tax on all banks in the state, and the question was whether this violated article 12, § 20, of the Constitution of 1869, providing that taxation shall be equal and uniform and in proportion to value, and the court held that it did not. The next case is *Attala County v. Kelly* (1890) 68 Miss. 44, 8 So. 376, a case in which the bank had paid in advance a commutation tax of \$1,000, called by the court a "privilege tax," and the legislature in the same year repealed that law, and provided for an ad valorem tax. The court held it was liable to the ad valorem tax notwithstanding it had paid the commutation tax, and that was the only point involved. The next case is *Louisville, N. O. & T. R. Co. v. Taylor* (decided at October term,

1890) 68 Miss. 361, 8 So. 675, not actually decided, however, till January 26, 1891, as the records of this court show. No question was raised in that case, by counsel or the court, as to the constitutionality of the exemption contained in such § 21 of the Mobile & Northwestern charter. The sole question involved was the right to exemption of a gravel pit claimed by the Louisville, New Orleans, & Texas Railroad Company under the charter of the Vicksburg, Pensacola, & Ship Island Railroad Company,—afterwards the Mississippi & Ship Island Railroad Company,—which never was a part of the Louisville, New Orleans, & Texas Railroad Company, and the court decided that the exemption should be allowed under that charter. This was a most extraordinary mistake, for it is now conceded by counsel for the railroad and everybody else that the

in all respects . . . to all the duties, regulations, and penalties required, prescribed, and enjoined by any law or laws now in force" respecting such company,—it steps into the shoes of the company, acquired according to its status at the time of the purchase, and does not thereby acquire an immunity from taxation granted in the original charter thereof when subsequent legislation accepted by it has taken away such immunity, and made such charter subject to alteration, modification, and repeal, and such company liable to taxation like other railroads of the state. *Seaboard & R. R. Co. v. Norfolk County*, 83 Va. 195, 2 S. E. 278.

The exemption of a main line of a railroad corporation does not attach to an extension of such main line made by acquiring the road of another company. *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72.

A railroad corporation required by its own charter to pay such taxes to the state upon its road, stock, and other property as other railroads pay, does not acquire an exemption from taxation which belonged to a former company by its charter, by a purchase of the latter's rights and franchises, and a statute declaring that the rights and franchises so purchased are thereby granted to such purchaser, when there are no provisions in the statute either conferring an exemption in express terms, or altering the purchaser's own charter in respect of taxation. *Evansville, H. & N. R. Co. v. Com.* 9 Bush, 438.

A railroad acquiring the powers, privileges, rights, and franchises of another road entitled to a limited taxation by an amendment to its charter does not acquire the right to commute taxes when, prior to the change of ownership, the general revenue law of the state has superseded the special taxation law. *Kentucky C. R. Co. v. Com.* 87 Ky. 661, 10 S. W. 269.

A corporation empowered by the law of its organization to take from a pre-existing corporation which has become insolvent a conveyance of all its franchises, rights, powers, privileges, and immunities, and to hold and enjoy the same in as full and ample a manner to all intents and purposes as they had been held and enjoyed by the earlier corporation; and, with its stockholders, further endowed with all the immunities as these had been held and enjoyed by the old company and its stockholders,—thereby succeeds to all the benefits of a statute which provided that the stock and income of the old company should be forever exempt from 60 L. R. A.

taxation. *Nichols v. New Haven & N. Co.* 42 Conn. 103.

A lease for the whole period of its chartered existence of all its property and franchises by one railroad corporation to another, and a ratifying act of the legislature "to have, hold, use, enjoy, possess, and exercise . . . the property, things, franchises, immunities, rights, powers, and privileges" by such lease and contract granted, leased, or demised, although neither indenture nor validating statute mentions taxation, carry over to and vest in the lessee company all the rights, privileges, and immunities belonging to the lessor company to commute taxes and be exempt otherwise from taxation enjoyed by it in virtue of an irrevocable contract with the state found in its charter and the supplements to such charter. *State Board v. Morris & E. R. Co.* 49 N. J. L. 193, 7 Atl. 826.

An act incorporating a railroad company chartered by another state, reciting the foreign charter and providing that the holder of it shall be a domestic corporation with all the powers and privileges given it by such foreign charter, not only grants the domestic company thus created the same exemption from taxation that the foreign charter gave it, but such immunity continues to its successor by a new title formed under an amendatory statute, which, though effecting fundamental changes, does not abrogate the former act or substitute a new company. *Atlantic, T. & O. R. Co. v. Mecklenburg County*, 87 N. C. 129.

When a statute explicitly declares that a railroad company is authorized and empowered to acquire by purchase and assignment all the property, rights, franchises, privileges, and immunities of another railroad; and, upon completion of such purchase and assignment, the former company shall be deemed in law and in equity invested with and entitled to all the said property, rights, franchises, privileges, and immunities as though the same were originally granted to it,—the language is broad enough to transfer an immunity from taxation. *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193.

When a general statute authorizes street railway companies to purchase and thereafter use and enjoy other railways and their rights, privileges, and franchises, just as the grantee might have done, a city contract for the payment of a percentage of gross earnings as a commutation for municipal taxes and the immunity from other taxation given thereby, possessed by a street railway corporation, will pass

charter of the Vicksburg, Pensacola, & Ship Island Railroad Company, afterwards the Mississippi & Ship Island Railroad Company, had nothing on earth to do with the charters of the Louisville, New Orleans, & Texas Railroad Company, nor was that railroad any constituent of the Louisville, New Orleans, & Texas Railroad Company. It appears that the court was led into this mistake by an assumption of counsel to that effect in the case. Certain it is that it was a tremendous mistake of fact, and one against the sovereign right of taxation. It is perfectly obvious that this case is wholly fictitious, and is of no authority for any purpose. It is further to be observed, however, that inasmuch as the Louisville, New Orleans, & Texas Railroad Company purchased the Natchez, Jackson, & Columbus Railroad Company in March, 1890, and the

decision in the *Taylor Case* was not rendered until January 26, 1891, the Louisville, New Orleans, & Texas Railroad Company could not possibly have made said purchase on the faith of the *Taylor Case*, nor on the faith of § 181 of the Constitution of 1890, because that was not adopted until November 1, 1890, and then continued only legal exemptions to corporations retaining the precise identity they had before the Constitution was adopted. The next case is *State v. Simmons* (1890) 70 Miss. 485, 12 So. 477, which involved the mere question as to whether the capital stock was exempt under the charter, and the court held that it was not. The next case, and the last, is *Natchez, J. & C. R. Co. v. Lambert* (1893) 70 Miss. 779, 13 So. 33, and the question contested in that case was whether the exemption of the Natchez, Jackson, & Columbus Railroad Com-

and inure to the benefit of its transferees. *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809.

When a state, in chartering a corporation to build a line of railroad, enacts that such corporation shall be forever exempt from taxation in consideration of the yearly payment, beginning after the lapse of a definite period following the completion of a stated mileage and increasing as the years go on; and thereafter, upon the failure of such corporation to construct the line, enacts a statute forfeiting its franchises to the state without extinction or merger; and by it provides that any other railroad corporation organized or to be organized with authority from the state to build, maintain, and operate a road within it, may, on compliance with certain stated conditions, succeed to and become invested with all and singular the rights, privileges, immunities, franchises, lands, and properties thus resumed and appertaining to the part of the road it shall take and complete,—a new corporation availing itself of, and meeting the conditions in, such statute, takes the tax exemption privileges, and assumes the reciprocal obligation of payment on account of its gross earnings; and such payment begins when the requisite time has elapsed after the stipulated mileage has been constructed upon any part of the original line, regardless of the state of the portion taken up anew. *State v. Northern P. R. Co.* 36 Minn. 207, 30 N. W. 663.

About the same time, in *Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 467, 31 N. W. 942, the same state court declared, with emphasis: "That the exemption from ordinary taxation, created in 1857 in favor of the Minnesota & Pacific Railroad Company, subsequently passed with the lands and as a right appendant thereto to the St. Paul & Pacific Railroad Company, and to the First Division of the St. Paul & Pacific Railroad Company, may be now accepted without question. It was so decided eighteen years ago in the case of the last-named Company v. Parcher, 14 Minn. 297, Gil. 224, which decision has been ever since followed. . . . We are not disposed to reconsider a question so long settled and so often recognized as settled in this court, and will only add that we do not think the decision . . . has been disturbed by the decisions of the Supreme Court of the United States."

This line of Minnesota decisions was followed in Dakota, originally part of the same territory. *L. R. A.*

Winona & St. P. R. Co. v. Deuel County, 3 Dak. 1, 12 N. E. 561.

The same subject was taken up again more recently still by the supreme court of Minnesota in the case of *Traverse County v. St. Paul, M. & M. R. Co.* 73 Minn. 417, 76 N. W. 217, and, in speaking of the statutes of the state in respect of the gross earnings taxes to be paid by the land grant roads in lieu of all other taxes, that court said: The decisions of this court from the Parcher Case down have all been to the effect that this exemption from ordinary taxation was not simply a personal privilege conferred upon the original company, but was appurtenant to the line of the road, and existed in favor of any company which, in consideration of the land grant, should assume the construction and maintenance of the line by which it was applicable; that the immunity, as well as the burden, passed to any company which acquired the road and assumed its operation and the performance of all the other duties which the original company owed to the public; that the transfer of the road and land grant to such a company did not constitute a sale of the lands within the meaning of either the act of 1857 or of acts similar to those of 1865. And, as support for this statement, there is cited the following line of cases: *State v. Winona & St. P. R. Co.* 21 Minn. 315; *Chicago, M. & St. P. R. Co. v. Pfender*, 23 Minn. 217; *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469; *Nobles County v. Sioux City & St. P. R. Co.* 26 Minn. 294, 3 N. W. 701; *State v. St. Paul, M. & M. R. Co.* 30 Minn. 311, 15 N. W. 307; *State v. Northern P. R. Co.* 32 Minn. 294, 20 N. W. 234; *Hennepin County v. St. Paul, M. & M. R. Co.* 33 Minn. 534, 24 N. W. 196; *Ramsey County v. Chicago, M. & St. P. R. Co.* 33 Minn. 537, 24 N. W. 313; *Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 467, 31 N. W. 942.

From the decision, however, one member of the court dissented. Canty, J., who thus disagreed, said: But, out of respect to the Parcher Case and the other cases explaining it and the rule of property resulting therefrom, I do not stand on the doctrine that such an immunity from taxation is a personal privilege, strong as that doctrine is. I stand on a still stronger doctrine, which is that the condition on which this immunity from taxation was granted, has happened, and the immunity has expired.

f. Loss of exemption.

Apart from the cases already noticed, there

pany, which had been purchased by the Louisville, New Orleans, & Texas Railroad Company, passed to the Yazoo & Mississippi Valley Railroad Company, the court deciding that it did. The question whether that exemption violated the Constitution of 1869 was not argued by counsel or considered or decided by the court.

These are the cases on which so much reliance has been placed to show a vested right,—a rule of property,—and it is perfectly manifest that in none of them was it proper to have decided upon the constitutionality of this § 21, unless in the *Taylor Case* and the *Lambert Case*, because in none of the other cases was that question involved, and they could all have been decided without reference to that question; and consequently, under the authority of *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759,

have been a few in which it was contended that, under the special circumstances disclosed, the exemption privileges theretofore enjoyed by the corporation had been extinguished.

In two of the Minnesota land grant cases, where the exemption of the lands granted was to terminate when they were sold by the grantees, it was decided that a transfer of such lands to stockholders of the railroads merely as security for debts did not constitute a sale so as to subject them to taxation; but it was otherwise if the whole beneficial interest in such lands was conveyed to the stockholders, and the company retained only a naked legal title. *St. Paul & S. C. R. Co. v. McDonald*, 34 Minn. 182, 25 N. W. 57; *St. Paul & C. R. Co. v. McDonald*, 34 Minn. 195, 25 N. W. 453.

The division of the territory of Minnesota after such railroad lands were granted and the exemption thereof conferred upon the roads, and the organization of Dakota territory, did not affect the continued exemption of such lands as became a part of the new territory. *Winona & St. P. R. Co. v. Deuel County*, 3 Dak. 1, 12 N. W. 561.

The exemption of a railroad from county taxation to pay county subscriptions in aid of its construction is not wholly lost to the purchaser of such railroad, but the purchaser becomes taxable for subsequent additions or betterments. *Louisville & N. R. Co. v. Hopkins County*, 87 Ky. 605, 9 S. W. 497.

Such an exemption is not lost by a mere division of the railroad entitled to it into two separate companies. *Louisville & N. R. Co. v. Com.* 89 Ky. 531, 12 S. W. 1064.

A statute relating to quo warranto actions, providing that in case, *inter alia*, "any corporation does or omits any act which amounts to a surrender or a forfeiture of its rights and privileges as a corporation" the attorney general may take proceedings, contemplates the forfeiture of the right and privilege to be a corporation or to exercise the powers and enjoy the franchise necessary to the purposes of its creation. It has no application to the rights and privileges the corporation may have in its property; hence, it affords no authority to vacate a grant exempting the corporate property from taxation, while leaving the charter and the corporate existence otherwise intact. *International & G. N. R. Co. v. State*, 75 Tex. 357, 12 S. W. 685.

A banking corporation having by its charter and subsequent statutes a right to a limited taxation in lieu of all other taxes is not, after the term of its existence would have expired, 60 L. R. A.

15 Sup. Ct. Rep. 673, and *Boyd v. Alabama*, 94 U. S. 645, 24 L. ed. 302, they are not binding, under the doctrine of *stare decisis* even, on this court in this case. And, while the question of the constitutionality of said § 21 was involved in the *Taylor Case* and the *Lambert Case*, the constitutionality of the exemption was conceded on all hands, and not contested, and, not having been contested, these cases, as held in *Cross v. Burke*, 146 U. S. 82, 36 L. ed. 896, 13 Sup. Ct. Rep. 22, are of no force on us in this case, under the doctrine of *stare decisis*. It will thus be clearly seen: (1) That the exemption claimed in *Mississippi Mills v. Cook* was one claimed under a general law applicable to all the factories in the state of the same class: whereas, the exemption claimed here, to wit, the 21st section of the charter of the Mobile & Northwestern Railroad Company,

had it not been extended by a later law, entitled to a continuance of such limited tax and exemption from further taxation, with no further grant in the statute extending its corporate life than one of its "powers, privileges, and franchises." *State v. Bank of Smyrna*, 2 Houst. (Del.) 99, 73 Am. Dec. 609.

An exemption from taxation granted in the charter of a corporation for establishing useful manufactures, whose powers include the acquisition of lands and water rights, the building of dams, canals, and flumes, and the furnishing of water power, is not lost in consequence of a later act of the legislature giving such corporation the right and power to extend its operations by condemning other lands and raising its dams. Such an act works no change in the character and attributes of the corporation, whose purposes are the same as before. It is like authority to a railroad to lengthen its line. It is not a new franchise. *State v. Society for Establishing Useful Manufactures* (N. J.) 6 Cent. Rep. 139.

If the consideration of an exemption grant is the building, equipping, and operating of the corporate works for public convenience, the exemption is lost by failure to complete and operate them. *Ford v. Delta & P. Land Co.* 43 Fed. 181.

A *fortiori* is such an exemption lost when the charter that confers it provides that if the corporation shall not have completed its main line within a stated time it shall forfeit so much of the granted rights and privileges as apply to the uncompleted part. *Wilmington & W. R. Co. v. Alsbrook*, 110 N. C. 137, 14 S. E. 652.

A lease for a thousand years of all its property by one railroad to another without reversion, upon consideration of completing the road in a definite time, extinguishes an exemption from taxation. *Com. v. Nashville, C. & St. L. R. Co.* 93 Ky. 430, 20 S. W. 383.

If a corporation falls for many years to accept and organize under its charter, and in the interval the state Constitution changes so as to command that all property be taxed and to prohibit tax exemptions, the grant in such charter of a tax exemption lawful when made is withdrawn, and the immunity is lost. *State v. Planters' F. & M. Ins. Co.* 95 Tenn. 203, 31 S. W. 992; *Planters' F. & M. Ins. Co. v. Tennessee* use of Memphis, 161 U. S. 193, 40 L. ed. 667, 16 Sup. Ct. Rep. 466; *State v. Mercantile Bank*, 95 Tenn. 212, 31 S. W. 989.

When a section in a general law for the taxation of railroads, providing that every com-

is an exemption attempted to be granted to this special corporation, and not to all the other railroads in the state,—a special privilege under a special charter to a special corporation. (2) That the Mississippi Mills had established their factory, after the passage of the acts of 1872 and 1873, on the faith of those acts as a rule of property; whereas, the Louisville, New Orleans, & Texas Railroad Company never came into existence, as admitted by counsel for the railroad, until the 12th day of August, 1884, by the consolidation of the Baton Rouge Railroad and the Vicksburg & Memphis Railroad, after the construction of the road had been practically finished in July, 1884. (3) That the exemption claimed in *Mississippi Mills v. Cook* had no irrepealable feature; whereas, the exemption set up under the said 21st section is on its face irrepeal-

able, and was so judicially declared to be, in the *Lambert Case* itself. (4) That the Louisville, New Orleans, & Texas Railroad Company claims under charters granted in 1882 and 1884, asserting as its exemption this 21st section, the unconstitutionality of which, as violative of § 13 of article 12 of the Constitution of 1869, was not only not considered, argued, or decided in *Mississippi Mills v. Cook*, but which, by virtue of its irrepealable feature and its special grant of an exclusive privilege to a special corporation, would have been condemned by the reasoning of that very case. (5) And not only it is true that the particular exemption claimed here, under this 21st section, was not argued or decided in *Mississippi Mills v. Cook*, but no other decision was ever rendered in this state in which the constitutionality of this 21st section was even in-

pany accepting the terms thereof and conformably therewith paying for a stated term annually a percentage of its gross receipts shall be exempt for that period from taxation. Is a nullity on account of conflicting with a constitutional provision requiring all property to be assessed and taxed equally and uniformly ad valorem,—a railroad that accepts such unconstitutional section, and pays the percentage tax fixed thereby, and surrenders the immunities it held under a perfectly valid charter exemption antedating such constitutional provision, as a consideration for the benefits offered by the void statute, does not thereby make a new contract with the state (although such would be the result if the statute was valid), since the legislature is powerless to make such a contract; but the acceptance and attempted change are void with the act they rest upon, and the charter contract remains unimpaired. *Memphis & C. R. Co. v. Gaines*, 3 Tenn. Ch. 604.

X. Conclusion.

The principal case and its congeners are in line with the current of authority. Grants of exemption are ever limited to their lowest terms. Every doubt in them is resolved against the grantee. The state is always considered not to have surrendered the power of taxation; deemed ever entitled to resume it if, perchance, it has parted with it. The immunity, presumptively, is a personal grant, and not transferable. Its continued enjoyment is contingent upon a rigidly exact observance of all the conditions upon which it was granted and a rigid maintenance of the status of the recipient.

There is a remarkable contrast between the attitude of the Maryland court of appeals toward the Baltimore & Ohio Railroad exemption and that of the Mississippi supreme court with respect of the Yazoo & Mississippi Valley Railroad exemption. It is, says the former, a matter of notoriety and of history, that in chartering the Baltimore & Ohio Railroad Company, the legislature and the people of Maryland regarded the completion of the work as a great state object, tending, eminently, to promote the future wealth and prosperity of Maryland, and particularly of the city of Baltimore, and to contribute to the permanence of the union of the United States. They also were duly sensible that this gigantic and patriotic undertaking could not be accomplished but at great expense and hazard of pecuniary loss to its undertakers. As an encouragement to the enterprise, they were willing to confer on it

every immunity, privilege, and exemption which could reasonably be required and tend to its completion. In expounding, therefore, those provisions of the charter of the company by which its express privileges and exemptions are imparted, liberal rules of interpretation for its benefit ought to be adopted to effectuate the benevolent designs of the legislature, and not such rules of restriction as should be applied to the charters of companies incorporated for the peculiar benefit of their stockholders. *Baltimore v. Baltimore & O. R. Co.* 6 Gill, 288, 48 Am. Dec. 531.

But although this was written in 1848, long before it became popular to hold the opposite opinion, the court as late as 1877 had not changed its views, even while admitting that it was a sound rule of construction that the power of taxation is never presumed to be relinquished unless the intent to relinquish it is clearly expressed. *State v. Baltimore & O. R. Co.* 48 Md. 49.

The net outcome of the Tennessee bank litigations, like those of the Yazoo & Mississippi Valley Railroad Company, has been, with less justification, to take away from the corporations practically all exemption whatever, and yet leave them bound to pay the commuted taxes. The contracts are left just as binding as ever upon the corporations; but judicial interpretation has emasculated them so far as the state of Tennessee is concerned. The doctrine that capital stock and share stock are two different subjects of taxation, and that the exemption or taxation of the one does not exempt the other, that has been so artistically and scientifically applied to extinguish entirely the corporate immunity, is a modern development. And, although such doctrine is now firmly established, it was, if in existence at all, quite embryonic in the middle of the nineteenth century, when these charters were granted. Knowing that the intention of the legislature is, when contracting upon the subject of taxation in a corporate charter, the dominant factor, one is moved to marvel if the Tennessee legislatures in the '50's intended to grant the corporations any real exemption or cheat them with a shadow.

In respect of the extent of an exemption from taxation granted to a corporation, the general rules that have found favor in the greater number of cases are: (1) That an exemption of the capital stock of a corporation does not necessarily exempt the property in which the capital stock has been invested. (2) That an exemption of corporate property is no barrier

volved, until *McCulloch v. Stone*, decided in 1886, 64 Miss. 378, 8 So. 236, four years after the grant of the charter of the Louisville, New Orleans, & Texas Railroad Company. (6) From which it necessarily follows that that road was not built on the faith of any decision ever rendered in this state, up to the time of the grant of its charter, which even involved the constitutionality of said 21st section, and that the claim that it was organized or built on the faith of such decision, operating as a rule of property, is utterly unfounded and absurd. (7) That the *Taylor Case* was neither more nor less than a fictitious case, which misled the court by the misstatement of fact that the Vicksburg, Pensacola, & Ship Island Railroad, afterwards Gulf & Ship Island Railroad, was one of the constituent members of the Louisville, New Orleans, & Texas Railroad, and its charter was a constituent charter of that railroad, and that the *Taylor Case* is authority for nothing. (8) That the *Lambert Case* was decided at the March

term, 1893, eleven years after, not before, the grant of the charter of the Louisville, New Orleans, & Texas Railroad Company. And it is hence utterly incomprehensible to the legal mind how anybody could invoke that case, under the doctrine of *stare decisis*, as affording a rule of property to a company constructed under a charter granted before it was rendered. Such claim becomes more incomprehensible still when the further fact is recalled that the consolidation of the Louisville, New Orleans, & Texas and Yazoo & Mississippi Valley into the present Yazoo & Mississippi Valley Railroad Company took place October 24, 1892, long before the decision in the *Lambert Case*.

Let us get out of the realm of idle and reckless assertion into the realm of fact, and inquire more particularly and accurately exactly what was decided, even in the opinion of the court, which went far beyond the record, in *Mississippi Mills v. Cook*. The

to a franchise or privilege tax. (3) That an exemption of the shares does not exempt the corporation from property taxes, nor always from franchise taxes. (4) That an exemption of the corporation from both property and franchise taxation may yet leave its stockholders taxable upon their shares. There is a respectable body of opinion, a minority larger in some than in other cases, against these rules.

The Rhode Island statute attacked in the Providence Bank Case imposed a specific tax upon the paid-up capital of all banks. This particular bank, whose charter long antedated the act, resisted the tax upon the ground that the contract expressed in its charter thereby was impaired. The tax was sustained upon the ground that the power of the state to tax the bank was unhampered inasmuch as no exemption in so many words had been given in the charter. Suppose, said the counsel for the bank, in his argument against this tax, that the bank had paid \$50,000 for the privileges it enjoys at the time of receiving its charter, could it be compelled to pay for them again? How does it alter the case that payment was in benefits of another kind, which the state acknowledges to have received. Suppose this franchise to have been a free gift, can payment be subsequently demanded?

The decision is sharply criticized in Angell & Ames on Private Corporations (§§ 465-470), where it is said that the court misapprehended the claim urged in behalf of the bank. These writers insist that the tax laid was a franchise tax for the privilege of doing business as a bank in a corporate capacity, and that privilege the state had parted with and could not resume or burden. That, as this franchise was created by the charter, the right to tax it, unlike the right to tax land granted, never existed, and must have been expressly reserved in the grant, or it never attached at all. They conceded the taxability of the property of the bank to the same extent that other property was taxable. And they conceded, too, that no exemption from a property tax arose without explicit language granting it, and that it need not be reserved. The critics deem their contention sustained by the after decision in *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. ed. 529, holding that the payment of a specific price in money by a bank for the franchise its charter gave it prevented the state from arbi-

trarily adding to that price under the guise of taxing the franchise it had sold.

There is nothing that can be added to this criticism to strengthen the argument against the validity of the tax on the Providence Bank. Everybody will concede that when a state grants to a citizen a tangible piece of property, — a section of the public lands, for instance, — that afterwards it may tax such land as it taxes other land, unless it has contracted not to do so. It will be freely conceded that such right to tax is wholly unaffected by the circumstance that a higher or lower price, or none at all, has been paid for the conveyance; in other words, that land owners are equally taxable, whether their titles come from the state or from private persons. It is not so clear that the state, having called a privilege into being and given it away, can still make a charge for permitting it to be enjoyed.

The authorities, except the *Gordon Case*, 3 How. 133, 11 L. ed. 529, plainly so hold. *Providence Bank v. Billings*, 4 Pet. 514, 7 L. ed. 339; *Portland Bank v. Apthorp*, 12 Mass. 252; *People v. Detroit & P. R. Co.* 1 Mich. 458.

The argument against the power of the legislature of a state to alienate beyond the power to resume the right to tax, which was involved in the long contest in which Ohio was defeated in the United States Supreme Court, is a very strong one. It runs to this: A corporate charter is a grant from the Crown to individual subjects, and therefore a contract between the King and his subjects, the grantees, equally binding upon both. The King may not resume the thing granted; he may not grant the same thing to another. But the taxing power was in Parliament, never in the King. The Crown could not bargain or grant the taxing power away. And, as every Parliament was unrestricted, no Parliament could tie the hands of its successors. An American legislature grants charters in the exercise of the royal prerogatives, and it parts with the rights of the Crown when it does; but it does not, and cannot, touch the parliamentary powers.

Mr. Justice Catron, in his dissent in the case of *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977, argues that, whatever may be true of legislatures generally, that of Ohio in 1845 had not the power to surrender the right to tax. The Constitution of that state, in reserving to the people all powers not

vice of that decision is that it looked exclusively to the word "subject" in § 13, art. 12, and failed to give force and effect to the words, "the same as that of individuals." When we say that the court's construction of the word "subject" attributed to it some supposed magical effect, we are simply reiterating the language of Chalmers, J. He said (56 Miss. 69): "I find no such magic as my colleague in the words, 'shall be subject to taxation the same as that of individuals.' To me they have no meaning other than that which would be conveyed by the equivalent phrases 'shall be viewed in the matter of taxation' or 'shall be treated' or 'shall be dealt with' 'the same as that of individuals,' or 'shall be liable to taxation the same as that of individuals.' These, and many similar phrases which might perhaps be suggested, all convey but one and the same idea, namely, that the lawgiver, in the imposition of taxes, shall know no difference between the property of individuals

and that of corporations for pecuniary profit." The opinion of the court declares as its gist that § 13 was not mandatory upon the legislature to tax the property of private corporations for pecuniary profit whenever the property of individuals was taxed. It distinctly put the property of such private corporations, as to the power to tax them or exempt them, in a class by themselves, distinct from the class of individuals. In other words, it held that, although the property of individuals might be taxed, yet the property of such corporations might be at the same time exempted by the legislature from taxation; provided such exemption extended to all corporations of the same class in the state. We think it is perfectly manifest that the language, "the same as the property of individuals," imperatively commanded the legislature, whenever they tax the property of private individuals, to tax also the property of such corporations, and under the same rules of equality and

expressly conferred, deprived the legislature, in his opinion, of such power. At all events, the Ohio supreme court had so interpreted the Ohio Constitution, and, whether its construction was sound or not, it was final. The concession that such construction might, possibly, be an unsound one somewhat weakened the dissent. One sees, here, the influence of the idea of state sovereignty,—an idea much more influential then than now.

Mr. Justice Miller of the same court in later years was generally consistent in denying the power of the state to surrender the right to tax, although in the more recent cases he acknowledged the controlling authority of the contrary decisions. One is a little surprised, therefore, to find him, in concurring in the result, but dissenting from the reasoning, of Swayne, J., in a case involving a supposed surrender of the police power, thus expressing himself: The question turns upon the existence of a contract and its nature, and not upon the power of the legislature to pass laws affecting the health and comfort of the community. Reference to the latter, and to the power of repeal and modification where no contract is in question, are irrelevant. It is said that such contract as may be found in the present case was made subject to the police power of the legislature over the class of subjects to which it relates. The extent to which this is true depends upon the specific character of the contract, and not on the general doctrine. This court has repeatedly decided that a state may, by contract, bargain away her right of taxation. I have not concurred in this view, but it is the settled law of this court. If a state may make a contract upon that subject which it cannot abrogate or repeal, it may, with far more reason, make a contract for a limited time for the removal of a continuing nuisance from a populous city. The nuisance in the case before us was the very subject-matter of the contract. The consideration of the contract was that defendant should do certain things which affected the health and comfort of the community; and the legislature can no more impair the obligation of that contract than it can resume the right of taxation it has on valid consideration agreed not to exercise, because in either case its wisdom has become doubtful. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036. 60 L. R. A.

The New Jersey cases holding that a general statute enacting that all thereafter granted corporate charters shall be open to alteration, amendment, or repeal at the will of any subsequent legislature does not prevent a subsequent legislature from making an irrepealable charter contract in relation to taxation if it so elects (*New Jersey v. Yard*, 95 U. S. 104, 24 L. ed. 352; *State v. Heppenheimer*, 58 N. J. L. 633, 32 L. R. A. 643, 34 Atl. 1061; *Hancock v. Singer Mfg. Co.* 62 N. J. L. 280, 42 L. R. A. 852, 41 Atl. 846), are reconciled with some difficulty with the case of *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346.

The rule which seems to be established by the last case without impairing too far the authority of the others may be stated thus: Given a general statute reserving the right to alter, amend, or repeal all thereafter granted corporate charters, a charter with a tax exemption in it, granted while it is in force, will, if silent upon that point, be open to alteration, amendment, or repeal, but will not be affected thereby if cast in express terms in the form of an irrepealable contract.

There is no necessary conflict between the cases of *State, Morris & E. R. Co., Prosecutor, v. Railroad Taxation Comrs.* 37 N. J. L. 228, and *Petersburg R. Co. v. Northampton*, 81 N. C. 487. The former held that a subsequent general tax act was so inconsistent in its terms with the charter tax provisions that both could not stand, and therefore that the tax act operated as a repealer of the charter to that extent. The latter held that there was no inconsistency between the North Carolina tax act and the charter tax provisions, but, on the contrary, the tax act contained expressions indicating an intent to make no change, so that both act and charter might well stand together.

The distinction sometimes made with respect of the rule of strict construction between statutes substituting a system of commuted and special in lieu of general taxation applying in particular to a corporation or a class of corporations, and laws releasing such a body or class absolutely from all taxation, has a reasonable foundation. It cannot, however, be said that it has yet been erected into a general principle.

J. B. G.

uniformity. It was well said by Campbell, J., that this provision of § 13 "sprang from the experience that corporations were in the habit of asking and obtaining legislative exemption from liability to taxation." 56 Miss. 56. That experience the state had acquired in the thirty-seven years elapsing between the Constitution of 1832 and the Constitution of 1869, and that experience was wisely availed of to put an end to the grant of exclusive privileges to such corporations. It marked a new era in the history of corporate taxation in this state. It laid down a fundamental new line of great public policy,—one that will be found essential to the preservation of the rights of the people, as is abundantly attested by the experience of older states dealing with such corporations. It is that feature of the decisions, thus holding that this § 13 merely permitted the taxation of such corporations, but did not require that taxation whenever the property of individuals was taxed, and in just the same manner, in all respects, as the property of private individuals was taxed, which we now condemn and overrule. In no other respect do we interfere with the decision in that case. That case decided, and properly decided, that under the Constitution of 1869 the legislature had the power to select for exemption from taxation certain designated kinds of property, such as the agricultural implements of farmers, the tools of the mechanic, etc. Such exemption of particular kinds of property, for reasons of public policy, the Constitution allowed the legislature to grant, and, when granted, it applied to such property, whether owned by individuals or such corporations. And to permit such exemptions was perfectly consistent with holding that said section mandatorily required the legislature to tax the property of such corporations whenever and just as it taxed the property of individuals. The vice of the holding of the court was in disregarding and repudiating the correlation by the Constitution of the property of such corporations and the property of private individuals in the same category as to the right to tax and the duty to tax, and in declaring that under that section the legislature might put into operation a scheme of taxation which taxed property of all the private individuals in the state, and at the same time, at the will of the legislature, exempt all property of such corporations from any taxation whatever. The Constitution plainly and clearly yoked together indissolubly the property of such corporations and the property of individuals, and subjected both alike to the same taxation, to be imposed under the same rules of equality or uniformity. The legislature might not exempt all the property of private corporations for pecuniary profit, and tax all the property of private individuals, but it might exempt certain selected kinds of property, in pursuance of a wise public policy, whether that property belonged to such corporations or to private individuals.

One other observation. The case before us most emphatically does not present a claim

to exemption under a charter identical with the charter in *Mississippi Mills v. Cook*, nor the case of any corporation which has acted on the faith of a decision construing a charter identical with the charter in the case of *Mississippi Mills v. Cook*, and which might thus be said to constitute, for such corporation, acting on it and investing its capital on it, a rule of property. It will be time enough to decide that precise question when that question shall be presented.

Whence did we get § 13, art. 12, of the Constitution of 1869? It is said in *Mississippi Mills v. Cook* that we got it from the constitution of Iowa. The clauses in the Constitution of Iowa and Constitution of Mississippi of 1869 are identical on this subject, and the supreme court of Iowa in *Davenport v. Chicago, R. I. & P. R. Co.* 38 Iowa, 635, and *Dubuque v. Illinois C. R. Co.* 39 Iowa, 56, expressly decided that this identical section prohibited the legislature from exempting the property of corporations from the same taxes imposed on the property of individuals, and that the property of corporations must be taxed whenever that of individuals was taxed.

The Constitution of Alabama, in *Mobile v. Stonewall Ins. Co.* 53 Ala. 570, declared that the provision was in itself self-executing, without the aid, in fact, in restraint, of legislative power, subjecting corporate property to the taxation imposed on individuals; and expressly declared, further, that if property of a particular kind is subjected to taxation, and owned by a corporation, it must bear the rate of taxation imposed on individuals.

The Constitution of California contains an identical provision, and in the case of *People v. McCreery* (1868) 34 Cal. 432, the supreme court of California announced the same construction held in Iowa and Alabama, expressly overruling early decisions to the contrary, just as we do here. The Constitutions of Arkansas and Florida contain similar provisions, and the supreme courts of those states announced the same construction which we here announce.

When, therefore, § 13 of the Constitution of 1869 was adopted in this state it was written in the organic law of our land, bringing with it the same meaning precisely, under well-settled rules of construction, which it had in the state from which it came here. And the same construction was unanimously approved by the Supreme Court of the United States in four concurring decisions rendered in November, 1883, March, 1885, April, 1893, and March, 1894, to wit: *Louisville & N. R. Co. v. Palmes*, 109 U. S. 248-254, 27 L. ed. 924-926, 3 Sup. Ct. Rep. 193; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 475, 28 L. ed. 1058, 5 Sup. Ct. Rep. 529; *New York ex rel. Schurz v. Cook*, 148 U. S. 408, 37 L. ed. 502, 13 Sup. Ct. Rep. 645; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 303, 304, 310-312, 38 L. ed. 451, 452, 454, 455, 14 Sup. Ct. Rep. 592.

In overruling this feature of the decision in *Mississippi Mills v. Cook*, therefore, we were announcing a rule of construction supported by four decisions of the United

States Supreme Court and by the decisions of five state supreme courts, as against a rule of construction announced in no case in this Union except *Mississippi Mills v. Cook*. We have all proper respect for the doctrine of *stare decisis*, but it is a doctrine not inflexible, and departed from over and over by the wisest courts in proper cases. And if the doctrine of *stare decisis* can be disregarded in proper cases, where the question is one merely of property rights between individuals, how much stronger is the reason for disregarding it when so to do results, as here, in restoring to a sovereign state the right to tax corporations, and make them bear their just share of the burdens of that government whose protection they so constantly and persistently invoke. This distinction is not one of our invention. It is well settled in the law, and it was voiced in words, which we quote, to approve, by Chief Justice George in *Lombard v. Lombard*, 57 Miss. 177, who said: "Speaking for myself alone, I would say that on constitutional questions, where the former decision refused a right reserved to individuals as against the power of the government, or where it impaired the powers of the people or their representatives to prevent maladministration by their officers and agents, or sanctioned an alienation by the legislature of powers conferred for the public good, I should feel little hesitation in departing from it, when satisfied of its incorrectness." And in *Beck v. Allen*, 58 Miss. 173, Judge George, delivering the opinion of the court, overruled two previous decisions on the same point, justifying departure from the rule of *stare decisis*, by the very distinction here referred to, the case being one involving the taxing power. In concluding this ground of decision, we repeat that it is wholly independent of the first ground of decision hereinbefore elaborated, and, whether we are right or wrong in the view announced in this second ground, the exemption must be denied, looking to the first alone.

In our summary of the holdings in this case, we said there were other views leading to the same conclusion, which we might embrace in the opinion. We proceed to notice these. We come now to a third ground of decision, and that is this: That the exemption claimed here under said 21st section of the Mobile & Northwestern charter, whether applied to the property of the Natchez, Jackson, & Columbus Railroad alone, or to the other property of the Louisville, New Orleans, & Texas Railroad Company, has been repealed by legislation, certainly since the Code of 1892 went into effect. It was declared in the *Lambert Case*, 70 Miss. 787, 13 So. 33, through Judge Campbell (the author of the Code of 1880), that, by the Code of 1880, each railroad in this state was subjected to taxation. That Code, therefore, repealed all railroad exemptions then existing. The *Lambert Case* further held that by the act of 1884, p. 29, the exemption of the Natchez, Jackson, & Columbus Railroad was restored, and that by the act of 1890, p. 12, if it then existed, it was

continued. An examination of all the statutes on the subject, which are as follows: Code 1880, §§ 596-606, inclusive; Id. §§ 607, 608; Acts 1886, § 6, p. 23; Acts 1888, p. 49; Acts 1890, p. 12; Code 1892, §§ 3379, 3875; Id. 3744,—will show that the scheme propounded by the legislature was, up to the Code of 1892, this: That railroad companies should pay ad valorem taxes unless they should accept the conditional exemption provided in the privilege tax law in lieu of the ad valorem tax, and manifest their acceptance of the law providing this conditional exemption from ad valorem taxation by putting such acceptance in writing, and annually paying the privilege tax specified. The provisions of law respecting such conditional exemption from ad valorem taxation by accepting the privilege tax imposed in lieu thereof, and paying it, run side by side through all the legislation from the Code of 1880 to the Code of 1892. The scheme was that ad valorem taxes should be paid by all railroads in the state, but that any railroad should be exempt from such ad valorem taxes which would pay the privilege tax provided in the various acts, provided it manifested its acceptance of such exemption in writing and paid such privilege tax. As to the Natchez, Jackson, & Columbus Railroad Company, the Code of 1880, as shown, repealed its special exemption in its special charter by §§ 597-606, and placed its conditional exemption from ad valorem taxation upon acceptance manifested in writing, and upon payment of the privilege tax thenceforward, under the general law of the state, thus withdrawing any right that the railroad company had to claim a special exemption under this special charter. And whether it had an exemption from ad valorem taxes thenceforward was to be determined, not by reference to a special charter, but by reference to the general law on the subject of privilege taxes, enacted from time to time. The act of 1884, in fixing the privilege taxes, did, however, restore, by recognition, to the Natchez, Jackson, & Columbus Railroad Company the exemption of its charter according to the opinion in the *Lambert Case*. As the act of 1884 did not pretend to affect §§ 597-606, Code 1880, in imposing ad valorem taxes, but only §§ 606-608, relating to the privilege taxes, it is to our mind quite doubtful whether the act of 1884 did have the effect to restore the charter exemption; but, conceding that it did, it is strange that the court in the *Lambert Case* overlooked the act of 1886, p. 23, § 6, amending the "privilege tax" chapter, Code 1880, fixing the privilege taxes to be paid by each railroad in the state, and expressly declaring "that hereafter said railroad companies shall pay privilege taxes respectively 25 per centum greater per mile than is fixed in said acts," without once alluding to any exemption of the Natchez, Jackson, & Columbus Railroad or any other railroad. Clearly, if the exemption of the Natchez, Jackson, & Columbus Railroad Company was restored by the act of 1884, it was repealed by said act of 1886, and was not in existence from

that time until the act of 1890 was passed. The act of 1890 (p. 12) amended the act of 1884, and then re-enacted it as amended. This seems to have been an ingenious effort on the part of some one who knew that the act of 1886 had repealed the exemption of the Natchez, Jackson, & Columbus Railroad Company, recognized in the act of 1884, to again restore it by an effort to repeal the act of 1886, without disclosing the fact or referring to the act of 1886. But the holding in the *Lambert Case* is that the act of 1890 continued the exemption, if it existed; and, since it is clearly shown that no exemption existed when the act of 1890 was passed, there was no exemption to be continued, and the act of 1890, under the rules of construction with reference to taxation, most certainly cannot be held to have created then anew such exemption. It follows from this that when the Constitution of 1890 was adopted the Natchez, Jackson, & Columbus Railroad had no exemption, and consequently § 181 of the Constitution had no effect to continue the exemption which was not then in existence. When the Code of 1892 was adopted, the legislature, carrying out the mandate of the Constitution of 1890, § 90h, expressly provided, in § 3379, that the privilege tax should be imposed on all railroads, without a suggestion of any exemption to any; and this Code was a revision of all general laws on the subject, and wholly omitted all the provisions of the acts of 1884 and 1890 in respect to exemptions. The scheme of the taxation, up to the Code of 1892, was that railroad companies might escape ad valorem taxation by accepting the provisions of the law as to privilege taxes, in writing, and paying the same. The scheme of taxation, under the Code of 1892, changed all this, and repealed all former exemptions of all railroads from taxation by said § 3379 and said § 3875. A consideration showing that this was the purpose of the legislature is the smallness of the privilege tax, under § 3379, no longer in lieu of ad valorem taxes, as compared with its amount under former laws. The Code of 1892 provides for the exemption of all property which is to be exempt in § 3744, and railroads are not mentioned in that section. The provision of that section is as follows: "The following property and no other shall be exempt from taxation,"—which declaration is as positive and emphatic an exclusion of all railroad exemptions as language can furnish. But not only did § 3379 of said Code impose privilege taxes, but § 3875 imposed ad valorem taxes. By that section, every railroad company in the state, without exception, was required to return all its property within and without this state, with its value, so that the assessors might know what value should be the basis of state, county, and municipal taxation, and the section further declares, as to railroads, that all of its property, real and personal, taxable and nontaxable, shall be included. The word "nontaxable," in this connection, does not mean exempt property, but property like government bonds, that is not taxable

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at all; and this is made plain by the provision at the close of the section, "that if the said property is claimed to be exempt from taxation it shall be separately stated and the law cited under which the claim is made." In other words, they were to return three classes of property,—taxable property; nontaxable property, that is, property that could not be taxed in its nature; and exempt property, if any, citing the law for the exemption. The word "nontaxable," therefore, creates no exemption, and does not describe exempt property, which is otherwise provided for, but means merely, as stated, property like government bonds, that cannot be taxed at all. So that we hold that certainly since the Code of 1892 went into effect, and, as we think, since the act of 1886, the exemptions set up by the railroad company in this case were repealed by the legislature, and on this ground, independently of any other ground heretofore set out, the exemptions must be denied.

4. Counsel for the state revenue agent presents another very ingenious view to this effect: That the 21st section of the Mobile & Northwestern charter was plainly prospective, and intended to carry the benefit of the exemption therein provided only to a company which should build a railroad after the grant to it of the exemption. We think it is entirely clear that said provision was prospective, and that the consideration to the state for the grant of the exemption was that recited in the act, to wit: "The construction of the railroads provided for therein and the great benefit which the state would receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also the increased value which would thereby be added to the property of the state, thus enabling the state to greatly increase its revenue without burdensome taxation upon the people." That was the consideration to the state; that clearly was the reason and object of the statute. So far we agree with counsel. Counsel's argument then proceeds to claim that the act of March 3, 1882, authorized the Memphis & Vicksburg Railroad Company and Mississippi Valley & Ship Island Railroad Company to consolidate, and that the object was to construct a railroad from Memphis, through Vicksburg, to Ship island,—a scheme well known to be dearly cherished by the people of Mississippi for years back. Counsel then proceeds to claim that § 1 of the act of March 3, 1882, in providing that the consolidated company should have all the rights, property, immunities, etc., now possessed by the companies which may enter into such consolidation, merely meant such rights, etc., as belonged to the companies existent at the date of the passage of the act; that as the Baton Rouge Railroad Company was not chartered until March 9, 1882, it was not contemplated that that company should be a constituent member of the consolidation; and that § 5, p. 1015., Acts 1882, was meant by the legislature to extend the exemption of said § 21 to such road only as the consolidated company

—the Louisville, New Orleans, & Texas Railroad Company—might build after it came into existence; and that, as said company did not come into existence until after the road from Memphis to New Orleans was completed, it is a perversion of the spirit and purpose of the legislature to allow the Louisville, New Orleans, & Texas Railroad Company to blanket this exemption over a road which was never built by it, and in the construction of which it incurred no indebtedness. This is certainly very persuasive, but we do not now decide whether it is a correct contention or not.

Another contention of counsel for the revenue agent, worthy of serious consideration, is this: That taking the charter of the Baton Rouge Company and the Memphis & Vicksburg Company, as written into the charter of the Louisville, New Orleans, & Texas Company, as part thereof, the legislation of the state shows that it was the purpose of the legislature to extend this exemption of the 21st section to the company created by the first consolidation, the Louisville, New Orleans, & Texas Railroad Company, but to exclude it from the present Yazoo & Mississippi Valley Railroad Company, the result of the second consolidation. Counsel's argument on this point is about as follows: That conceding that the 1st section of the act of March 3, 1882 (the Louisville, New Orleans, & Texas charter), contained the word "immunity," and that by virtue thereof the exemption of the said 21st section passed to the Louisville, New Orleans, & Texas Railroad Company, the only authority for any future consolidation of the said Louisville, New Orleans, & Texas Railroad Company with the Yazoo & Mississippi Valley Railroad Company is to be found in § 16 of the Baton Rouge charter, and § 25 of the Memphis & Vicksburg charter, and that in both these sections the legislature intentionally omitted the word "immunity," and any other words equivalent thereto, and that this omission conclusively shows that it was the purpose of the legislature to limit the existence of the exemption provided by said 21st section to the Louisville, New Orleans, & Texas Railroad Company, the result of the consolidation of the Memphis & Vicksburg Railroad Company and the Baton Rouge Railroad Company, only so long as it retained its existence as the said Louisville, New Orleans, & Texas Railroad Company, and not indefinitely to pass this exemption along to all future consolidations. Counsel has so succinctly stated the facts on this subject that we cannot do better than to quote that part of his brief, which is as follows: "All of these sections thus put in the same charter demonstrate that it was the purpose of the legislature to pass the exemption into the Louisville, New Orleans, & Texas under the word 'immunities,' but to withhold it from any future consolidation by omitting the word 'immunities,' in said §§ 16 and 25, and by using therein no words to indicate the intention of passing the exemption to any future consolidation. But, in this connection, the court

will bear in mind that the act of 1890, as to the sale of the Natchez, Jackson, & Columbus Railroad, on which the *Lambert Case* is based, used the word 'immunities,' as elsewhere shown. When the legislature passed the act of March 3, 1882 (the Louisville, New Orleans, & Texas charter), it necessarily had in mind the provisions of the charters of the Memphis & Vicksburg Company and the Mississippi Valley & Ship Island Company, because both of these companies are mentioned in the very beginning of the act, and it was passed for their express benefit; and the legislature made these charters necessary parts of the act, because, by its terms, it could not be made effectual without the charters of said consolidated company be taken and held to be parts of this act." "Said Mississippi Valley & Ship Island Railroad Company was incorporated in 1871 (Acts 1871, p. 237) as the Vicksburg, Pensacola, & Ship Island Railroad Company. In 1873 its name was changed to Mississippi Valley & Ship Island Railroad Company (Acts 1873, p. 562). The 15th section of the original charter of this company gave the power of consolidation (Acts 1871, p. 247), but omits the word 'immunities,' and gives no power to vest in the consolidated company the exemption from taxation contained in the 21st section of the charter. Besides, the amendatory act of 1873, which vested this exemption from taxation in the charter as amended, uses the word 'immunities' in § 1, p. 562, Acts 1873. The charter of the Yazoo & Mississippi Valley Railroad Company uses the word 'immunities' to embrace exemption from taxation. Acts 1882, § 5, p. 843. The amendment of the Yazoo & Mississippi Valley Railroad Company charter (Acts 1884, § 3, p. 985) uses the word 'immunities' for the same purpose. The amendment of the Louisville, New Orleans, & Texas charter (Acts 1884, p. 936) uses the word 'immunities' for the same purpose. All these things were in the mind of the legislature as parts of said act of March 3, 1882, and show they used the word 'immunities' advisedly, and did not intend that any exemption should pass into any future consolidation, after the formation of the Louisville, New Orleans, & Texas, and this § 15 of the Mississippi Valley & Ship Island Railroad Company expressly provided that any consolidation should form one company, and have a joint common stock."

Certainly the significance counsel seeks to have attached to the omission of the word "immunity" in the act referred to seems fully borne out by the opinion of Mr. Justice Peckham in *Phoenix F. & M. Ins. Co. v. Tennessee*, 161 U. S., at page 177, 40 L. ed. at page 661, 16 Sup. Ct. Rep. 471; but we decline now to pass definitely upon this contention.

There is also much force in another view presented by counsel for the revenue agent, to the effect that, since 1888, the proof in the record shows that the railroad company had been able to declare and pay the annual dividend of 8 per cent upon even its fictitious capital stock over and above its fixed

charges on the proper construction debt. But to go into this would protract this opinion beyond anything necessary for present decision.

There is a rather curious proposition of counsel for the railroad companies in his brief at page 118 *et seq.* The argument is that what was provided by the 21st section of the Northwestern charter was not an ordinary exemption at all, although counsel admits that the *Lambert Case* expressly so decided, but that it was a contract of appropriation, irrepealable in its nature, and not an exemption at all. If counsel's contention as to this is sound, then it is perfectly plain that the claim of rule of property and vested right, under former decisions of this court, falls at once to the ground; for no one will contend that this court has ever treated the said 21st section as an appropriation by contract, irrepealable in its nature. Counsel's construction is therefore utterly inconsistent with the reiterated claim that the view we take is trenching upon any rule of property laid down in any previous decision rendered by this court. This is the first time that such a construction was ever presented to this court or asserted in any form.

Finally, all the judges concur that, because of the inconsistent compromise verdict, the judgment must be reversed, both on appeal and the cross appeal.

The judgment is reversed, both on appeal and the cross appeal, and verdict set aside, and the cause remanded for a new trial.

Woods, Ch. J., dissents.

A petition to strike the above opinion from the files, because not filed within proper time, having been made, **Whitfield, J.**, on November 28, 1898, handed down the following response:

Section 4352 and § 4381 of the Code of 1892 were fully complied with by the summary of holdings handed down in June last, certified to and used in the circuit court on the trial of the case after it was remanded. Every reason for decision contained in that summary is also set out in the opinion filed recently, insisted on, and enforced. 77 Miss. 194, *ante*, 33, 24 So. 200. The court has receded from no position in that summary announced. It has added one new reason, and one only, for the decision: That the exemption was repealed by legislation, to wit, the act of 1886, and the provisions of the Code of 1892. With this single exception, the reasons given for decision in the summary are identical with the reasons given in the opinion now on file. And it is too plain for argument that, had the new reason for decision now set out in the opinion been also set out in the summary, the circuit court would merely have had one more reason for sustaining the action it took. The railroad companies were not, and could not possibly have been, prejudiced by the fact that the summary did not contain this additional reason. Nor is it now, nor can it be, prejudiced by the fact that the opinion does

not contain this one additional reason for our decision.

Other views of counsel are adverted to in the opinion, but it is distinctly declared that as to them we decide nothing,—not adopting them in any wise as reasons for decision. Moreover, we distinctly stated in the summary: "There are other views, leading to the same conclusion, which we may embrace in the opinion yet to be filed. What we have said is a mere summary of the holdings set forth." And at the last term of this court a motion was made to have a fuller opinion handed down then, before the trial in the circuit court, based on § 4352, Code 1892, which we overruled on the ground that the summary was a sufficient compliance with that section, and should stand as the opinion of the court for the time being. The argument made then, and repeated now, as to this, was that the law requires the opinion to accompany the mandate, and that the court below could not proceed without both. This point was disposed of adversely to this contention in *Foster v. Jordan*, 54 Miss. 510, the court saying: "This is an erroneous conception of the province of the mandate. It is the judgment of this court reversing and remanding a case which gives the lower court authority to enter upon a new trial." And the opinion of this court is not more necessary to the jurisdiction of the circuit court than the mandate. Both are mere matters of practice. Beyond this, the scope of the motion is to assert the proposition that this court has not the power, after the trial of a remanded cause, in any way to revise, add to, or take from the mere reasons for its decision, even though the reason added or taken away in no wise affected the party losing in the lower court prejudicially. That, precisely and exactly, is the proposition asserted. It is hardly necessary to say that this wholly novel and extraordinary proposition is untenable. This court, of equal and co-ordinate dignity with the legislative and executive departments in matters judicial, "uttering the voice and registering the will of the state," is reduced to no such pitiable plight. The very question here presented has been settled by authority over and over again. In *Houston v. Williams*, 13 Cal. 24, 73 Am. Dec. 565, Mr. Justice Field, afterwards on the Supreme Bench of the United States, says, for a unanimous court, after citing the statute there relied on, which provided that "all decisions given upon an appeal . . . shall be given in writing, with the reasons therefor, and filed with the clerk of the court:" "It will not be impertinent to the matter under consideration to say a few words as to the control of the court over its opinions and records. There are some misapprehensions on the subject, arising chiefly from a confusion of terms, and from a misconception of the relation of the different departments of government to each other, and the entire independence in its line of duties of the judiciary. The terms 'opinions' and 'decisions' are often confounded, yet there is a wide difference between them, and in ignorance of

this, or by overlooking it, what has been a mere revision of an opinion has been sometimes regarded as a mutilation of a record. A decision of the court is its judgment. The opinion is the reasons given for that judgment. The former is entered of record immediately upon its rendition, and can only be changed through a regular application to the court upon a petition for a rehearing or a modification. The latter is the property of the judges, subject to their revision, correction, and modification in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records. . . . All these errors, whether in language, form, or substance, should be corrected before a publication is permitted as an authoritative exposition of the law, and as such binding upon the court. . . . In no civilized state, excepting California, has the existence of this power ever been doubted. Every judge, from the chief justice of the Supreme Court of the United States down, claims and exercises without question the right of revision, including thereby modification and partial suppression of his opinions. . . . When the opinions have been revised, and finally approved and recorded, then they cease to be the subject of change." There has been no suppression here. The majority of the court have receded from no position announced in the summary, but positively affirm every one of them in the opinion. And that this is so we here make part of this opinion that summary, in its entirety, so that a comparison of it with the opinion now on file may show the facts as they are. That summary is as follows:

"Summary of the Court's Holdings.

"Whitfield, J.: First. Because of the inconsistent compromise verdict, the judgment is reversed, and cause remanded, on the appeal and the cross appeal.

"Second. *The Lambert Case*, 70 Miss. 779, 13 So. 33, is *res judicata* as to the taxes for the year 1892 on all the property that originally belonged to the Natchez, Jackson, & Columbus Railroad Company, which was in Adams county; and, being *res judicata*, it is, as to that, beyond our power to overrule it.

"Third. *The Lambert Case* is not *res judicata* as to any of the other taxes here involved, on the property that once belonged to the Natchez, Jackson, & Columbus Railroad Company, or on any of the other property here involved.

"Fourth. *The Lambert Case* did decide that § 180 of the Constitution of 1890 did not cut off the exemption from taxation asserted in this case, on the ground that this is a case of mere merger, and not of consolidation; that the resultant corporation was not a new corporation,—and applied the principles of *Tennessee v. Whitworth*, 117 U. S. 130, 29 L. ed. 833, 6 Sup. Ct. Rep. 649, which is, beyond all controversy, a clear case of simple merger, and not of consolidation; taking 'merger,' proper, to mean the absorption of one corporation by another, the autonomy of the absorbing corporation being

preserved, without the formation of a new company, and 'consolidation,' proper, to mean such union of two corporations as results in a third new corporation, under whatever name. We hold that the clear legislative purpose was (using the words in the sense indicated) consolidation, and not merger, yet consolidation in such sense as to result in the formation of a new corporation, and, besides, that what was actually done here was necessarily the creation of a new corporation, and not mere merger; that, hence, the principles of the *Whitworth Case* do not apply, but the principles of *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 38 L. ed. 450, 14 Sup. Ct. Rep. 592, do apply; that, consequently, the Constitution of 1890, § 180, cut off the exemption; that the *Lambert Case* cannot be upheld, and should be, and is hereby, overruled. If it be conceded that the purpose aimed at by the articles of agreement of the railroad company was mere merger, it is not to be permitted that the company could overthrow the purpose of the legislature to authorize consolidation, and not merger, nor to name that 'merger' which the actual things done show was consolidation. Consolidation is a privilege, to be exercised or not, not a contract. Section 181 of the Constitution, and § 279 of the schedule thereto, merely mean that corporations existing at the adoption of the Constitution, having then exemptions or other 'rights,' should have them 'continue' so long as such corporations retained the precise corporate existence they then had. The new corporation here takes its life, as from a new grant of corporate life, from the date of the consolidation.

"But we hold further than the 21st section of the Mobile & Northwestern Railroad Company's charter was an effort to secure, as is expressly recited in its face, an irrepealable grant of exemption, and violative of the Constitution of 1869, art. 12, § 13, and article 12, § 20, even as construed in *Mississippi Mills v. Cook*, 56 Miss. 40. The exemption claimed in *Mississippi Mills v. Cook* had no irrepealable feature.

"But, again, we hold that such section violated said clauses of said Constitution, even had it not been irrepealable. *Mississippi Mills v. Cook* turned upon some supposed magical distinction, in the particular connection, between the words 'subject' and 'subjected,' and sacrificed a great constitutional principle to a piece of mere verbal jugglery. Precisely the same clause, using precisely the same word, 'subject,' occurs in the Constitution of Florida and Arkansas; and the supreme courts of both states held, in precisely identical contention, that the clause forbade exemption from taxation of 'corporations for pecuniary profit,' and both of these decisions were, on this identical proposition, affirmed by the United States Supreme Court. *St. Louis, I. M. & S. R. Co. v. Berry*, 41 Ark. 509, 113 U. S. 475, 28 L. ed. 1058, 5 Sup. Ct. Rep. 529; *Palmer v. Louisville & N. R. Co.* 19 Fla. 231, 109 U. S. 253, 254, 27 L. ed. 925, 3 Sup. Ct. Rep. 193. And this construction is reaffirmed in

Keokuk & W. R. Co. v. Missouri, 152 U. S. 310, 311, 38 L. ed. 454, 455, 14 Sup. Ct. Rep. 592. The word 'subject' should have been given its plain, popular signification, occurring in the connection it did, in a great popular instrument, the Constitution,—the very signification attached to it by the Supreme Court of the United States. We prefer to align ourselves now with that court in this matter, and overrule *Mississippi Mills v. Cook* on that point. It passes all understanding how the court could gravely hold in *Mississippi Mills v. Cook* that a solemn declaration in the Constitution of a state, its organic law, formulating fundamentally great lines of public policy, that 'the property of all corporations for pecuniary profit' should be subject to taxation the same as that of individuals, added no new feature, but merely stated what was the law before, and without the declaration, to wit, that the 'property of corporations for pecuniary profit' was liable to taxation. All the world knew that before! Judge Campbell, in his dissenting opinion in *Beck v. Allen*, 58 Miss., at page 177, most wisely said: 'Subtlety and refinement and astuteness are not admissible to explain away an expression of the sovereign will. . . . The framers of the Constitution, and the people who adopted it, must be understood to have intended the words employed in that sense most likely to arise from them on first reading them.' Doubtless, the rule of *stare decisis* is a wise rule, and one not lightly to be infringed. But instances justifying its disregard find manifold illustration in the Reports. And, surely, stronger reasons for not applying it can never arise than where, as here, to disregard it restores to the sovereign the exercise of one of the highest attributes of sovereignty,—the taxing power,—and merely requires that corporations for pecuniary profit, constantly demanding and securing the protection of the government, shall also bear their just share of the burdens of taxation.

We feel, therefore, confident of the propriety of overruling, as we now expressly do, the *Lambert Case*, and the case of *Mississippi Mills v. Cook*, 56 Miss. 40. There are other views, leading to the same conclusion, which we may embrace in the opinion yet to be filed. What we have said is a mere summary of the holdings set forth. Reversed and remanded."

But the California case is not the only authority. In the appendix to 131 U. S., at page XVIII., it is said: "Judges frequently correct their opinions in the hands of a reporter after a printed copy has been filed with the clerk. . . . If one curious in such things would know how far back this corrective practice has existed, let him look as far back as the seventh volume of Cranch (1st ed.), where he will find corrections made by Mr. Justice Story in the opinion of the court delivered by him in *Barnitz v. Casey*, 7 Cranch, at page 456, 3 L. ed. 403. In later editions the changes are incorporated in the text. We have examined this first edition, and it is there stated on the page following the table of cases cited in that volume as follows: "Since this volume was printed, Mr. Justice Story has requested that the following corrections and additions should be made in the opinions delivered by him." So that illustrious judge actually corrected and added to his opinion in 7 Cranch after the official volume of Reports had been published. So far as due process of law is concerned, it is too obvious for discussion that it cannot be involved in mere matters of practice of the courts. We conclude with these words of Judge Field in the case cited: "The power over our opinions and the records of our court we shall exercise at all times, while we have the honor to sit on the bench, against all encroachments from any source, but in a manner, we trust, befitting the highest tribunal in the state."

The motion is denied.

NEW HAMPSHIRE SUPREME COURT.

PITTSFIELD COTTONWEAR MANUFACTURING COMPANY

v.

PITTSFIELD SHOE COMPANY.

(.....N. H.....)

1. A landlord is not relieved from liability for injury to tenants of a lower floor by the freezing and bursting of an automatic fire extinguisher in the portion of the building retained by him, by the fact that he has

employed an independent contractor to keep the building heated.

2. A tenant of the lower floor of a building, the remainder of which is retained by the landlord, cannot, in an action on the contract, recover for breach by a third person of his contract with the landlord to keep such remainder heated, by reason of which water pipes freeze and burst, to his injury.
3. One who contracts with the owner of a building to keep the portions of it remaining in his possession heated,

NOTE.—As to liability of landlord for defects in portion of premises remaining under control, see *Kuhn v. Sol Heaverich Co.* (Wis.) post, —, and footnote thereto.

As to right of third person to maintain action on contract made for his benefit, see *Boston Ins. Co. v. Chicago, R. I. & P. R. Co.* (Iowa) 59 L. R. A. 796, and footnote thereto.

For exceptions to the rule that employer is not liable for acts of independent contractor, see *Hawver v. Whalen* (Ohio) 14 L. R. A. 828, and 60 L. R. A.

note; *Larson v. Metropolitan Street R. Co.* (Mo.) 16 L. R. A. 330; *Carrio v. West Virginia C. & P. R. Co.* (W. Va.) 24 L. R. A. 50; *Colgrove v. Smith* (Cal.) 27 L. R. A. 590; *Cabot v. Kingman* (Mass.) 33 L. R. A. 45; *Wertheimer v. Saunders* (Wis.) 37 L. R. A. 146; *Richmond & M. R. Co. v. Moore* (Va.) 37 L. R. A. 258; *Thompson v. Lowell, L. & H. Street R. Co.* (Mass.) 40 L. R. A. 345; *Bonaparte v. Wiseman* (Md.) 44 L. R. A. 482; *Moran v. Corliss Steam-Engine Co.* (R. I.) 45 L. R. A. 267; *Knoxville*

failure to do which may result in the bursting of water pipes designed for the protection of tenants in possession of lower floors against fire, and in the flooding of their goods, owes the latter the duty of exercising care in the management of the heating apparatus so long as he retains control of it; and he will be liable to a tenant in tort for negligently permitting the fire to go out so that the pipes freeze and burst, to the tenant's injury.

4. One who has undertaken to furnish heat to protect from freezing fire extinguisher pipes in the portion of a building retained by the landlord, where the freezing might result in injury to tenants of a lower floor, is not liable to the tenants for negligently permitting the fire to go out and the pipes to freeze to their injury, if the exercise by the landlord of the ordinary care which he owed the tenants to keep the water from injuring them would have detected the escape of water and prevented the injury, so that failure to exercise it was the proximate cause of the injury.

(November 5, 1902.)

EXCEPTIONS by defendant to a ruling of the Superior Court for Merrimack County overruling a demurrer to the complaint in an action brought to hold defendant liable for injury to plaintiff's goods through the bursting of a water pipe. *Overruled.*

From the pleadings it appeared that plaintiff occupied the lower floor of a building known as the Drake & Sanborn mill. The remainder of the mill was in possession of the owner. Defendant occupied another building a short distance away, and between the two was a boiler house designed to furnish heat and power to the two mills. The boilers were connected by piping with the different floors of the Drake & Sanborn mill so that heat could be supplied to it. The owner of this mill had contracted with defendant, who owned the boiler house, to furnish the heat for the building. In the building was an automatic sprinkling device for fire purposes. The heating contract required the furnishing of sufficient heat to prevent the sprinkler pipes from freezing. One night the fires were negligently permitted to go out in the boiler house, and, in consequence, a sprinkler pipe froze and burst, and the water flooded plaintiff's stock to its injury.

The declaration alleged that it was the duty of defendant to exercise reasonable care and prudence in the management of the boiler house and in the maintenance of a proper fire under the boilers, and to furnish sufficient heat to prevent the freezing of the water pipes; and that, if defendant had exercised such care, the pipes would not have burst.

Further facts appear in the opinion.

Traction Co. v. Lane (Tenn.) 46 L. R. A. 549; *Lion v. Baltimore City Pass. R. Co.* (Md.) 47 L. R. A. 127.

As to liability for negligence in sale or manufacture of article to person injured thereby, where there is no privity of contract between them, see *Schubert v. J. R. Clark Co.* (Minn.) 15 L. R. A. 818, and *note*; *Heizer v. Kingsland & D. Mfg. Co.* (Mo.) 15 L. R. A. 821; *Craft v. W. L. R. A.*

Messrs. Albin & Shurtleff, for defendant:

This is an action of tort; and it cannot be maintained unless the defendant has violated some duty which it owed to the plaintiff.

14 Enc. Pl. & Pr. 331; *Hewison v. New Haven*, 34 Conn. 130, 91 Am. Dec. 718; *Bishop*, Non-Contract Law, § 446.

The duty here was not owing to plaintiff. *Winterbottom v. Wright*, 10 Mees. & W. 109.

If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded on contract, so that an action *ex contractu* for the breach of contract, or an action *ex delicto* for the breach of duty, may be brought at the option of the plaintiff who brings the action; but the plaintiff must be a party to the contract, for no person can, in general, sue in respect of a tort founded on contract who was not a party or privy to, and could not have sued upon, the contract.

Addison, Torts, p. 17; *Daugherty v. Herzog*, 145 Ind. 255, 32 L. R. A. 837, 44 N. E. 457; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *Losce v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Heizer v. Kingsland & D. Mfg. Co.* 110 Mo. 605, 15 L. R. A. 821, 19 S. W. 630; *Lewis v. Terry*, 111 Cal. 39, 31 L. R. A. 220, 43 Pac. 398; *Davidson v. Nichols*, 11 Allen, 514; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 740, 15 S. W. 1112; *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503; *Kahl v. Love*, 37 N. J. L. 5; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Tollit v. Sherstone*, 5 Mees. & W. 283; *Blakemore v. Bristol & E. R. Co.* 8 El. & Bl. 1035; *Smith v. Tripp*, 13 R. I. 152; *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19; *Nickerson v. Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1; *Housmon v. Trenton Water Co.* 119 Mo. 304, 23 L. R. A. 146, 24 S. W. 784; *Murch v. Concord R. Corp.* 29 N. H. 9, 61 Am. Dec. 631; *Williams v. Chicago & A. R. Co.* 135 Ill. 401, 11 L. R. A. 352, 26 N. E. 661; *O'Donnell v. Providence & W. R. Co.* 6 R. I. 211; *Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 514, 11 L. R. A. 385, 12 S. E. 553; *Jackson v. Rutland & B. R. Co.* 25 Vt. 150, 60 Am. Dec. 246; 1 Thomp. Neg. p. 452.

A test, often applied by the courts to determine whether an action in tort is founded on a contract, is by answering the question: Is it necessary for the plaintiff to plead or prove the contract in order to maintain his action?

Whittaker v. Collins, 34 Minn. 299, 57 Am. Rep. 55, 25 N. W. 632.

Parker, W. & Co. (Mich.) 21 L. R. A. 189, and cases in *note*; *State use of Heartlove v. M. Fox & Son* (Md.) 24 L. R. A. 679; *Lewis v. Terry* (Cal.) 31 L. R. A. 220; *Wise v. Morgan* (Tenn.) 44 L. R. A. 548; *Ives v. Welden* (Iowa) 54 L. R. A. 854; *McCaffrey v. Mossberg & G. Mfg. Co.* (R. I.) 55 L. R. A. 822; *Smith v. Middleton* (Ky.) 56 L. R. A. 484; and *Peters v. Jackson* (W. Va.) 57 L. R. A. 428.

Messrs. Sargent, Niles, & Morrill, for plaintiff:

The duty in the present case is not a duty imposed by contract; it is the general duty correlative with the general right of personal security, and of universal application, by which all persons are under obligation, in the management of property, forces, or agencies under their control, to exercise reasonable care to avoid doing injury to the person or property of others.

When there is a violation of a legal right existing independent of any contract between the parties, such as an invasion of a right of property, then the tort is not founded on contract.

1 Addison, Torts, Dudley & B.'s ed. 17.

The right and the corresponding duty being founded on the common law, and existing independent of contract, the fact that the defendant was under a contractual obligation to a third party to exercise the same diligence is no defense to this action.

Bishop, Non-Contract Law, 32.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion.

Baltimore & P. R. Co. v. Jones, 95 U. S. 441, 442, 24 L. ed. 507; *Rich v. New York C. & H. R. R. Co.* 87 N. Y. 382; *Kerwhacker v. Cleveland, C. & C. R. Co.* 3 Ohio St. 188, 62 Am. Dec. 246; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503; *Nashua Iron & Steel Co. v. Worcester & N. R. Co.* 62 N. H. 159; *Roberts v. Boston & M. R. Co.* 69 N. H. 354, 45 Atl. 94.

Everyone is responsible for the consequences if he fails to act with ordinary care in the conduct of his lawful business.

Felch v. Concord R. Co. 66 N. H. 318, 29 Atl. 557; *Mitchell v. Boston & M. R. Co.* 68 N. H. 96, 34 Atl. 674; *Buch v. Amory Mfg. Co.* 69 N. H. 257, 44 Atl. 809.

The duty of exercising ordinary care in maintaining such a degree of heat as would secure the plaintiff from an invasion of its right of peaceable possession of its premises and property rested, as a matter of course, upon whomever was engaged in the business of supplying that heat.

Pollock, Torts, 2d ed. 72; *Murray v. Currie*, L. R. 6 C. P. 24; *Beven*, Neg. 310, 312; *Buswell*, Personal Injuries, 48; *Slater v. Mersereau*, 64 N. Y. 138; *Bishop*, Non-Contract Law, 274, 275; 1 Jaggard, Torts, 231.

The contractor, and not the employer of the contractor, is liable for the tort of the contractor and of his servants.

1 Jaggard, Torts, 238; 2 Thomp. Neg. 899; 1 Shearm. & Redf. Neg. 5th ed. § 116; *Knowlton v. Holt*, 67 N. H. 155, 30 Atl. 346; *Carter v. Berlin Mills Co.* 58 N. H. 52, 42 Am. Rep. 572; *Wright v. Holbrook*, 52 N. H. 120, 13 Am. Rep. 12; *Gilbert v. Beach*, 5 Bosw. 445; *Stewart v. Harvard* 60 L. R. A.

College, 12 Allen, 58; *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339.

In actions on the case for negligence in the performance of a contract between the defendant and a third person, to which contract the plaintiff is a stranger, his right to recover for an injury to his person or property depends upon the defendant's negligence being the proximate cause of the injury. And it is the proximate cause unless, between it and the injury, there intervenes such a duty of inquiry in some other person that the failure to make the requisite inquiry constitutes a new efficient, proximate cause of the injury. In the present case there was no such intervening duty of inquiry. The defendant's negligence remains the sole efficient, proximate cause of the injury.

Bradley v. Hartford Steam-Boiler Inspection & Ins. Co. 19 Fed. 246.

Everyone in the conduct of his lawful business is bound to act with ordinary care, and, if he fails to do so, is responsible for the consequences.

Nashua Iron & Steel Co. v. Worcester & N. R. Co. 62 N. H. 159.

The negligence, if any, was in a mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held.

Boomer v. Wilbur, 176 Mass. 482, 53 L. R. A. 172, 57 N. E. 1004; *Knight v. Fox*, 5 Exch. 721; *Blake v. Ferris*, 5 N. Y. 48, 55 Am. Dec. 304.

Parsons, Ch. J., delivered the opinion of the court:

No claim is made of lack of heat in that part of the premises occupied by the plaintiffs. Whether the occupation of the premises by the plaintiffs, as tenants of the Drake & Sanborn Company, and the consent of the defendants to furnish them with heat, presumed from their continuance in performance with knowledge of the change in occupation, gave the plaintiffs any right in the contract, so far as it related to the premises occupied by them, need not, therefore, be considered. The wrong alleged is the invasion of the plaintiffs' premises, and the injury to their goods, by water flowing from the sprinkler pipes in the attic of the Drake & Sanborn mill. As stated by the plaintiffs' counsel in argument, the complaint is not for "insufficient heat, but because of an excess of water." This legal wrong to the plaintiffs was not dependent upon their occupation of a portion of the Drake & Sanborn mill as tenants to the Drake & Sanborn Company. They would be entitled to protection from such invasion, and to recompense for loss so sustained if they were tenants to another, or occupied adjacent real estate under title in fee.

It has been said that, in ascertaining the "content of the law," "legal duties come before legal rights" (Holmes, Common Law, 219); but, in the administration of the law, there must be found a correlative existence of rights and duties. If there is no wrong without a remedy, there can be no

invasion of a legal right for which the law affords a remedy, unless there exists at the same time a legal duty upon some one to prevent or abstain from such invasion. The wrong to the plaintiffs being the incursion of water upon their premises, the next inquiry, in a philosophical search for a remedy, is: Upon whom does the law, upon these facts, impose the duty of preventing the invasion by water from which the plaintiffs suffered?

In the attic of the Drake & Sanborn mill, for a lawful purpose,—protection against fire,—water was so confined and maintained that there was probability of injury to others if it escaped. Upon the parties responsible for the collection and maintenance of this water the law imposes the duty of exercising care to prevent its escape. The care and control of the premises upon which the dangerous condition existed having been surrendered by the owners to others, the responsibility for the failure to exercise such care and control rests with the guilty parties, and not with the owners. *Carter v. Berlin Mills Co.* 58 N. H. 52, 42 Am. Rep. 572. In this situation, the only duty of the Drake & Sanborn Company toward the plaintiffs—the only right which the plaintiffs could insist upon against them—was the exercise of care to prevent injury to them. They had no ground of complaint if the building were not heated, if by any mechanical device the freezing of the water or its escape if frozen could be prevented, or if by due attention and watchfulness the flow of the water from the frozen or broken pipe into their premises could have been stopped before injury was done. Their right to damages for their injury is not dependent upon the fact of lack of care in heating. Any carelessness by which the water escaped upon them to their injury would have sustained their action.

It is suggested that, because the Drake & Sanborn Company employed an independent contractor to operate the boilers and to furnish them with heat, they were relieved from all liability for an injury to others, which might result from the failure to supply heat to the building. *Carter v. Berlin Mills Co.* 58 N. H. 52, 42 Am. Rep. 572, is cited. The argument, however, is based upon a misconception of the "independent contractor" rule, as it is called, and the principle of the case cited. The rule is that, where the liability sought to be enforced is based upon the principle of *respondere superior*, if the person for whose negligence recovery is sought is himself an independent contractor, or the employee of one over whom as to the detail of his work the defendant has no control, liability cannot be enforced by invoking that doctrine. But, where the duty sought to be enforced is one imposed by law upon the defendant, he cannot escape liability by showing that he employed another, over whom he had no control, to perform it for him.

"There are certain absolute duties resting upon natural persons and corporations, either by operation of law, or by reason of

having been voluntarily assumed. The law does not permit a person or corporation to cast off such a duty upon an independent contractor so as to exonerate himself or itself for the consequences of its nonperformance. Of this nature is the duty of guarding dangerous substances collected upon their property." 1 *Thomp. Neg.* § 665; *Cabot v. Kingman*, 166 Mass. 403, 406, 33 L. R. A. 45, 44 N. E. 344. A master cannot relieve himself of any nondelegable duty owed by him to his servants by contracting for its performance. *Story v. Concord & M. R. Co.* 70 N. H. 364, 368, 48 Atl. 288; 1 *Thomp. Neg.* § 532. A railroad corporation cannot relieve itself from responsibilities imposed by law, as a part of its franchise, by contracting for the exercise of part of its authority by an independent contractor. *Rolfe v. Boston & M. R. Co.* 69 N. H. 476, 45 Atl. 251.

"Unquestionably, no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. . . . That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do, or, by a parity of reasoning, to cases in which the contractor is intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." *Pickard v. Smith*, 10 C. B. N. S. 470, 480.

In *Carter v. Berlin Mills Co.* 58 N. H. 52, 42 Am. Rep. 572, the damage did not occur because the act which the Thurstons were employed to do was unlawful, nor because of the unlawful or improper construction of the dams. It was due to the improper use of the dams by the Thurstons. As the Berlin Mills had no control over the manner of use of the constructions by the Thurstons,—as the Thurstons were not their servants,—they were not liable for their careless acts, and, as no other ground of liability except that of *respondere superior* was suggested, the plaintiffs failed. The duty imposed upon the Drake & Sanborn Company was to exercise care to prevent the incursion of water upon the plaintiffs' property. They are not excused by the fact that they employed others, over whom they retained no control, to exercise this care for them. Because the Drake & Sanborn Company are liable, it does not necessarily follow that the defendants are not. But the consideration that the primary duty (the violation of which resulted in the injury complained of) rested upon the Drake & Sanborn Company may be important upon the question which may arise hereafter, whether the plaintiffs' injury was caused by the fault of the defendants.

"Actionable negligence is the neglect of a legal duty. The defendants are not liable unless they owed to the plaintiff a legal duty

which they neglected to perform. With purely moral obligations the law does not deal. . . . To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty." *Buch v. Amory Mfg. Co.* 69 N. H. 257, 260, 44 Atl. 809, 810. The duty must be one owed by the defendants to the plaintiffs in respect to the very matter or act charged as negligence. *Leavitt v. Mudge Shoe Co.* 69 N. H. 597, 45 Atl. 558; *McGill v. Maine & N. H. Granite Co.* 70 N. H. 125, 46 Atl. 684; *Morrison v. Burgess Sulphite Fibre Co.* 70 N. H. 406, 47 Atl. 412; *Davis v. Boston & M. R. Co.* 70 N. H. 519, 520, 49 Atl. 108.

It is alleged in the plaintiffs' declaration that it was the duty of the defendants to exercise care and prudence in the operation of the boilers, and to furnish sufficient steam to heat the Drake & Sanborn mill, and to prevent the freezing of the water in the pipes therein. As the duty, the breach of which constitutes actionable negligence, is one imposed by law, the mere allegation of the duty is insufficient to establish it. The question remains whether, upon the facts stated, the law imposes the duty. 1 Chitty, Pl. 370; *Seymour v. Maddox*, 16 Q. B. 326; *Kennedy v. Morgan*, 57 Vt. 46; *Marvin Safe Co. v. Ward*, 46 N. J. L. 19, 23.

It is alleged that, at the time of the injury complained of, the defendants were under contract with the Drake & Sanborn Company to furnish sufficient steam to heat their mill; but this allegation does not make out a cause of action in favor of these plaintiffs against the present defendants. It discloses a duty on the part of the defendants to heat the building; but this duty was to the Drake & Sanborn Company, and to no one else. Nothing is better settled than that an action will not lie in favor of any third party for a breach of duty so created. *Loose v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Necker v. Harvey*, 49 Mich. 517, 14 N. W. 503; *Winterbottom v. Wright*, 10 Mees. & W. 109; *Longmeid v. Holliday*, 6 Exch. 761; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503. The plaintiffs concede in argument that no recovery can be had upon any duty imposed by force of the contract, and that the recovery, if had, must be based upon a duty imposed by law under the circumstances, without reference to the contract. It is therefore unnecessary to refer in detail to the numerous cases cited by the defendants in support of the propositions that the rule that no one can sue upon a contract unless he is a party to it cannot be evaded by bringing what is really an action for a breach of contract in the form of an action for a tort, and that "for an injury arising from mere negligence, however gross, there must exist between the party inflicting the injury and the one injured some privity, by contract or otherwise, by reason of which the former owes some legal duty to the latter." *Buckley v. Gray*, 110 Cal. 330, 342, 31 L. R. A. 862, 42 Pac. 900; *Roddy v. Missouri P. R. Co.* 104 Mo. 234, 12 L. R. A. 746, 15 S. W. 1112; *National* 60 L. R. A.

Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621. Without attempting to define the principle by which all these cases were or might have been decided, it may safely be said that in no case has recovery been permitted where the action, though in form for tort, was in substance merely for a breach of the warranty in the contract of the defendant with a third person. *Murch v. Concord R. Corp.* 29 N. H. 9, 34, 61 Am. Dec. 631; *Patterson v. Colebrook*, 29 N. H. 94, 102. The action has been deemed maintainable only when the act complained of could be seen to be the breach of a legal duty owed from the defendant to the person injured, without any reference to the warranties of the contract. The plaintiffs, therefore, cannot recover upon the ground that the defendants failed to do as they agreed with the Drake & Sanborn Company.

Although the contract is evidence tending to prove that the defendants were managing the boilers, upon the question of their negligence toward the plaintiffs—their breach of any duty owed by them to the plaintiffs—the engagements which they entered into with the Drake & Sanborn Company are entirely immaterial. *Styles v. F. R. Long Co.* 67 N. J. L. 413, 51 Atl. 710. Whether the maker of a machine which he sells to another is liable to a third person for injuries arising from defects in its construction is a question raised in numerous cases. The weight of authority is against any such liability, except "where the thing causing the injury is of a noxious or dangerous kind," or "where the defendant has been found guilty of fraud or deceit in passing off the thing." *McCaffrey v. Mossberg & G. Mfg. Co.* (R. I.) 55 L. R. A. 822, 50 Atl. 651. It may be that the principle of these cases would relieve the defendants from direct liability to the plaintiffs, if the ground of action arose upon their engagements to furnish steam for heating purposes to the Drake & Sanborn Company from an independent plant operated by themselves. Such facts may present a question of difficulty, but its consideration is not now necessary.

The claim presented by the declaration is not merely for furnishing an insufficient supply of steam, but it is for the negligent and unskillful management of machinery designed to protect all of the occupants of the building from the danger from which the plaintiffs suffered. It is also alleged that the exercise of ordinary care in the management of the boilers would have prevented the injury, and that the defendants were at the time in the sole and exclusive possession of the heating machinery, and were operating it. "The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law." *Buch v. Amory Mfg. Co.* 69 N. H. 257, 261, 44 Atl. 809, 811. The mere possession, therefore, of the means by which harm could be averted from the plaintiffs imposed upon the defendants no legal obligation to protect them. Pos-

session merely of the boiler house and machinery did not impose upon the defendants any legal obligations to put the heating devices in operation. But the declaration goes further, and alleges that the defendants were in fact operating the machinery, and the negligence relied upon is the want of skill and care in what the defendants were assuming to do.

Assuming to operate the machinery for the purpose for which it was designed,—to protect all the occupants of the building, including the plaintiffs,—the law imposes upon the defendants, by force of such assumption, the obligation to exercise ordinary care and skill in doing what they attempted to do. *Eduards v. Lamb*, 69 N. H. 599, 50 L. R. A. 160, 45 Atl. 480; *Gill v. Middleton*, 105 Mass. 477, 479, 7 Am. Rep. 548; *Baird v. Daly*, 57 N. Y. 236, 240, 241, 15 Am. Rep. 488. This obligation arises, not from the contract, but from the action undertaken. There is a privity, not of contract, but of duty. It may be conceded that no liability would attach if the defendants, in violation of their contract, had ceased to manage the boilers. The charge is of negligent management while still in control; the duty violated is the obligation to exercise care so long as they retained control. Upon the facts stated in the declaration, the case is as if the defendants had assumed to hold closed a valve which, closed, prevented the flow of water into the plaintiffs' premises. Knowing that if the water escaped harm would result to others, the duty would rest upon them—at least, toward all for whose protection the device they assumed to operate was designed—to exercise care in what they did. They could not carelessly abandon their voluntarily assumed duty.

In the present case, upon the facts alleged, the defendants were holding back the water by supplying heat. While under no obligation, so far as the plaintiffs were concerned, to furnish heat or hold back the water, they could not suddenly cease from their self-appointed task without care as to what might happen from such action. If the pipe in the attic froze because no steam was admitted to the steam pipes upon that floor, there would be no liability, because the defendants did not assume to so protect the pipes. As tending to show that the defendants were not in fact operating the heating plant for the protection of the occupants of the building, the contract would, of course, be material. If they were operating it for the purpose of heating their own building merely, or portions of the Drake & Sanborn mill from which no harm came, they are not liable. The defendants, so far as the Drake & Sanborn Company were concerned, were the agency employed by them to operate the heating plant common to both mills. Though independent contractors, so that Drake & Sanborn were not liable for their casual acts of negligence under the rule of *respondeat superior*, the ground 60 L. R. A.

of the defendants' liability to others is explained upon the analogy of the liability of a servant to third parties.

As a general rule, a servant or agent who has contracted to perform a duty owed by his master or employer is liable only to his employer for mere failure to perform such duties, and is not liable to third parties. *Wilson v. Rich*, 5 N. H. 455; *Hill v. Caverly*, 7 N. H. 215, 26 Am. Dec. 735; *Denny v. Manhattan Co.* 2 Denio, 115, 5 Denio, 639; *Murray v. Usher*, 117 N. Y. 542, 546, 547, 23 N. E. 564; *Lane v. Cotton*, 12 Mod. 473, 478; 1 Ch. Pl. 75; *Story, Agency*, §§ 308, 309; 1 Shearm. & Redf. Neg. § 243. The principle is the same as in the cases cited as to the construction of a machine under contract with a third party. The liability cannot arise out of the engagements of the contract, but only from such duty as the law implies from the use and possession of the tools and appliances of the master. So long as the servant does nothing, his contract creates no liability to third persons, but the moment he enters upon the work the obligation of care arises. He cannot create a dangerous situation, and suddenly abandon the work without care for the danger of others. He is bound to the same obligation of care in stopping the machine as in starting it. *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437, 137 Mass. 1.

It is suggested that the failure of the Drake & Sanborn Company to maintain an inspection of the building by a watchman was the proximate cause of the injury to the plaintiffs. The plaintiffs cannot recover here unless the fault complained of was the proximate cause of their damage. If ordinary care on the part of the Drake & Sanborn Company, which they were bound to exercise to perform their duty to keep the water from the plaintiffs, would have detected the escape of the water and prevented the injury to the plaintiffs, their failure to exercise such care would constitute the proximate cause, not of the bursting of the pipes, but of the injury to the plaintiffs. The facts alleged of the necessity of heating to prevent injury to the plaintiffs' goods by water negative the suggestion that any negligence except that in the management of the heating plant was legal cause for the injury. If the suggestion is sustained by evidence at the trial, the question will be raised. It is sufficient now to say that the defendants are liable only for damage which was the proximate result of their unskilful management of the heating plant. They are not liable to those as to whose injury their negligence was only a remote cause, if the proximate cause of the injury was the failure of third parties to perform a positive duty owed by them to the plaintiffs.

The defendants' knowledge of the plaintiffs' situation and the character of the probable damage to their property by water may be important upon the question whether the

defendants acted with ordinary care under all the circumstances as they knew or ought to have known them. If the plaintiffs consider an amendment of the declaration as suggested advisable, application for leave to

make such amendment can be made to the superior court.

Exceptions overruled.

All concur.

RHODE ISLAND SUPREME COURT.

Annie McGARR

v.

NATIONAL & PROVIDENCE WORSTED MILLS.

(.....R. L.....)

1. A mother who owns the property, takes care of the family, pays the bills, and who, by express direction amounting to a relinquishment of the father's right, is entitled to the earnings of their child, may maintain an action to recover for the loss and expense to which she is subjected by injuries negligently inflicted by a third person upon the child.
2. Evidence that, in repairing a belt which parted where the ends were laced together causing injury to an employee, a double row of holes was substituted for a single one, is inadmissible upon the question of the employer's negligence.
3. Evidence as to the manner of repairing a belt which parted and caused injury to an employee is not admissible to corroborate witnesses who testify as to the custom with respect to the preparation of belts.
4. In an action to recover for injuries to an employee by being struck by a parted belt, a requested instruction that, if she was not hit by the belt, negligence in its maintenance was immaterial, should be given.
5. Loss of the child's society is not an element of the damage to be awarded a parent for negligent injuries to it.

(October 13, 1902.)

PETITION by defendant for a new trial after verdict in plaintiff's favor in an action brought to recover damages for the loss of service of plaintiff's minor daughter, and the expenses incurred in her treatment, because of a personal injury alleged to have been inflicted upon her by defendant's negligence. *Granted.*

The facts are stated in the opinion.

Mr. Walter B. Vincent, for defendant:

The plaintiff, the mother, has no right of action against the defendant for loss of services (1) because she is not bound to support the child, and (2) because, the alleged accident having occurred in the lifetime of the father, a right of action accrued to him

NOTE.—As to right of mother to bring action for tort on behalf of minor daughter, see, in this series, *Williams v. Pope Mfg. Co.* (La.) 50 L. R. A. 816.

As to right of mother to maintain action for death of child, see *Atlanta & C. Air Line R. Co. v. Gravitt* (Ga.) 26 L. R. A. 553, and *Hennessey v. Bavarian Brewing Co.* (Mo.) 41 L. R. A. 385.

60 L. R. A.

which could not thereafter become detached and attach itself to another person.

At common law a mother has no right of action for damages for the injury of her minor child, and no right to recover for loss of services.

Citizens' Street R. Co. v. Willooby, 15 Ind. App. 312, 43 N. E. 1058; *Com. v. Murray*, 4 Binn. 487, 5 Am. Dec. 412; *Schouler, Dom. Rel.* 5th ed. § 254; *Worcester v. Marchant*, 14 Pick. 510; *Pray v. Gorham*, 31 Me. 240.

The cause of action having once attached to the father, it cannot become detached and attach itself to another person.

Matthews v. Missouri P. R. Co. 26 Mo. App. 75; *Geraghty v. New*, 7 Misc. 30, 27 N. Y. Supp. 403; *Pray v. Gorham*, 31 Me. 240.

Messrs. John W. Hogan and Philip S. Knauer, for plaintiff:

The parent of an infant child injured by defendant's negligence may recover the value of the services of the child while so incapacitated, and the expenses necessary to be incurred to restore the child to health, including medical attendance and nursing.

Drew v. Sixth Ave. R. Co. 26 N. Y. 49; *Dollard v. Roberts*, 130 N. Y. 269, 14 L. R. A. 233, 29 N. E. 104; *Buck v. People's Street R. Electric Light & P. Co.* 46 Mo. App. 555; *Kennedy v. New York C. & H. R. R. Co.* 35 Hun, 186.

The parent may recover the reasonable value of his own services in care and nursing.

Barnes v. Keene, 132 N. Y. 13, 29 N. E. 1090; *Schmitz v. St. Louis, I. M. & S. R. Co.* 46 Mo. App. 380; *Cuning v. Brooklyn City R. Co.* 109 N. Y. 95, 16 N. E. 65; *Dennis v. Clark*, 2 Cush. 347, 48 Am. Dec. 671; *Black v. Carrollton R. Co.* 10 La. Ann. 37, 63 Am. Dec. 253; *Union P. R. Co. v. Jones*, 21 Colo. 347, 40 Pac. 891; *Harford County v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Matthewson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339.

The right of action to the master grows out of loss of service sustained by the master, and the same principle has been applied with reference to parents.

Buswell, Personal Injuries, §§ 10-13; 2 *Shearm. & Redf. Neg.* § 763; *Thomas, Neg.* p. 463; *Schouler, Dom. Rel.* §§ 258, 486; *Hodson v. Stallebrass*, 11 Ad. & El. 305.

Generally, any person who stands in loco parentis, and who is entitled to the service of the child, may recover.

Wood, Mast. & S. §§ 244, 255, 256; *Fernsler v. Moyer*, 3 Watts & S. 416, 39 Am. Dec. 33; *Davidson v. Goodall*, 18 N. H. 423;

Monnell v. Thomson, 2 Car. & P. 303; *Edmonson v. Machell*, 2 T. R. 4; *Irvine v. Dearman*, 11 East, 23; *Maguinay v. Saudak*, 5 Sneed, 146; *Bracy v. Kibbe*, 31 Barb. 273; *Kinney v. Laughenour*, 89 N. C. 365; *Ball v. Bruce*, 21 Ill. 161; *Harper v. Luffkin*, 7 Barn. & C. 387; *Martinez v. Gerber*, 3 Mann. & G. 88.

This right to the child's services is naturally in the father, but he can surrender the right to another by contract or otherwise; as—

1. By binding the child as an apprentice. *Ames v. Union R. Co.* 117 Mass. 541, 19 Am. Rep. 426.

2. By binding the child in service to another.

Day v. Everett, 7 Mass. 145; *Campbell v. Cooper*, 34 N. H. 62; *State ex rel. Hodgdon v. Libbey*, 44 N. H. 322, 82 Am. Dec. 223.

3. By allowing another person to so act that he stands in loco parentis.

Whitaker v. Warren, 60 N. H. 26, 49 Am. Rep. 302; *Moritz v. Garnhart*, 7 Watts, 302, 32 Am. Dec. 762; *Morse v. Welton*, 6 Conn. 350, 547, 16 Am. Dec. 73; *Johnson v. Terry*, 34 Conn. 263; *Cooney v. Lincoln*, 20 R. I. 186, 37 Atl. 1031; *Seymour v. Felious*, 12 Jones & S. 126, 77 N. Y. 179; *Lockwood v. Cullin*, 4 Robt. 129; *Mack v. Mack*, 3 Hun, 323; *Suau v. Caffé*, 122 N. Y. 312, 9 L. R. A. 593, 25 N. E. 488; *Schouler, Husb. & W.*, § 386; *Rivers v. Carleton*, 50 Ala. 40.

The mother was legally entitled to the services of her daughter at the time of the injury.

The wife has all the parental duties and obligations immediately upon the death of the husband.

Natchez, J. & O. R. Co. v. Cook, 63 Miss. 38; *Harford County v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Horgan v. Pacyna Mills*, 158 Mass. 404, 33 N. E. 581; *Kennedy v. New York C. & H. R. R. Co.* 35 Hun, 187.

The mother is equally bound, under the pauper statutes, to maintain her children, even during the lifetime of the husband. This entitles her to recover for loss of their services.

Moritz v. Garnhart, 7 Watts, 302, 32 Am. Dec. 762; *Matthewson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339; *Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288; *Union P. R. Co. v. Jones*, 21 Colo. 347, 40 Pac. 891.

The loss of the comfort, attention, and society of a child who has been injured is an element of damages to be taken into consideration by a jury in a suit by a parent or person in loco parentis.

Louisville, N. A. & C. R. Co. v. Rush, 127 Ind. 545, 26 N. E. 1010.

Plaintiff is entitled to recover for loss of service and wages, for medicines and proper medical attendance, and also for her own time and labor in nursing.

Watson, Damages for Personal Injuries, pp. 332, 604; 2 Shearm. & Redf. Neg. § 763; *Buswell, Personal Injuries*, § 13; *Dennis v. Clark*, 2 Cush. 347, 48 Am. Dec. 671; *Cum-60 L. R. A.*

ing v. Brooklyn City R. Co. 109 N. Y. 96, 16 N. E. 65; *Black v. Carrollton R. Co.* 10 La. Ann. 33, 63 Am. Dec. 253; *Connell v. Putnam*, 58 N. H. 534; *Schmitz v. St. Louis, I. M. & S. R. Co.* 46 Mo. App. 380; *Union P. R. Co. v. Jones*, 21 Colo. 340, 40 Pac. 891; *Bradbury v. Benton*, 69 Me. 199; *Harford County v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739.

Damages for loss of service may include time after majority of child, upon reasonable expectation of pecuniary benefit.

17 Am. & Eng. Enc. Law, p. 391; *Johnson v. Missouri P. R. Co.* 18 Neb. 690, 26 N. W. 347; *Johnson v. Chicago & N. W. R. Co.* 64 Wis. 425, 25 N. W. 223; *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504, 18 N. E. 103.

The plaintiff's right to recover is not limited to the value of the child's service during minority.

St. Louis, I. M. & S. R. Co. v. Davis, 55 Ark. 462, 18 S. W. 628; *McLean County Coal Co. v. McVey*, 38 Ill. App. 158; *Colorado Coal & I. Co. v. Lamb*, 6 Colo. App. 255, 40 Pac. 251; *Flaherty v. New York, N. H. & H. R. R. Co.* 19 R. I. 604, 35 Atl. 308.

Tillinghast, J., delivered the opinion of the court:

This is an action of trespass on the case for negligence, and is brought to recover damages for the loss of service of the plaintiff's minor daughter, Sarah McGarr, and also to recover for the expenses incurred by the plaintiff for medicines, medical attendance, and nursing, occasioned by reason of personal injuries sustained by said Sarah while in the employ of the defendant corporation. Said Sarah McGarr, by her father and next friend, Owen McGarr, had previously brought suit against the defendant to recover damages for personal injuries growing out of the accident in question (see 22 R. I. 347, 47 Atl. 1092), and had obtained a substantial verdict therein; and thereafterwards the mother, Annie McGarr, brought this action to recover for the consequential damages suffered by herself on account of said injuries to her daughter, and upon trial thereof a verdict was rendered in her favor for the sum of \$9,500. The case is now before us upon the defendant's petition for a new trial upon the grounds (1) that the verdict is against the law and the evidence; (2) that the presiding justice erred in admitting certain evidence against the objection of the defendant, and also erred in refusing to admit certain evidence offered by the defendant; (3) that the presiding justice also erred in his instructions to the jury; and (4) that the damages awarded by the jury were excessive and unjust. At the trial of the case all of the questions involved, including the question of the defendant's negligence, were considered as fully as if there had been no prior verdict and judgment in favor of the daughter, Sarah McGarr. The proof shows that she was employed by the defendant as a spinner, and at the time of the accident, January 6, 1899, was engaged in tending a

spinning frame in No. 6 mill of the defendant company. The spinning frame was run by an overhead belt some 10 feet from, and substantially parallel with, the floor. The claim of the plaintiff is that this belt, by reason of its improper and insufficient lacing, suddenly broke, and that one end of it struck her daughter upon the side of her head, inflicting severe injuries, from which major hysteria developed, together with other physical ailments of a very serious and permanent nature. Owen McGarr, the father of Sarah and the husband of the plaintiff, died on November 5, 1900.

Defendant's counsel starts out with the broad contention that the action will not lie, on the ground that the plaintiff, as the mother of said Sarah, is not entitled to maintain it: First, because she was not bound to support her child, Sarah; and, second, because the right of action for loss of service, having become vested in the father during his lifetime, could not become divested and vest in the mother after his death. Having taken this position at the jury trial, the defendant objected to the introduction of any testimony as to damages. And as the trial court overruled this objection, subject to exception by the defendant, the first question which logically presents itself is, whether the action will lie.

1. That at the common law the father is entitled to the benefit of his minor children's labor while they live with him and are supported by him, there can be no doubt. His right to their services, like his right to their custody, rests upon the parental duty of maintenance, and is said to furnish some compensation to him for his own services rendered to the child. Schouler, Dom. Rel. 5th ed. § 252; *Brown v. Smith*, 19 R. I. 319, 30 L. R. A. 680, 33 Atl. 466. The mother, on the other hand, not being thus bound for the maintenance of her minor children, has no implied right, at the common law, to their services and earnings. The common-law doctrine as thus briefly stated, however, has been greatly relaxed by modern decisions in this country, if not in England; and the strong tendency of the courts in this country, as well stated by Field, C. J., in *Horgan v. Pacific Mills*, 158 Mass. 402, 33 N. E. 531, "is to give to a widow left with minor children, who keeps the family together and supports herself and them with the aid of their services, very much the same control over them and their earnings during their minority, and to impose on her, to the extent of her ability, much the same civil responsibility for their education and maintenance, as are given to and imposed on a father." The chief justice then stated the opinion of the court in that case to be as follows: "We are of opinion that when a minor child lives with its mother, who is a widow, and the child is supported by the mother, and works for her as one of the family, the mother is entitled to recover for the loss of services of the child, and for labor performed and expenses reasonably incurred in the care and cure of the child, so far as they

are the consequences of an injury to the child negligently caused by the defendant." This statement of the law is abundantly supported by the authorities cited in the opinion, and by numerous others which might be added. See 17 Am. & Eng. Enc. Law, p. 387, and cases collected in notes 1 and 2; *Drew v. Sixth Ave. R. Co.* 26 N. Y. 49; *McElmurray v. Turner*, 86 Ga. 215, 12 S. E. 359; 2 Kent, Com. 205, 206; *Nightingale v. Withington*, 15 Mass. 274, 8 Am. Dec. 101; *Natches, J. & C. R. Co. v. Cook*, 63 Miss. 38; *Harford County v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Kennedy v. New York C. & H. R. R. Co.* 35 Hun, 186; *Moritz v. Garnhart*, 7 Watts, 302, 32 Am. Dec. 762; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Matthews v. Missouri P. R. Co.* 26 Mo. App. 75.

2. It being well settled, then, that a widow may maintain an action for loss of services of her minor child, the next question which arises is, whether the plaintiff can maintain her action, the cause of which accrued prior to the death of her husband. The answer to this question, in so far as it relates to the plaintiff's right to recover for loss of service, etc., prior to the death of the father, depends primarily upon the relation which existed between the mother and daughter at the time of the accident as to the right of service; that is, whether the mother or the father of the girl at that time was legally entitled to her services. And as the father was presumably entitled thereto, it devolves upon the plaintiff to prove that he had in some way relinquished his right or conferred it upon her. While the right to the child's services is naturally in the father, he can doubtless surrender this right to another by contract or otherwise, in various ways, as (a) by binding the child as an apprentice (*Ames v. Union R. Co.* 117 Mass. 541, 19 Am. Rep. 426); (b) by allowing another person to so act that he stands in loco parentis (*Whitaker v. Warren*, 60 N. H. 26, 49 Am. Rep. 302). This principle is fully recognized in *Morse v. Welton*, 6 Conn. 547, 16 Am. Dec. 73, where it was held that the right of a parent to the services of his minor children "is bottomed on his duty to maintain, protect, and educate them. . . . But this right and this duty may be transferred to another, and may be relinquished to a child." The law doubtless is, however, that the father cannot permanently transfer his rights and duties to another, except by deed. *State ex rel. Hodgdon v. Libbey*, 44 N. H. 321, 82 Am. Dec. 223.

The testimony upon which the plaintiff relies to show that the services of Sarah belonged to her at the time of the accident is to the effect that the plaintiff is, and long has been, the real head of the family; that she owns the property, takes care of the family, and pays the bills; and that, by express direction from the father in his lifetime, she was entitled to, and did, receive all of the earnings of the daughter, Sarah. She employed the physician who has at-

tended the daughter since the accident, and is personally responsible to him for his services. Dr. O'Keefe testifies that he rendered his services at the request of the mother; that the night he was called he saw the case would be prolonged, and he had a talk with the mother, and she told him she wanted him to attend her daughter, and would see him paid; and that his services have been charged to her. The testimony further shows that the father had no property, and no income except his current earnings. In view of this state of the proof, plaintiff's counsel contends that the wages of Sarah were the property of the mother, for the recovery of which she could have maintained an action. In other words, the contention is that the arrangement and understanding between the father and mother of Sarah as to her wages, taken in connection with the other facts aforesaid, amounted to a relinquishment by the father of his right to the daughter's services and earnings and an assignment thereof to the mother, and hence that the latter can recover for the loss thereof. We think this is so. It is true, the evidence fails to show the making of any formal agreement between the plaintiff and her husband as to the child's services and earnings; but, as it appears that there was an understanding between them to the effect that they belonged to the mother, and as it also appears that the mother managed the affairs of the family, owned the property, and contracted and paid the bills, we think this is sufficient to entitle her to maintain the action, not only for loss of services, etc., since the death of the father, but also prior thereto. If the case were one which simply showed the payment to the mother of the child's wages by direction of the father, we should not deem this sufficient to enable the mother to maintain an action of this sort, as it is matter of common knowledge that for prudential and other reasons this is frequently done. But where, as in the case at bar, there is other evidence which, taken in connection with this, shows a relinquishment by the father of his right to the child's services, and an assumption of his duties to the child by the mother, then she can maintain the action. In a leading New York case upon assignment of claim by husband to wife, the wife was allowed to collect, in an action for the recovery of the value of services, for work and labor done by plaintiff's husband and assignor for the defendant. In rendering its opinion, the court said: "The defendant contends that the plaintiff's title to the claim in suit is invalid because acquired by assignment directly from her husband. While a different rule might prevail if the rights of the husband's creditors were concerned, transfers of personalty made by husband to wife are sustained as valid between the parties, and choses in action are held to pass by delivery from one to the other without a written assignment." *Seymour v. Fellows*, 12 Jones & S. 126. This case was affirmed upon an appeal in an opinion writ-

ten by Danforth, J., who said: "The appellant objects that the assignment of the cause of action, having been made directly to the plaintiff by her husband is void. The rights of creditors are not in question, and we think the court below properly overruled the objection." *Seymour v. Fellows*, 77 N. Y. 179. In *Harper v. Luffkin*, 7 Barn. & C. 387, the father was allowed to recover for the seduction of his married daughter, although her husband had not consented to his wife becoming the servant of her father. In delivering the opinion of the court, Lord Tenterden, Ch. J., in speaking of the husband, said: "He may put an end to that relation of master and servant, but, unless he interferes, it by no means follows that such a relation may not exist, especially as against third persons who are wrongdoers. It appears to me that such a relation might, and did in fact, exist in this case, and that, in the absence of any interference by the husband, it is not competent to the defendant to set up his rights as an answer to the action." In *Parker v. Meek*, 3 Sneed, 29, the mother was held entitled to recover for loss of services consequent upon the seduction of her daughter, who was twenty-four years of age, although the father of said daughter was living at the time of the seduction. In delivering the opinion of the court, McKinney, J., said: "Where the action is case, it is no more necessary in the case of a daughter of full age than in that of a minor that she should have been living in the family of the parent at the time of the seduction. Nor is it any more important in the one than in the other who was entitled to or enjoying her services at the time of the injury. The only inquiry of importance in either case is, On whom has the consequential injury fallen? And such person, whether father, mother, or other person standing in *loco parentis*, is entitled to legal redress in the present form of action. . . . The present action may be maintained by the mother, although by reason of the fact that the father was living at the time of the seduction, and the seduced was at the time a member of his family and rendering service to him, the mother was not then, nor could she be, in law, entitled to the services of the daughter. But, the latter having remained with the mother, after the father's death, in the presumed relation of servant, and the trouble and expenses of lying in having fallen upon her, the action is maintainable upon this ground." In *Sargent v. —*, 5 Cow. 106, the mother, who was a widow, bound her minor daughter by indenture as a servant until she should be eighteen years of age. During that period the daughter was seduced, and the indenture canceled. Thereupon the daughter returned to her mother, who then sued for seduction in an action on the case. The court held that upon the daughter's return the relation of master and servant was restored, and that it was not material who was entitled to the services at the time of the seduction, but "the real inquiry is, Upon

whom has the consequential injury fallen,—the expense attending her confinement and the loss of her services?” In neither of these cases was there any claim that the mother had actually acquired the right to the service of the child at the time of the injury, as is shown in the case at bar. Indeed, the right of recovery in those cases seems to be based upon a consequential injury independent of any such considerations. The last-named case was followed in *Ingersoll v. Jones*, 5 Barb. 661; *Bracy v. Kibbe*, 31 Barb. 273; *Gray v. Durland*, 50 Barb. 100; *Furman v. Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441.

An examination of the numerous cases bearing upon the general question involved shows that the consensus of opinion is to the effect that, in cases of wrongful injury, whoever, by reason of right or relationship, suffers consequential damage thereby, and may be liable for necessary expenses consequent upon such injury, is entitled to recover against the wrongdoer the amount of such damages and necessary expenses. The right of recovery is based, both upon the right to service, and upon the liability to support and maintain the person injured, where the result of the injury may be to render the person injured a public charge. The right to such recovery, in so far as it is based upon the liability to support the person injured, rests upon the pauper statutes, so called, beginning with the 43d Elizabeth, which is as follows (chap. 2, § 7): “And be it further enacted that the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person in that manner and according to that rate as by the justices of the peace of that county, where such sufficient persons dwell, or the greater number of them, at their general quarter sessions shall be assessed, upon pain that every one of them shall forfeit 20 shillings for every month which they shall fail therein.” Our own pauper statute (Gen. Laws, chap. 79, § 5) is a practical re-enactment thereof, and is as follows: “Sec. 5. The kindred of any such poor person, if any he shall have, in the line or degree of father or grandfather, mother or grandmother, children or grandchildren, by consanguinity, or children by adoption, living within this state and of sufficient ability shall be holden to support such pauper in proportion to such ability.” A number of courts have upheld the right of one standing in *loco parentis* to a child to recover for loss of services of such child, resting such right upon the liability of such person for the maintenance of the child under statutes similar to 43 Elizabeth. Thus in *Moritz v. Garnhart*, 7 Watts, 302, 32 Am. Dec. 762, the court said of a grandparent (and in that case it is pertinent to note that both the mother and putative father of the child were alive): “He is, indeed, not a parent, but is chargeable by the poor laws with the duty of one. 60 L. R. A.

The rights of a parent are pupillary, and, as they are given for the benefit of the child, the person in the exercise of them must necessarily have a correlative remedy for their infraction.” In *Mattheusson v. Perry*, 37 Conn. 435, 9 Am. Rep. 339, the court said: “Our statute concerning the support of paupers by relatives imposes the obligation to provide for children alike on father and mother, making each liable if of sufficient ability. Gen. Stat. title 50, § 40. The provisions of this statute are taken substantially from 43 Eliz. If the right to receive the earnings of minor children, which is conceded to the father, be made to rest on the liability of the father for their support, the mother, having the same liability, should be entitled to the same right.” See also *Hammond v. Corbett*, 50 N. H. 501, 9 Am. Rep. 288; *Whitaker v. Warren*, 60 N. H. 26, 49 Am. Rep. 302; *Union P. R. Co. v. Jones*, 21 Colo. 347, 40 Pac. 891.

The uncontradicted evidence in the case at bar shows that the plaintiff has supported, cared for, and nursed her said daughter, Sarah, since the happening of the accident in question, and also that she has lost the benefit of her services during all of said time. And we are of the opinion, and therefore decide, that, upon the facts and law as above stated, the rulings of the trial court, whereby the plaintiff was permitted to introduce evidence of loss of services, etc., from the date of the accident, were correct, and should be sustained. The exceptions to such rulings are therefore overruled.

3. Amongst the testimony which the plaintiff was permitted to introduce, subject to defendant's exception, bearing upon the question of the defendant's negligence in causing the accident, was the following, viz. She was permitted to prove the manner in which the belt which broke and struck the daughter was subsequently repaired. The witness, Joseph Higginbottom, after having testified that at the time when the belt broke there was only one row of holes for the lacing in each end where it parted, was asked the following question:

Q. What did Mr. Smith do with the belt when he fixed it?

A. He punched holes over again on each end of the belt.

Q. When he punched them over again, how many rows of holes were there on each side?

A. Two rows.

Counsel for defendant objected to this, as it took place after the accident, saying: “They may have put on a new belt and done a great many things suggested by this accident, but you cannot put in testimony as to what occurred afterwards. The question is whether this belt at the time was proper. That is all. Sometimes an accident may happen, and that may suggest for the first time that something else might be done.” After considerable discussion by counsel upon both sides, the court ruled that the

testimony was admissible. Last question read to witness, as follows:

Q. When he punched them over again, how many rows of holes were there on each side?

A. Two rows of holes on each side.

Q. On each side of what?

A. Of the belt.

While there has been some difference of opinion in the courts of the several states upon the question whether it is competent for a plaintiff in an action of this sort to prove that changes were made after an accident, looking to the improvement and safety of the appliance or structure causing the injury, it is now the "well-settled rule of law," as said by Rogers, J., in delivering the opinion of this court in the recent case of *Morancy v. Hennessey*, 24 R. I., at page 209, 52 Atl. 1021, "that evidence of precautions against further accidents, taken after an accident, is not competent to show antecedent negligence." In *Morse v. Minneapolis & St. L. R. Co.* 30 Minn. 465, 16 N. W. 358, the question here involved was fully considered, and, notwithstanding several previous decisions of the court to the contrary, it squarely and strongly took the ground that such evidence was not only inadmissible, but that its admission was sufficient ground for a new trial. The court said: "But on mature reflection we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is, on principle, wrong; not for the reason given by some courts, that the acts of the employees in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." In *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309, Earl, J., in delivering the opinion of the court, used the following language, which is very pertinent to the case at bar: "After an accident has happened, it is ordinarily easy to see how it could have been avoided; and then, for the first time, it frequently happens that the owner receives his first intimation of the defective or dangerous condition of the machine or structure which caused or led to the accident. Such evidence has no tendency whatever, we think, to show that the machine or structure was not previously in a 60 L. R. A.

reasonably safe and perfect condition, or that the defendant ought, in the exercise of reasonable care and diligence, to have made it more perfect, safe, and secure. While such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is undoubtedly to prejudice and influence the minds of the jury. Hence, in this court, and generally in the supreme court, it has been held erroneous to receive such evidence." The recent Pennsylvania case of *Baron v. Reading Iron Co.* 202 Pa. 274, 51 Atl. 979, discusses the question very fully, and arrives at the same conclusion; stating in summing up that "to the same effect are the decisions of nearly every state in which the subject has been considered." And this statement is well fortified by the numerous cases cited. See also *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309, reversing judgment for plaintiff; *Getty v. Hamlin*, 127 N. Y. 636, 27 N. E. 309, reversing judgment for plaintiff; *Payne v. Troy & B. R. Co.* 9 Hun, 526; *Nalley v. Hartford Carpet Co.* 51 Conn. 524, 50 Am. Rep. 47; *Ely v. St. Louis, K. C. & N. R. Co.* 77 Mo. 34; *Hudson v. Chicago & N. W. R. Co.* 59 Iowa, 581, 44 Am. Rep. 692, 13 N. W. 735; *Hawitt v. Taunton Street R. Co.* 167 Mass. 483, 46 N. E. 106. See also cases collected in "Negligence Rules, Decisions, and Opinions," by Edward B. Thomas, title Subsequent Acts and Statements, pp. 583-593.

Of course, the main purpose of the evidence introduced as to the change in the manner of lacing the belt in question after the accident was to show a recognition by the defendant of its negligence in not having properly laced it before the accident. And that such evidence might very naturally have been so taken and construed by the jury, there can be no doubt. Its admission, therefore, was reversible error. *Graham v. Coupe*, 9 R. I. 478; *Tourgee v. Rose*, 19 R. I. 432, 37 Atl. 9; *Kolb v. Union R. Co.* 23 R. I. 72, 49 Atl. 392; *Corcoran v. Peekskill*, 108 N. Y. 151, 15 N. E. 309.

But plaintiff's counsel argues in his brief that the testimony in question "was proper as showing the condition of the joint at the time it broke, and explaining why it broke, and as corroborating the testimony of the witnesses Higginbottom and Sarah McGarr to the effect that this 'section hand' who had charge of these belts was accustomed to make joints and lace them with only one row of holes punched upon either side." Doubtless it did show, or strongly tend to show, why, in the judgment of the defendant's servant who repaired it, it was defectively fastened together; but, as already suggested, this knowledge might have been, and probably was, gained by reason of the accident, and, hence, cannot properly be attributed to the defendant before the accident happened. Its showing the condition of the belt at the time it broke, and explaining why it broke, as argued, is not apparent; for at the time it broke it was, according to the testimony produced by the plaintiff, in a different condition, namely, there

was but one row of holes in each end of the belt where it was laced, whereas afterwards a second row of holes was punched in each end thereof, and two rows of lacing inserted. As to the testimony being proper as corroborating the testimony of the witnesses Higginbottom and Sarah McGarr, as argued, it is sufficient to reply that we know of no rule of evidence which permits a witness to be corroborated in this manner.

Plaintiff's counsel further argues that "at all events, in view of the other testimony in the case, the admission of this testimony was harmless to the defendant, and so is no ground for a new trial." As already intimated, we cannot agree to this contention. On the contrary, we are of the opinion that it was very prejudicial to the defendant, and that its admission was such error as compels the granting of a new trial. The exception to the admission of the testimony now under consideration is therefore sustained.

A number of other exceptions were taken by the defendant to the admission and rejection of testimony during the trial, but an examination thereof fails to satisfy us that any of them are tenable, or that they are of sufficient importance to require special consideration.

4. There is an exception to the refusal of a request by the defendant to charge the jury, however, which we think should be sustained. We refer to the fourth request, which was as follows: "(4) If the belt broke and passed over the girl's head without hitting her, the matter of lacing and inspection is not material." This request should have been granted. The only claim which the plaintiff alleges and declares upon, and the only one which the evidence tends to sustain, and hence, of course, the only one upon which she can recover, is that the belt broke and struck the girl, and thereby caused the injury complained of. It therefore necessarily follows that, if she was not hit by the belt, the action cannot be maintained. This exception is therefore sustained.

5. There is also an exception by the defendant to the granting of a request made by the plaintiff to charge the jury to the effect that damages might be awarded for loss of the society of the child, caused by the accident. The court instructed the jury that, if the plaintiff lost the society of the child "through the wrongful act of another, she would be entitled to recover for that." This was error. In an action of this sort, the proper measure of damages is the pecuniary value of the child's services from the time of the injury until it attains its majority, less its support and maintenance, together with the necessary costs and expenses incident to the care and cure of the child,—such as those for medical and surgical attendance. 2 Sedgw. Damages, 7th ed. p. 520, note "b," and cases cited. But the jury are not at liberty to consider the fact that the plaintiff has been deprived of the comfort and society of the child, nor can they consider any physical or mental suffering or

pain which may have been sustained by the parent by reason of the injury to the child. *Louisville, N. A. & C. R. Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010; *Oakland R. Co. v. Fielding*, 48 Pa. 320; *Cowden v. Wright*, 24 Wend. 429, 35 Am. Dec. 633. In short, the measure of damages in such a case is the same as that which obtains in a case brought by a master for the loss of services of his servant or apprentice. It is therefore practically a business and commercial question only, and the elements of affection and sentiment have no place therein. Moreover, in the case at bar the plaintiff does not allege in her declaration that any damages were sustained by reason of the loss of the society of her daughter, but only that she sustained damages by reason of having been deprived "of the earnings and income and services of her minor daughter and servant," and in nursing and caring for her, as aforesaid. In actions for the seduction of a daughter and for the alienation of the affections of a wife, a different rule doubtless prevails, and damages may be recovered for the disgrace and humiliation brought upon the parent in the former class of cases, in addition to those sustained by loss of service,—*Cooley, Torts*, 2d ed. 271; 2 Greenl. Ev. 16th ed. § 579; 3 Sutherland, Damages, 2d ed. § 1283,—and for loss of the society and affection of the wife in the latter class. The defendant's exception to that part of the charge referred to is therefore sustained.

As we have come to the conclusion that a new trial must be granted, there is no occasion for us to consider the other grounds upon which the defendant's petition is based, namely, that the verdict is against the evidence, and that the damages awarded are excessive.

The verdict is set aside, and a new trial granted. Case remitted to the Common Pleas Division for further proceedings.

Albert B. CRAFTS

v.

Phebe A. CARR.

(.....R. L.....)

1. A third extension of time to file statement of evidence on a motion for new trial will be presumed to be within the time of a former extension, where it was duly allowed by the trial judge, and the statute requires extensions to be within the time of former ones, although the second one is not on file.
2. A statement of evidence on petition for new trial may be filed on the day "to" which the time for filing has been extended, since the extension includes the day to which it is granted.
3. A requested instruction that the petition sets out no cause of action

NOTE.—For services of attorney in defending or prosecuting suit for infant as necessities, see also, in this series, *Askey v. Williams* (Tex.) 5 L. R. A. 176, and cases in note thereto; also cases in note to *Kilgore v. Rich* (Me.) 12 L. R. A. on page 860.

against an infant under age is properly refused, where defendant was described as an infant, her guardian served with process, and the cause of action alleged to be for necessities furnished.

4. A promise by an infant to pay for necessities consisting of services of an attorney in conducting a lawsuit will be implied, where the suit was brought by her next friend, was legally proper, and the infant conferred with the attorney, appeared as a witness, and profited by the successful prosecution of the suit.
5. Services of an attorney in prosecuting for an infant an action to recover damages for an indecent assault on her are necessities.
6. A father is not bound to supply his infant daughter with counsel fees to prosecute an action for damages for an indecent assault on her.
7. Submission to the jury of the question whether or not services rendered to an infant were necessities is not available as error to defendant, who is sought to be held liable therefor, where the jury found them to be necessities, and the court would have been compelled to make the same ruling had it undertaken to decide the question.

(August 5, 1902.)

MOTION by defendant for new trial of an action brought to recover for services by plaintiff to defendant, in which a verdict had been rendered in plaintiff's favor. Denied.

The facts are stated in the opinion.

Mr. S. W. K. Allen for defendant.

Mr. Albert B. Crafts, in propria persona:

To November 8th does not include November 8th.

People ex rel. Elston v. Robertson, 39 Barb. 9.

Beneficial legal services in defense of the rights of an infant may be considered as necessities, and constitute a valid consideration for a deed to a share of the land recovered.

Searcy v. Hunter, 81 Tex. 644, 17 S. W. 372; *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Cundall v. Hascell* (R. I.) 51 Atl. 426; *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151; *Pardey v. American Ship Windlass Co.* 20 R. I. 147, 37 Atl. 706.

If the advice, direction, and assistance of an attorney in a lawsuit are accepted, though there is no express engagement or promise, a promise to pay therefor will be implied.

Ames v. Potter, 7 R. I. 265.

Plaintiff was employed by George H. Sprague as agent of his daughter. Acceptance of the services and the benefit of the trial render the daughter liable.

Ibid.

Rogers, J., delivered the opinion of the court:

This is defendant's petition for a new trial, after verdict for the plaintiff, of an 60 L. R. A.

action of assumpsit for counsel fees for services alleged to have been rendered to the defendant, who is a minor, in bringing and successfully prosecuting an action at law brought by the defendant, by her father and next friend, George H. Sprague, against one Joseph H. Brown, for an alleged indecent assault upon her.

1. After the petition for a new trial was filed, the plaintiff moved to dismiss it for the following reasons: The defendant, upon the rendition of the verdict against her, duly filed notice of her intention to claim a new trial, and asked for an extension of time to file statement of evidence, etc., which was granted, and time was extended to October 15, 1901. On October 31st the time was further extended to November 8th, on which last-named date the statement was filed, and has been allowed by the justice presiding at the jury trial. The plaintiff claims that, inasmuch as there is no written extension of time from October 15th to October 31st on file, the petition should be dismissed, as the last extension was not made "within any extension thereof," etc., as required by R. I. Gen. Laws, chap. 251, § 6, p. 864. The statute provides that within five days after verdict, or within any extension thereof from time to time on motion therefor, the justice may extend the time for filing statements to such time as he may prescribe. With such discretion in the justice, it is to be presumed that his action was regular, and that the extension from October 15th to October 31st has been lost. That a clerical error was committed by the defendant's attorney in dates is apparent, for he heads his original motion for time extension thus, "Adjourned June Session, A. D. 1891," instead of 1901, and asks that the time be extended to October 15, 1891, instead of 1901; the name of the county and the name of parties and the name of court being correctly given. The justice, in extending the time, gives the date of his action as July 10, 1901,—the very date of the rendition of the verdict,—and extends the time to October 15, 1901, so the clerical error is of no practical account.

2. The plaintiff also claims that filing the statement on November 8, 1901, is not a compliance with the extension to November 8, 1901. The invariable practice since the enactment of the judiciary act in 1893 by successive judges has been to construe the extension as inclusive of the day to which the extension was granted, and to allow statements so filed when correct; and the presiding justice has allowed the statement in this case. The construction so adopted and followed has become too securely established, in our opinion, to be now successfully attacked. For the reasons given, the plaintiff's motion to dismiss the petition for a new trial is overruled. The defendant petitions for a new trial on the ground that the trial justice erred in his rulings upon questions of law raised at the trial, and that said justice declined to rule and charge the jury as requested by the petitioner, and ruled against her requests. The defendant's requests which the justice refused to give,

and to which refusal the defendant excepted, are as follows, *viz.*: "(1) The declaration sets out no cause of action against the defendant, an infant under the age of twenty-one years. (2) The testimony discloses no cause of action against the infant defendant; the services rendered not being necessities as a matter of law, and the defendant never having ratified the claim after arriving at her majority. (3) If the defendant was an infant under the age of twenty-one years, the father could not bind her estate by any contract with the plaintiff for professional services." We think the first request was properly denied. In the second judicial district court, where the action was originally brought, the defendant was described as an infant, and her guardian was duly served with process as required by statute. The defendant demurred because the declaration did not set out that the services rendered by the plaintiff as an attorney were necessities. The case was tried, both on its merits on the general issue, and on the demurrer, evidence being put in as to necessities; and, while the district court was holding it for advisement, the plaintiff filed an amended declaration with the averment inserted, for the lack of which the defendant had demurred. Subsequently the district judge rendered a long decision in favor of the plaintiff, deciding that the services were necessities. Thereupon the defendant asked for a jury trial, and the case was certified to the common pleas division, where the defendant again demurred for the same reason as before, with the added ground that the declaration did not set out that the defendant had ratified the contract since attaining majority. The demurrer was overruled, and the case was tried to the jury on the questions whether the defendant had made a promise, and whether the services rendered were necessities that the defendant, under the circumstances of the case, was liable for; there being no pretense on the plaintiff's part that the defendant had ratified any promise made by her after attaining her majority. We think the declaration set out a cause of action against the defendant, an infant under twenty-one years, and the trial showed that the defendant's counsel fully understood and appreciated the cause set forth.

3. The next question raised is whether the plaintiff's services were necessities. The services rendered by the plaintiff were as follows: The defendant in the summer of 1898 was seventeen years old and unmarried. In August of that year her father, George H. Sprague, went to the plaintiff's office in Westerly, and told him of an indecent assault upon her by one Joseph H. Brown, and wanted a suit brought in order to protect her and others from similar assaults. The result of the consultation was that the plaintiff brought action against said Brown in the name of the defendant, by her father as her next friend, and after trial thereof the jury rendered a verdict in favor of the infant (being the defendant in the case at bar) for \$600, which verdict was sustained on a petition for a new trial, and 60 L. R. A.

judgment was entered on the verdict in June, 1899. Mr. Allen, who is counsel for the defendant in the case at bar, was counsel for the said Brown in the damage suit against him. When the plaintiff in the case at bar visited the clerk's office of the common pleas division with reference to getting out an execution in the damage suit against Brown, he found a paper filed June 13, 1899, signed by said Brown and by Phebe A. Carr (for Miss Sprague had been married then), to the effect that the case had been settled: but said paper was not signed by her father, George H. Sprague, her next friend, nor had any guardian then been appointed. Notwithstanding this peculiar settlement, execution was ordered to issue. The plaintiff in the case at bar, as shown by the statement of evidence, swore as follows, *viz.*: "I went to see her [the present defendant], and she was sick. I asked her if she had made that settlement, and she didn't answer at first, but finally admitted that on June 13th she was sent for by Mr. Allen to come to a neighbor's there, and she went without the knowledge of her father or mother, and they settled it up, taking a \$400 note. At this time she told me she didn't want to settle it, and wanted me to look out for her." The full judgment, amounting to \$663, was finally collected, but not without efforts made in court by said Brown to enforce the settlement. After the execution was collected, the amount was paid to the defendant's guardian, who had then been appointed. It is urged for the defendant that the plaintiff's claim for services is properly one against George H. Sprague, and not against her. The situation was this; a girl of seventeen, having no estate and no guardian, was the victim of an indecent assault. She had a father and mother, and her father, her natural guardian, so to speak, at once took steps for his daughter's protection and for compensation for her sufferings, and incidentally for the punishment of her assailant. Her father was naturally her next friend, and legally became such to enable a suit to be brought, as she, being a minor, could not, except under very extraordinary circumstances, bring it without the aid of a next friend to manage it, which the law presumes, from the disability of her infancy, she is unable properly to manage herself; the next friend being liable to the defendant for costs of suit in case the infant fails in the action. *Bliven v. Wheeler*, 23 R. I. 379, 50 Atl. 644. If the infant recovers, her estate would be enriched, and, as she would then have an estate, she would then require a guardian, to whom the amount recovered would be paid. If the suit against Brown was a legally proper one for the next friend to have aided the infant to bring, and the expense of counsel engaged therein was what is technically termed in law "necessaries," then the infant defendant would be liable for such necessities. It has been urged that the infant, *in propria persona*, did not promise the plaintiff in the case at bar to pay him for services, nor did she actually engage him. The father's duty as next

friend was to exercise his mature judgment in the management of the action which the immature judgment of the infant, the law presumed, was not equal to; and the very first occasion for the exercise of such judgment was in the employment of capable counsel. The daughter knew of the bringing of the suit, and profited by its successful prosecution. She must have conferred with counsel and appeared as a witness, and she certainly attempted to settle such action in a manner highly injurious to her own interests. An implied promise for necessities is sufficient (*Gay v. Ballou*, 4 Wend. 403, 21 Am. Dec. 168), and in the case at bar the circumstances, we think, are sufficient to imply a promise on the part of the infant defendant.

4. The next question to be considered is, Was the service rendered by the plaintiff, as an attorney at law, legal necessities for the minor? In 5 Bacon, Abr. Bouvier's ed. 116, it is stated that where infants "contract for necessities they are absolutely bound; and this, likewise, is in benignity to infants, for, if they were not allowed to bind themselves for necessities, no person would trust them, in which case they would be in worse circumstances than persons of full age. Therefore, it is clearly agreed by all the books that speak of this matter that an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessities, and likewise for his good teaching and instruction, whereby he may profit himself afterwards." Bouvier, in his Law Dictionary (vol. 2, p. 476), says: "The term 'necessaries' is not confined merely to what is requisite barely to support life, but includes many of the conveniences of refined society. It is a relative term, which must be applied to the circumstances and conditions of the parties." Dicey, in his work on Parties to Actions (p. 285), says: "The word 'necessaries,' as applied to an infant, extends beyond the sense which is given it in ordinary conversation. It not only includes such articles as are necessary to the support of life, but extends to articles fit to maintain the particular person in the station and degree of life in which he is placed. The term 'necessaries' is, in other words, purely relative to the infant's position in life. . . . From the relative character of the term, combined with the tendency of juries to find an infant, if it be possible, liable on contracts of which he has received the benefit, has arisen a considerable variety in the decisions on the question as to what things are, and what are not, necessities." As said by the supreme court of Nebraska in *Englebert v. Trowell*, 40 Neb. 195, 204, *sub nom. Englebert v. Pritchett*, 26 L. R. A. 177, 58 N. W. 852. "As to what are necessities for an infant cannot be defined by any general rule applicable to all cases. It is a mixed question of law and fact, to be determined in each case from the particular facts, circumstances, and surroundings in that case."

There are numerous cases to be found in the books deciding that an infant is not

liable to an attorney for services rendered, though these are in most part for services rendered as to the infant's property. Then there are cases where infants have been held liable for counsel fees as necessities, even when the services related to the infant's property, if beneficial to the infant's estate. *Epperson v. Nugent*, 57 Miss. 45, 34 Am. Rep. 434; *Searcy v. Hunter*, 81 Tex. 644, 17 S. W. 372; *Thrall v. Wright*, 38 Vt. 491. There is a class of cases allowing counsel fees as necessities for an infant, where the cases in which the services were rendered affected the infant's personal relief, protection, or liberty, which, it seems to us, more closely analogize the case at bar than those relating merely to property rights. *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151, was a case where a female infant was seduced and got with child under a promise of marriage. The seducer afterwards refused to marry her, and she was left in a state of destitution and suffering, her father having turned her out of doors. Thereupon she applied to an attorney to bring suit for her for the breach of the promise of marriage. He did so, and it was afterwards settled by the marriage of the parties. After the marriage the attorney sued the husband and wife for his services. The decision was that if the services were necessary for the personal relief, protection, and support of the female defendant, the action might be maintained; and the court refused to disturb the jury's verdict for the plaintiff. The court, through Hinman, Ch. J. (p. 307, 31 Conn., 83 Am. Dec. 151), says: "The law, being founded in reason, admits of exceptions. Now, one of the principal reasons why an infant is not allowed to make contracts is to protect him from improvident bargains resulting from his inexperience, and the same reason causes the exception, where he is allowed to contract for necessities, since it can never be for his benefit to be unable to contract for food, shelter, etc., if he has no funds or other means of being provided for; and, situated as this infant was, abandoned by her natural protector, and having become an outcast, but still having valid claims, which, if enforced, would rescue her from this condition, it appears to us that it was obviously for her benefit that she should be enabled to employ counsel to enforce them. It was not the case of merely prosecuting an infant's right to property, or for the recovery of an ordinary debt. In such cases there is, or ought to be, a guardian to protect the infant's rights. There was none here, and it does not appear that there were any practicable means of procuring one to be appointed. No one would incur liabilities on her account unless he could rely upon her agreement to indemnify him out of the damages she might recover in the suits to be commenced. It appears to us, therefore, that, while the court recognized the rule that the ordinary fees of an attorney for the prosecution of an infant's rights to property could not generally be said to be necessities, it yet further correctly informed them, in substance, that such serv-

ices, where requisite for the personal relief, protection, and support of the infant, might lawfully be contracted for by the infant, and that he would be bound in law to pay for them. It appears to us that this is a very reasonable rule, which will operate for the benefit of minors, and therefore comes within the principle on which they are allowed in certain cases to make contracts, and in others are not authorized to do so. We think there may be cases (and the jury have found this to be one of them) where a civil suit may, under extraordinary circumstances, be the only means by which an infant can procure the absolute necessities which he requires; and, where such is the case, it would be a reproach to the law to deny him the power of making the necessary contracts for its commencement and prosecution." In *Barker v. Hibbard*, 54 N. H. 539, 20 Am. Rep. 160, the plaintiff sued an emancipated infant for services rendered him as attorney in defending him in a bastardy proceeding. The court said, *inter alia*: "We think it must be held that an infant is liable for the services of his attorney in defending him against a bastardy proceeding. This may, it is true, sometimes subject him to larger liabilities than he would incur by making no defense, and procuring his liberty by applying for a discharge from imprisonment after he had been found chargeable; but it is to be presumed that he is innocent until he is proved to be guilty. A bastardy proceeding, though held to be a civil action, can only be sustained upon the ground that the defendant has committed a criminal offense. His good name is at stake, as well as his property, if he has any or ever acquires any,—for a judgment rendered against him will be valid, whether he is or is not liable to pay his attorney; and, besides, if he is found chargeable, the court may not release him upon satisfactory evidence of his inability to comply with the order. If an infant has property, the law provides for the appointment of a guardian to hold and manage it. If he has property and is without a guardian, it is very easy to procure one to be appointed. There can rarely be occasion for an infant to employ an attorney in suits relating to his property, but, if he has no property, the law does not contemplate that he shall have a guardian; and, if one should be appointed in such a case, it would be unreasonable to expect him to employ at his own expense an attorney for his ward. If an infant has no authority to pledge his credit to an attorney when arraigned as the putative father of a bastard child, he may sometimes be prevented from getting bail or from making a successful defense. We are of the opinion that the consequences of holding that he has such authority are much more likely to be beneficial than prejudicial to his interests. He will only be liable for services and expenses which it was reasonable to render and incur. That his own directions were followed, unless there was reasonable cause to believe it was for his interest to follow them, will be immaterial. Any express promise he may make to pay exor-

bitant fees to his attorney will be void. He will only be liable upon an implied promise to pay a reasonable sum. . . . Charges incurred in making, or attempting to make, a defense which there was no good reason to believe it was for the interest of the infant to make, will not be recoverable." In *Askey v. Williams*, 74 Tex. 294, 5 L. R. A. 176, 11 S. W. 1101, the question was as to the liability of an infant to an attorney for services rendered the infant, at his request, in defending him when indicted for stealing cattle. The court said: "The contracts of an infant for necessities are neither void nor voidable, and we are of opinion that the services of an attorney should be held necessary to an infant when he is charged by an indictment with crime. His life or his liberty and reputation are at stake, and it would be unreasonable to deny him the power to secure the means of defending himself. He may contract for food and raiment suitable to his condition in life, though they be such as are not demanded by his absolute wants, and it is not to be questioned that the immunity from punishment and disgrace is a matter of far more importance to his welfare. It has accordingly been held that reasonable attorney fees in defense of a criminal action brought against an infant are necessities." Following the analogy of the last three cases cited, which commend themselves to us, we think that in the case at bar the action of the defendant against her assailant, Brown, was brought for her protection, even if the result of it, after paying the plaintiff's counsel fees, will increase her estate. We are of the opinion that the counsel fees sued for in this case were legal necessities.

The third request of the defendant, which the presiding justice denied, *viz.*, "If the defendant was an infant under the age of twenty-one years, the father could not bind her estate by any contract with the plaintiff for professional services,"—might be correct as an abstract proposition of law, disconnected from the circumstances of this case; but, with its connections, we think it was properly denied. The father's employment of the plaintiff as counsel in the action against Brown was simply for his infant daughter while he was acting as her *prochein ami*, and, in connection with the conduct of his daughter, was not the father's promise, but the implied promise of the infant daughter.

We find no errors in the rulings of the presiding justice at the jury trial of which the defendant can complain, for the defendant's fourth request to charge was granted; and that, in our opinion, without further explanation, was too favorable to the defendant. That request was as follows: "Nothing to the contrary appearing, it is presumed that the father provided the defendant with all necessities, and she must bind herself for necessities." It is a general rule that a father, at least of sufficient ability (*Pearce v. Olney*, 5 R. I. 269), is bound to

supply an unemancipated infant with food, raiment, etc. (th: ordinary necessities), yet he is not bound, in our opinion, to supply counsel fees out of his own purse for the infant in a case like that against Brown; and the evidence showed that the plaintiff trusted the infant, and not the father. The principle upon which the father of an infant is obliged to provide the ordinary necessities is that he is entitled to the infant's wages until he voluntarily emancipates her during her infancy, or the law emancipates her upon attaining her majority. The action against Brown was brought by the infant for the suffering he inflicted upon her, and for her protection against him in the future. It was not brought by the father for the loss of the infant's services, and it could not have been brought by him for her suffering; hence, the amount recovered went, not to him, but to the infant, and has been paid to the infant's guardian. It seems to us clear, from analogy, that, just as an emancipated infant can bind herself for necessities of all kinds when, released from her father's claim upon her for the consideration, she is liable to him for the necessities furnished by him, so she can bind herself for necessities such as the one under consideration, for which, the father not being bound to provide for her, he technically gets no benefit from. It certainly does not seem just that a father, of slender means, perhaps, should be obliged to pay counsel for services which technically he gets no pecuniary benefit from, and the infant's estate gets all the pecuniary benefit of. In *Munson v. Washband*, 31 Conn. 303, 83 Am. Dec. 151, the infant's father turned her out of doors, while in this case the infant's father lent all the aid in his power; but in the former case the court required the counsel's services to be paid, and we see no reason why in this case counsel is not equally entitled to pay for his services. Whether, however, the fourth charge was too favorable for the defendant, or not, is of no consequence, as it did not injure the defendant.

The defendant's conditional exception, contained in her counsel's words, "If your honor has charged that the jury is to decide whether these services were necessary or not, then I wish to take an exception," if formally correct and allowed, can avail the defendant nothing. There are authorities both ways, *etc.*, that the question of necessities is for the court, and also that it is a question for the jury. Inasmuch as the jury have found that the plaintiff's services were necessities, if it was a question for them, and inasmuch as, if it was a question for the court, the court would have had to have ruled that said services were necessities in this case, the defendant has no ground to be aggrieved.

For the reasons hereinbefore given, the defendant's petition for a new trial is denied, and the case is remitted to the Common Pleas Division, with direction to enter judgment upon the verdict.

60 L. R. A.

Angelo PAOLINO

v.

Frank McKENDALL

(.....R. I.....)

An occupier of land who undertakes to burn rubbish thereon is under no obligation to guard children of tender years who are in the habit of resorting there to play, from injury by approaching the fire.

(October 6, 1902.)

ON DEMURRER to the declaration in an action brought to recover damages for injuries to plaintiff's minor child, which were alleged to have been caused by defendant's negligence. *Sustained.*

The facts are stated in the opinion.

Messrs. Miller & Carroll, for defendant, in support of demurrer:

The defendant, as owner or lawful occupant of the premises, had the right to use them to burn thereon waste materials.

The temptation to the child to approach the fire does not constitute an invitation, on the part of the owner or occupant, for her to come upon the premises.

Holbrook v. Aldrich, 168 Mass. 15, 36 L. R. A. 493, 46 N. E. 115; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1068; *Delacare, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993; *Barney v. Hannibal & St. J. R. Co.* 126 Mo. 372, 26 L. R. A. 847, 28 S. W. 1069; *Vanderbeck v. Hendry*, 34 N. J. L. 467; *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965; *O'Connor v. Illinois C. R. Co.* 44 La. Ann. 339, 10 So. 678.

To make the defendant liable in an action of this kind, it is necessary to allege and prove that the acts done by the defendant were wilfully injurious, or that the injury was due to the reckless or careless conduct of the defendant, or that the danger was concealed.

Ryan v. Towar, 128 Mich. 463, 55 L. R. A. 310, 87 N. W. 644; *Smith v. Jacob Dold Pkg. Co.* 82 Mo. App. 9; *Stendal v. Boyd*, 73 Minn. 53, 42 L. R. A. 288, 75 N. W. 735; *Kayser v. Lindell*, 73 Minn. 123, 75 N. W.

NOTE.—As to liability of railroad company for injuries to children playing on turntable, see in this series, Chicago, B. & Q. R. Co. v. Krayenbuhl (Neb.) 59 L. R. A. 920, and cases in footnote thereto.

As to liability for maintaining on private premises dangerous attractions for children generally, see *Penso v. McCormick* (Ind.) 9 L. R. A. 313; *Rodgers v. Lees* (Pa.) 12 L. R. A. 296; *Barney v. Hannibal & St. J. R. Co.* (Mo.) 26 L. R. A. 847; *Missouri, K. & T. R. Co. v. Edwards* (Tex.) 32 L. R. A. 825; *Siddall v. Jansen* (Ill.) 39 L. R. A. 112; *O'Leary v. Brooks Elevator Co.* (N. D.) 41 L. R. A. 677; *Biggs v. Consolidated Barb-Wire Co.* (Kan.) 44 L. R. A. 655; *Kopplekom v. Colorado Cement Pipe Co.* (Colo. App.) 54 L. R. A. 284; *Ryan v. Towar* (Mich.) 55 L. R. A. 310; *Uttermohlen v. Boggs Run Mln. & Mfg. Co.* (W. Va.) 55 L. R. A. 911; and *Brinkley Car Works Mfg. Co. v. Cooper* (Ark.) 57 L. R. A. 724.

1038; *Savoia-Cella v. Brooklyn Union Elev. R. Co.* 55 App. Div. 98, 66 N. Y. Supp. 1021; *Fitzgerald v. Rodgers*, 58 App. Div. 298, 68 N. Y. Supp. 946; *Thomas v. Pocatello Power & Irrig. Co.* (Idaho) 63 Pac. 595; *Feehan v. Dobson*, 10 Pa. Super. Ct. 6; *Re Demarest*, 86 Fed. 803; *Fitzpatrick v. Cumberland Glass Mfg. Co.* 61 N. J. L. 378, 39 Atl. 675; *Peters v. Bowman*, 115 Cal. 345, 47 Pac. 113, 598; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573, 41 S. W. 62.

The doctrine of the *Turntable Cases* must be limited to cases of attractive and dangerous machinery, and to other similar cases where the danger is latent.

Stendal v. Boyd, 73 Minn. 53, 42 L. R. A. 288, 75 N. W. 735; *Erickson v. Great Northern R. Co.* 82 Minn. 60, 51 L. R. A. 645, 84 N. W. 402; *Twist v. Winona & St. P. R. Co.* 39 Minn. 164, 39 N. W. 402; *McEachern v. Boston & M. R. Co.* 150 Mass. 515, 23 N. E. 231; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Arnold v. St. Louis*, 152 Mo. 173, 48 L. R. A. 291, 53 S. W. 900; *Uthermohlen v. Bogg's Run Co.* 50 W. Va. 457, 55 L. R. A. 911, 40 S. E. 410; *Taylor v. Had-donfield & C. Turnp. Co.* 65 N. J. L. 102, 46 Atl. 707; *Hayes v. Norcross*, 162 Mass. 546, 39 N. E. 282; *Holly v. Boston Gaslight Co.* 8 Gray, 123, 69 Am. Dec. 233.

Mr. D. J. Holland for plaintiff, *contra*.

Rogers, J., delivered the opinion of the court:

This is a demurrer to both counts of the plaintiff's declaration in an action of trespass on the case for negligence. The first count is as follows: "For that the said defendant on, to wit, the 8th day of July, A. D. 1901, by his agents and servants, was engaged in erecting a building on Swiss street, near Knight street, public highways in the city of Providence; that near to and adjoining the lot upon which said building was erected was a vacant lot, which for a long time theretofore had been used by the occupiers of the premises in the vicinity and neighborhood thereof as a common resort for pleasure of said occupiers, and as a playground for their children, and in which the plaintiff's intestate, a child of one of said occupiers, and other children, the children of said occupiers, with the knowledge and consent and by the invitation of the owner of said premises, were accustomed to play, to the knowledge of said defendant; and that on, to wit, the 8th day of July, A. D. 1901, the said defendant, by his agents and servants, lighted a large fire upon said lot for the purpose of burning waste materials used in the building of said house. And the plaintiff avers that it was the duty of the defendant to take and use reasonable and proper means and precautions to prevent accident or injury happening to the plaintiff's intestate while using said parcel of land as a playground aforesaid, and to keep and maintain said fire so started by him as aforesaid properly guarded and protected against damage to the lives of children of tender years who might go, wander, or be allowed or attracted thereto by their childish

instincts; yet the defendant, well knowing the premises, but not regarding his duty therein as aforesaid, neglected, failed, and refused to take and use reasonable and proper means to prevent accident or injury to the plaintiff's intestate while using said parcel of land as a playground as aforesaid, and did not keep and maintain said fire so started as aforesaid properly protected and guarded. And the plaintiff avers that on, to wit, the 8th day of July, A. D. 1901, at Providence, the plaintiff's intestate, who was then and there a child of tender years, to wit, of the age of five years, being a child of one of the occupiers of the premises in the vicinity and neighborhood of said parcel of land, while using said parcel of land as a playground aforesaid, with the knowledge and consent and by the invitation of the defendant, and while in the exercise of due care, and allured and induced by her childish instincts to approach said fire, her dress suddenly caught fire from said flame, and she was so seriously burned that in consequence thereof she died." The second count is substantially like the first, except that it is alleged that the defendant was building the house as a contractor, and it is not alleged that the plaintiff's intestate went upon the lot by reason of any invitation of the defendant or the owner of said lot. The grounds of demurrer to the first count are: (1) Because it does not state facts sufficient to constitute a cause of action; (2) because it does not set forth with sufficient certainty wherein said defendant's negligence consists; and (3) because it appears therein that the injury to the plaintiff's intestate was caused by her own negligent act in approaching said fire. The grounds of demurrer to the second count are the same as those to the first count, with two additional grounds, but the third ground to the first count constitutes the fifth ground to the second count. The third and fourth grounds of demurrer to the second count are: (3) Because there is no averment therein that plaintiff's intestate was upon said lot upon the invitation or with the knowledge or consent of said defendant, or upon the invitation or with the knowledge or consent of the owner of said lot, if said defendant was not the owner thereof, nor is there set forth in said count any fact showing such invitation, knowledge, or consent; (4) because, according to the allegations in said second count, the defendant owed no duty to the plaintiff's intestate to keep her from being injured as set forth in said count while on said premises.

In the words of the plaintiff's brief: "The plaintiff bases his case solely upon the theory that an occupier of land, having thereon dangerous agencies, to which children of tender years, too untrained and inexperienced to appreciate the dangers and resist the temptations placed before them, are likely to be allured or attracted, is under the duty of exercising the care which an ordinary person would exercise in the premises to prevent injury therefrom to such children, either by guarding or inclosing the dangerous

agency, or by giving warning to parents of the existence of the danger." The words "by the invitation of," referring to the owner or occupier of the premises, in connection with the use of said lot as a common resort as a playground for the children of the neighborhood, including the plaintiff's intestate, are more than once used in the first count of the declaration, yet an express invitation is nowhere alleged, and those words are always preceded by the words "with the knowledge and consent and." With such a use of words, coupled with the theory upon which the plaintiff bases his claim, as shown in the above quotation from his brief, we understand that the only invitation to use said lot as a playground for children, intended to be alleged, was only a constructive invitation, or such, if any, as could be implied from the owner's or defendant's knowing said lot was so used without objection made, and that, as to the fire, there was no invitation to approach it, other than the fact of the fire being there, whereby the plaintiff's intestate was "allured and induced by her childish instincts to approach said fire." We are further led to this understanding by the fact that some of the cases cited on the plaintiff's brief proceed upon the doctrine of constructive invitation; that is, that if, by way of illustration, a person is allured, or, more properly, tempted, by some act of a railroad company to enter upon its land, he is not a trespasser; and it has been held that leaving a turntable unguarded is such an act. We have been thus particular in defining our understanding of the use of the word "invitation," in the first count of the declaration, because if the invitation to the plaintiff's intestate to use said vacant lot as a playground was express, or by implication making it equal in significance to an express invitation, the rule as to liability would be very different from what it would be if the invitation was only constructive, consisting of the kind of allurements or mere license we have referred to.

The basis of a cause of action for injury to a person by reason of negligence or want of due care is the breach of some duty or the nonobservance of some obligation that the defendant is under to the plaintiff. As said by the New Jersey court of errors and appeals in *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 637, 41 L. R. A. 831, 40 Atl. 682: "There cannot be such a thing as the negligent performance of a nonexistent duty." The very first step in attempting to fasten a liability upon a defendant is to show a duty he is under, either by commission or omission, to the plaintiff. Having done that, the next step is to show the breach or neglect of such duty. "There is a clear distinction," said this court in *Beehler v. Daniels*, 18 R. I. 563, 565, 27 L. R. A. 512, 29 Atl. 0, "between a license and an invitation to enter premises, and an equally clear distinction as to the duty of an owner in the two cases. An owner owes to a licensee no duty as to the condition of premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril 60 L. R. A.

or wilfully cause him harm, while to one invited he is under obligation for reasonable security for the purposes of the invitation." In speaking of this class of cases, Bigelow, Ch. J., in *Sweeney v. Old Colony & N. R. Co.*, 10 Allen, 368, 373, 87 Am. Dec. 644, after referring to keepers of inns and of shops, said: "The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation, allurements, or inducement, either express or implied, by which they have been led to enter thereon. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner or person in possession to provide against the danger of accident. The gist of the liability consists in the fact that the person injured did not act merely for his own convenience and pleasure, and from motives to which no act or sign of the owner or occupant contributed, but that he entered the premises because he was led to believe that they were intended to be used by visitors or passengers, and that such use was not only acquiesced in by the owner or person in possession and control of the premises, but that it was in accordance with the intention and design with which the way or place was adapted and prepared or allowed to be so used. The true distinction is this: A mere passive acquiescence by an owner or occupier in a certain use of his land by others involves no liability; but, if he directly or by implication induces persons to enter on and pass over his premises, he thereby assumes an obligation that they are in a safe condition, suitable for such use, and for a breach of this obligation he is liable in damages to a person injured thereby." As to what such an inducement or allurements is will be considered later. "The rule is," said the supreme court of New Jersey in *Vanderbeck v. Hendry*, 34 N. J. L. 467, 472, "that he who enjoys the permission or passive license is only relieved from the responsibility of being a trespasser, and must assume all the ordinary risk attached to the nature of the place or the business carried on."

In the case at bar the defendant is sought to be made liable upon the doctrine of a series of cases called the "*Turntable Cases*," consisting of *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, decided in 1873, and reviewed and adhered to in *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619, decided in 1894, and of other cases following it. In the *Stout Case* a boy six years old was injured while playing on a railroad company's land on a railroad turntable that was not attended or guarded by any servant of the company, was not fastened or locked, and revolved easily on its axis. The propositions laid down in that case by Hunt, J., delivering the opinion, are that, "while it is the general rule in regard to an adult that, to entitle him to recover damages for an injury resulting from

the fault or negligence of another, he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." Further, that, "while a railway company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts." The doctrine of that series of cases is thus clearly and comprehensively stated in 7 Am. & Eng. Enc. Law, 2d ed. pp. 403, 404: "When a child of tender years commits a mere technical trespass, and is injured by agencies that to an adult would be open and obvious warnings of danger, but not so to a child, he is not debarred from recovering, if the things instrumental in his injury were left exposed and unguarded, and were of such a character as to be likely to attract children, excite their curiosity, and lead to their injury, while they were pursuing their childish instincts. Such dangerous and attractive instrumentalities become an invitation by implication."

The facts alleged in both counts of the declaration in the case at bar are so analogous to those in the *Turntable Cases* as to make the principle of law properly applicable to one also applicable to the other; and inasmuch as the rule of the so-called *Turntable Cases* has been adopted by many courts, thus affording ample authority, yet whether we shall follow that rule depends upon the weight of the reason on which it rests, for some of the courts which have recognized the rule have limited its operation strictly to turntables and other dangerous and attractive machinery, and it has been utterly rejected by the courts of last resort of New Hampshire in 1886, Massachusetts in 1891, New York in 1895, Texas in 1897, New Jersey in 1898, West Virginia in 1898 and again in 1901, Michigan in 1901, and Georgia in 1901. See *Frost v. Eastern R. Co.* 64 N. H. 220, 9 Atl. 790; *Daniels v. New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248, 28 N. E. 283; *Walsh v. Fitchburg R. Co.* 145 N. Y. 301, 27 L. R. A. 724, 39 N. E. 1068; *Dobbins v. Missouri, K. & T. R. Co.* 91 Tex. 60, 38 L. R. A. 573, 41 S. W. 62; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682; *Ritz v. Wheeling*, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993; *Uthermohlen v. Bogg's Run Co.* 50 W. Va. 457, 55 L. R. A. 911, 40 S. E. 410; *Ryan v. Towar*, 128 Mich. 463, 55 L. R. A. 310, 87 N. W. 644; *Savannah, F. & W. R. Co. v. Beavers*, 113 Ga. 398, 54 L. R. A. 314, 39 S. E. 82.

The disapproval of *Sioux City & P. R. Co. v. Stout* in the cases just cited is very emphatic, and the president of the supreme court of appeals of West Virginia, in *Ritz v. Wheeling*, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993, concludes his stricture upon it in this wise (p. 270, 45 W. Va., p. 153, 43 L. 60 L. R. A.

R. A., and p. 996, 31 S. E.): "I am guilty of no undue assumption in condemning the *Stout Case*, as it has received in some courts—the most eminent in the land—open condemnation, and in others criticism tantamount to condemnation, and some which followed it limit its application to its facts, or desire to recant."

It is apparent, as stated in the New Jersey case of *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682, and in the West Virginia case of *Uthermohlen v. Bogg's Run Co.* 50 W. Va. 457, 55 L. R. A. 911, 40 S. E. 410, that the principle on which the doctrine of liability rests in the *Turntable Cases*, if sound, must be applicable more widely than to railroad companies and their turntables, and that it would require a similar rule to be applied to all owners and occupiers of land, in respect to any structure, machinery, or implement maintained by them which presents a like attractiveness and furnishes a like temptation to children.

The *Stout Case* was decided in October, 1873, and since then has been referred to at least twice in the court of last resort in this state. *Bishop v. Union R. Co.* 14 R. I. 314, 51 Am. Rep. 386, decided in January, 1884, was a case of negligence, where two empty horse cars of the defendant, fastened together one behind the other, and drawn by a single horse, were driven slowly over the company's tracks in a public highway in the city of Providence by a driver occupying the platform in front of the forward car, from the stable, in Elmwood, to the repair shop, on Thurber's avenue. The plaintiff, a boy six years old, to outstrip a playmate with whom he was racing, jumped on the rear platform of the leading car, and soon afterwards fell off or jumped off, and was seriously injured. After nonsuit, the plaintiff petitioned for a new trial, which was denied; and Durfee, Ch. J., delivering the opinion, in referring to a dangerous object left exposed, without guard or attendant, in a place of common resort for children, said: "An object so left is a standing temptation to the natural curiosity of a child to examine it, or to his instinctive propensity to meddle and play with it. In *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207, 18 Am. Rep. 393, which was precisely like *Stout v. Sioux City & P. R. Co.* 2 Dill. 294, Fed. Cas. No. 13,504, this peculiarity was specifically stated, and commented on as the ground of liability. 'The defendant knew,' say the court, 'that, by leaving this turntable unfastened and unguarded, it was not merely inviting young children to come upon the turntable, but was holding out an allurement, which, acting upon the natural instincts by which children are controlled, drew them by those instincts into hidden danger.' These cases seem to reach the limit of liability. They go beyond what was thought to be the limit in *Mangan v. Atterton*, L. R. 1 Exch. 239." The court then proceeds to distinguish the case from the *Turntable Cases*. In *Goodwin v. Nickerson & Dugan*, an unreported case, being decision

No. 3,834 in this court, October term, 1891, the declaration set out that the defendants, being in the business of moving buildings, in the course thereof used their own lot, situated on South Bend street, in Pawtucket, a public highway, and surrounded by many houses, and entirely open and unfenced, and commonly used by children of tender age as a playground, for storing and placing thereon large quantities of timber and blocking, and were in the habit of piling such blocking and timber in such manner that certain long timbers, by being placed upon a tier of said blocking, were easily tilted or balanced, and formed what is commonly known as a "seesaw," thus rendering said timber upon said piles of blocking not only dangerous, from its liability to fall, but also attractive to children, etc., whereby the duty devolved upon the defendants to take such care in the piling of such timbers and blocking so to place them that they should not attract children thereto, and that the same should not be in danger of falling upon and crushing said children, and so to fence and otherwise to protect said lot and said pile of timber and blocking that children should be prevented from coming thereupon, or in such proximity thereto as to cause peril to life, and alleging defendants' neglect of said duty, whereby a large beam fell upon the plaintiff's son, less than four years old, who had been attracted to said lot by said timbers, and so grievously injured him as to cause death. The defendants demurred, and the court overruled the demurrer in a short rescript, in this wise: "The court is of the opinion that the plaintiff's case, as set forth in the declaration, falls within the class of cases represented by *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745." The recognition of the authority of the *Stout* Case accorded in the *Bishop* Case is altogether too dubious, and that in the *Goodwin* Case is too little considered, to establish a rule of law by which we are willing to abide in the case at bar and in future cases. In the *Bishop* Case the court not only does not follow the *Stout* Case, but attempts to distinguish it, and characterizes it as "seeming to reach the limit of liability," if not, indeed, intimating that it has exceeded it, by the reference to *Mangan v. Atterton*, L. R. 1 Exch. 239. In the *Goodwin* Case the *Stout* Case seems to have been accepted as authority as a matter of course, apparently without mature consideration, notwithstanding the very equivocal treatment of it in the *Bishop* Case, and the fact that our neighboring state of New Hampshire, in *Frost v. Eastern R. Co.* 64 N. H. 220, 9 Atl. 790, decided in 1886, four years before the *Goodwin* Case, declined to follow the *Stout* Case, in the following unambiguous terms: "We are not prepared to adopt the doctrine of *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The

owner is not an insurer of the safety of infant trespassers."

The reasoning of the *Stout* Case is so unsatisfactory that we cannot give it our approval, and it is evident from the trend of decisions during the last seven years that disapproval of the doctrine of that case has been greatly on the increase. The supreme court of Michigan, speaking as late as October 22, 1901, in *Ryan v. Tower*, 128 Mich. 463, 55 L. R. A. 310, 87 N. W. 641, said: "The rule laid down in *Sioux City & P. R. Co. v. Stout* must be a general one, applicable to every one; and, aside from the impropriety of judicial legislation, a wise public policy should forbid such a sweeping innovation by judicial main strength. In innumerable cases the courts have applied and continue to apply the general rule that a landowner need not protect a trespasser, every case being an assertion of the principle which is disregarded in the cases relied upon by the plaintiff. We have cited a few of them,—enough, we think, to show that the great weight of authority does not sustain the principle of the *Turntable Cases*. While some of the courts have followed the rule of *Sioux City & P. R. Co. v. Stout*, both the courts and profession have evinced a tendency to allow this innovation to go no further, and refuse to consider it applicable to other cases every way analogous. They speak of the cases generically, as the '*Turntable Cases*,' and treat such cases as exceptional. We are of the opinion that they are exceptional, and that they are not based upon principle, but contravene one of the old and well-established rules of the law; and we therefore decline to recognize them as authority, preferring to adhere to the better doctrine of the other cases cited. The defendant owed no duty to these children, who were trespassers."

We find no satisfactory ground for the distinction sought to be made between infants and adults, in the duty of the owner or occupier of land to a mere trespasser to keep his premises safe. Clark, J., in *Frost v. Eastern R. Co.* 64 N. H. 220, 9 Atl. 790, states the law very clearly in this wise: "A landowner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises; and, to recover for an injury happening to him, he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury by the exercise of reasonable care after discovering the danger. . . . The maxim that a man must use his property so as not to incommode his neighbor only applies to neighbors who do not interfere with or enter upon it. . . . To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it. . . . One having in his possession agri-

cultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling; nor is the owner of a fruit tree bound to cut it down or inclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond or a blueberry pasture legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is under no duty to a mere trespasser to keep his premises safe, and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. "The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public, and not to another, under the same circumstances. In this respect, children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different kind of care; but precautionary measures, having for their object the protection of the public, must, as a rule, have reference to all classes alike." *Nolan v. New York, N. H. & H. R. Co.* 53 Conn. 461, 4 Atl. 106."

Again, the *Stout Case*, it seems to us, errs in construing a mere temptation as an allurement sufficient to legally constitute an invitation to enter the premises of another. "Temptation," says Holmes, J., in delivering the opinion in *Holbrook v. Aldrich*, 168 Mass. 15, 36 L. R. A. 493, 46 N. E. 115, "is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen." It is not easy to give an exhaustive definition, within reasonable limits, of exactly what is meant by the words "allurement or inducement" that legally operate to constitute an invitation to enter the premises of another; but, as we have seen that mere temptation does not form such an inducement, a single illustration of what would form such an inducement will be sufficient for our purpose. *Sweeney v. Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644, from which we have already quoted as to the difference in the duty of an owner or occupier of land to one who enters upon his land by invitation, express or implied, and to one who enters without such invitation, even if he has a mere naked license or permission to enter or pass over the land, affords us that illustration. In that case a railroad company that had made a private crossing over its track, at grade, in a city, and allowed the public to use it as a highway, and stationed a flagman there to prevent persons from undertaking to cross when there was danger, was held liable in damages to one who, using due care, was induced to cross by a signal

from the flagman that it was safe, and was injured by a collision which occurred through the flagman's carelessness.

We see no good purpose to be served by our further considering the general principles upon which the case at bar rests. Suffice it to say that we approve the cases hereinbefore cited as disapproving the doctrine in the *Stout Case*, as well as a masterly monograph entitled "Liability of Landowners to Children Entering without Permission," in 11 Harvard Law Review, 349-373, 434-448, by Hon. Jeremiah Smith, formerly one of the justices of the supreme court of New Hampshire, all of which have learnedly, and some of which have exhaustively, considered those principles and afford ample support for the views we entertain.

The plaintiff urges upon our attention the unreported case in this court of *Lemieux v. Darling et al.*, Ex., No. 2,688 of 1900, wherein the plaintiff recovered, as one exactly analogous to the case at bar. In that case the plaintiff's intestate, a child five years old, while attracted to the unfenced lot of the defendants abutting on two public highways in Woonsocket, by an apple tree thereon, the branches whereof hung over an insecurely guarded well, situated 241 feet from one highway, and 95 feet from the other, fell into said well and was drowned. The court, in a brief rescript, said: "The principal question argued, namely, the liability of a landowner for injuries received by trespassing children from some dangerous object, agency, or condition negligently permitted by such landowner to exist on the land trespassed upon, is not before us. No ruling of the court denying such liability was asked for by the defendants." After a brief recital of the instructions given by the trial justice to the jury, followed by the words, "and no exception was taken by the defendants to such instructions," the rescript concludes as follows: "There is no evidence that the plaintiff knew that the well was not securely covered so that it would be safe, and therefore the jury were warranted in finding that he was not negligent." That case seems to us to furnish no authority for the case at bar, for in the *Lemieux Case* the defendants, by not raising any question of the defendants' liability to the trespassing child, practically admitted that they had been guilty of a neglected duty, and defended against their liability thereon, on the ground that the child had been guilty of contributory negligence, whereas the question in the case at bar is simply whether, on the facts alleged in the declaration,—construing the word "invited," contained therein, as referring only to a constructive invitation, as explained in the quotation from the plaintiff's brief hereinbefore set forth,—the defendant was liable on any neglect of duty he owed to the plaintiff's intestate. With such a construction of the word "invited," used in the first count, as intended by the plaintiff's counsel, already explained, leaving both counts without an allegation of invitation to the infant, express or implied, other than a constructive one, amounting at most to a mere license to

enter upon the land, we are of the opinion that neither count of the declaration states facts sufficient to constitute a cause of action, because there is no breach alleged of any legal duty the defendant owed the infant; and, of course, if there was no duty owed, there could be no neglect of duty, and the infant's injury was caused by his own negligent act, solely, in approaching the fire. We have already decided that the constructive invitation set out, or intended to be set out, and hence treated by us as such, is not a sufficient invitation to cast a legal duty upon the defendant in regard to said infant, other than not wilfully subjecting him to injury; and, as no such wilful injury has been alleged, we fail to see how the suit can be sustained without allegation and proof of an invitation to the infant, express or implied, to enter upon said premises.

The plaintiff raises the point whether the question of what is an attraction for children is not one for the jury. In our view of the law, the question in this case is not whether a fire is or is not attractive to a child, but whether, on the undisputed facts alleged in this case,—for the demurrer admits them to be true,—there was any duty on the owner or occupier of the land on which this fire was located to guard the child against it. Whether the facts alleged, not being questioned, raised a duty on the defendant in favor of the child, it seems to us, is a question of law for the court, that can properly be decided on demurrer. In *Ritz v. Wheeling*, 45 W. Va. 262, 43 L. R. A. 148, 31 S. E. 993, Brannon, president of the West Virginia court of appeals, on page 263,

45 W. Va., page 150, 43 L. R. A., and page 994, 31 S. E. says: "The case is not one involving credibility of witnesses, or weight of evidence, or the proper inferences and deductions from evidence, which are matters proper for the consideration of a jury; for the material facts of the case are undisputed, and the case presents simply the question of law, whether, upon the facts, a liability rests on the city. . . . Where the case turns on the weight and effect of the evidence in proving or not proving facts necessary to support the action, and the evidence appreciably goes to prove such facts, it ought to go to the jury, as a verdict upon such evidence gives it a force which it might not have with the judge before verdict, and fortifies the case more against the action of the court, as the court cannot set the verdict aside unless plainly and decidedly contrary to or without evidence; but where the case is not such, but one of undisputed or indisputable facts, leaving it only a matter of law whether the facts show a liability on the defendant, the court should take the case from the jury, and direct a verdict, if the evidence shows no case for the plaintiff, because, if there were a verdict for him, it would be a finding against law, and the court always annuls a verdict against law upon conceded or indisputable facts."

For the reasons hereinbefore set forth, we think the demurrers to both counts of the declaration must be sustained.

Demurrers sustained, and case remitted to the Common Pleas Division for further proceedings.

TENNESSEE SUPREME COURT.

James L. COOLEY, *Plff. in Err.*,
v.

Luther A. GALYON.

(.....Tenn.....)

1. **Calling for the remainder of the record of a suit**, part of which has been introduced in evidence by plaintiff, is not an introduction of original evidence, so as to destroy the right to demur to plaintiff's evidence.
2. **Words spoken by a witness in a judicial proceeding concerning a stranger to the suit**, which are pertinent to the issues involved, and fairly responsive to questions propounded to him, are absolutely privileged notwithstanding actual malice.
3. **Charges that one who had offered to complete a building at the contract price did not pay for materials purchased, and did not use the character of materials called for by his contracts, are responsive to inquiries as to his being a reliable contractor, and pertinent to an inquiry as to damages**

suffered by interference with the construction of the building, which was alleged to have increased its cost, so as to be privileged.

(November 29, 1902.)

ERROR to the Circuit Court for Knox County to review a judgment in favor of plaintiff in an action brought to recover damages for slander. *Reversed*.

The facts are stated in the opinion.

Messrs. Green & Shields, for plaintiff in error:

By an absolutely privileged communication is meant a publication in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action for libel.

Townshend, Slander & Libel, 248, § 202; *Ruohs v. Backer*, 6 Heisk. 405, 19 Am. Rep. 598; *Shadden v. McElwee*, 86 Tenn. 153, 5 S. W. 602; *Lea v. White*, 4 Sneed, 113; 1 Starkie, Slander & Libel, 403, 404; Cooke, Defamation, 48.

NOTE.—As to privilege of defamatory testimony, see also, in this series, *Cooper v. Phipps* (Or.) 22 L. R. A. 836, and *note*; and *Blakeslee v. Carroll* (Conn.) 25 L. R. A. 106.

As to privilege of defamatory words used in 60 L. R. A.

pleading, see *Randall v. Hamilton* (La.) 22 L. R. A. 649, and *note*; *Sherwood v. Powell* (Minn.) 29 L. R. A. 153; *Jones v. Brownlee* (Mo.) 53 L. R. A. 445; and *Grant v. Hayne* (La.) 54 L. R. A. 630.

Before a witness can be held liable in a civil action, it must be shown that his statements were not only false and malicious, but that they were not pertinent to the issues, and not in response to questions asked by counsel.

Cooper v. Phipps, 24 Or. 357, 22 L. R. A. 839, 33 Pac. 985; *Shadden v. McElwee*, 86 Tenn. 146, 5 S. W. 602; *Odgers, Libel & Slander*, p. 191; *Hoar v. Wood*, 3 Met. 193.

Messrs. Templeton, Carlock, & Templeton, for defendant in error:

Defamatory words spoken or written of a party, which prejudice such person in his profession or trade or business, are actionable in themselves without proof of special damages.

Continental Nat. Bank v. Bowdre Bros. 92 Tenn. 723, 23 S. W. 131; *Mattson v. Albert*, 97 Tenn. 232, 36 S. W. 1090.

Defamatory statements made by a witness under oath in the course of judicial proceedings are not absolutely, but only *prima facie* or conditionally, privileged.

Proof of actual malice may destroy the privilege.

18 Am. & Eng. Enc. Law, 2d ed. p. 1048.

Shields, J., delivered the opinion of the court:

This is an action to recover damages for alleged slanderous words spoken by Cooley, the plaintiff in error, of and concerning Galyon, the defendant in error, while being examined as a witness before the master upon a reference to ascertain damages resulting from the wrongful suing out of an injunction issued in the case of *Eckle et al.* against the Florence Crittendon Home, lately pending in the chancery court of Knox county. Galyon and Cooley were both contractors and builders residing in Knoxville, and neither was a party to the chancery cause. The declaration contains two counts,—one in slander and one in libel,—both predicated upon the same words, which are hereinafter set out, in stating the averments of a special plea filed by the defendant. It is averred that the words were falsely and maliciously spoken and published of and concerning the plaintiff, with respect to his occupation and business as a builder and contractor, to his damage \$5,000. The defendant filed a plea of not guilty, and a special plea in which he says that he uttered the language complained of while being examined as a witness in a suit pending in the chancery court of Knox county, styled "*G. B. Eckle et al. vs. Florence Crittendon Home*," in answer to questions put to him by counsel in the said cause; that the bill in said cause was filed to enjoin the Florence Crittendon Home from completing a house then in course of construction, and designed as a home for fallen women; that an injunction was issued in said cause, and remained in force until the cause was heard and the bill dismissed; that upon a reference to the master to hear proof, and report what damages, if any, the Florence Crittendon Home had sustained by reason of the wrongful suing out of said injunction, it was proved that at the time the

injunction was issued the Florence Crittendon Home had awarded the contract for the building of said house to Thomas & Turner, contractors, for the contract price of \$2,497, and that after the dissolution of the injunction they refused to carry out the contract, because of an advance in wages and material, unless the Florence Crittendon Home would pay them the additional sum of \$303.90; that the complainants, Eckle and others, claimed that Galyon, who was alleged to be a reliable contractor, was then offering to do the building for the original contract price of \$2,497, and that therefore the defendant was not damaged by the wrongful suing out of the injunction; that upon this reference the defendant, who was in no way interested in or connected with said litigation, was called and sworn as a witness in behalf of the Florence Crittendon Home, to prove the advance in the price of labor and material, and, on cross-examination by the complainant's solicitors, he was asked questions, and made answers thereto, as follows:

Q. Is Mr. Galyon a reliable contractor?

A. I know Mr. Galyon hasn't paid us for some bills that he bought last year. We would not sell him lumber to-day without cash.

Q. He is considered reliable with respect to his work, is he not?

A. That depends on how broad a sweep you give the word "reliable." If you mean he faithfully performs all his contracts in every particular, I must say he is not reliable. In other words, I will be a little more explicit. He will complete a contract, and put in an inferior grade of material than what is called for in the specifications.

That these answers had reference to the said inquiry, and were fairly responsive to the questions asked him by counsel; and that they were absolutely privileged, under the law. He denies that he uttered the words maliciously. While this defense could have been made under the general issue, it could also be made by special plea. *Shadden v. McElwee*, 86 Tenn. 148, 5 S. W. 602. Issue was joined, and the case was tried by the circuit judge and a jury, and upon the trial the plaintiff introduced the solicitor of the complainants in the cause of Eckle and others against the Florence Crittendon Home, as a witness in his behalf, and had him identify the original bill, the answer, the decree denying the complainants relief, and ordering the reference to the master to ascertain the damages sustained by the defendant by reason of the wrongful issuance of the injunction, and the deposition given by defendant, Cooley, in the chancery cause; the original papers being used by consent, all of which were then read in evidence by the plaintiff. Upon cross-examination the witness identified the depositions of other witnesses taken in the cause, the report of the master allowing damages to the defendant in that cause, and the decree confirming the same, which were then read to the jury by defendant's attorney. Other evidence was

introduced by the plaintiff tending to prove that the defendant gave the deposition read, and entertained malice toward the plaintiff. The proof introduced by the plaintiff sustained the averments of the special plea, and upon the conclusion of plaintiff's evidence the defendant filed a demurrer, in proper form, thereto, which was overruled by the court, and the damages of the plaintiff assessed by the jury at \$500, and judgment given therefor; and the defendant has brought the case before this court, and assigns error.

For the plaintiff it is said that the defendant, by calling out and reading in evidence those portions of the record in the chancery cause which the plaintiff had not offered, introduced original evidence in his behalf, and lost his right to demur to the evidence of the plaintiff, and that for this reason the action of the court in overruling the demurrer was correct, regardless of other questions. It is true that, if a defendant introduce any original evidence in his behalf, he cannot demur to the evidence of the plaintiff; but, Can it be said that the evidence elicited by the defendant in this case was original evidence? Clearly not. The plaintiff had introduced part of the record in the chancery cause, and it was perfectly competent for the defendant to call for the remainder of it. It would have been the better practice to have required the plaintiff to read the entire record; but, having failed to do so, the defendant had the right to call for the rest of it, and examine the witness then upon the stand in relation to it. This was legitimate cross-examination, in the strictest sense, as the evidence brought out related to and was germane to that elicited in the examination in chief. But whether germane or not, the defendant had the right to bring out upon cross-examination any matter pertinent to the issue; the rule in Tennessee being that the cross-examination is only limited by relevancy and competency of the evidence sought to be introduced, and the defendant, by exercising this right, is not precluded from demurring to the evidence. This question was fully discussed in the case of *Sands v. Southern R. Co.* 108 Tenn. 1, 64 S. W. 478, and the rule there stated as here applied.

The question upon which this case must be determined is whether the language imputed to the defendant is actionable. It is well settled that defamatory words falsely spoken or written of one, which prejudice him in his business or occupation, are actionable, without proof of special damage; and therefore the publication of the words imputed to the defendant, other questions out of the way, would entitle plaintiff to recover. *Continental Nat. Bank v. Boudre Bros.* 92 Tenn. 723, 23 S. W. 131; *Mattson v. Albert*, 97 Tenn. 232, 36 S. W. 1090. The defendant, however, insists that the words here spoken and published are absolutely privileged, on account of the occasion when done, regardless of the presence of malice; the only inquiry allowed being whether they were pertinent to the issues involved in the

cause in which the defendant was examined as a witness, and fairly responsive to the questions propounded to him by counsel; while for the plaintiff it is said that the words are only qualifiedly or conditionally privileged, and, malice appearing, they are actionable. The question is therefore presented whether the answers of the defendant in question are absolutely, or only conditionally, privileged.

"By an absolutely privileged communication," says Mr. Townshend in his work on *Slander and Libel* [4th ed. § 209, p. 297], "is not to be understood a publication for which the publisher is in no wise responsible; but it means a publication in respect of which, by reason of the occasion upon which it is made, no remedy can be had in a civil action of slander or libel. A conditionally privileged communication is a publication made on an occasion which furnishes a prima facie legal excuse for the making of it, and which is privileged unless some additional fact is shown which so alters the character of the occasion as to prevent it furnishing a legal excuse." Townshend, *Slander & Libel*, p. 248. § 202, cited and approved in *Ruohs v. Backer*, 6 Heisk. 405, 19 Am. Rep. 598. In *Odgers, Libel & Slander*, p. 191, it is said: "A witness in the box is absolutely privileged in answering all the questions asked him by the counsel on either side; and, even if he volunteers an observation (a practice much to be discouraged), still, if it has reference to the matter in issue, or fairly arises out of any question asked him by counsel, though only going to his credit, such observation will also be privileged. . . . But a remark made by a witness in the box, wholly irrelevant to the matter of inquiry, uncalled for by any question of counsel, and introduced by the witness maliciously, for his own purposes, would not be privileged, and would also probably be a contempt of court." This statement of the law is quoted and approved by this court in the case of *Shadden v. McElwee*, 86 Tenn. 150, 5 S. W. 602. In the case of *Lea v. White*, 4 Sneed, 113, 115, it is said: "There is a . . . class of cases which are absolutely privileged, and depend in no respect for their protection upon their bona fides. The occasion is an absolute privilege, and the only questions are whether the occasion existed, and whether the matter complained of was pertinent to the occasion. . . . In this class are embraced judicial proceedings. The proceedings connected with the judicature of the country are so important to the public good that the law holds that nothing which may be therein said with probable cause, whether with or without malice, can be slander, and, in like manner, that nothing written with probable cause under the sanction of such occasion can be libel. The pertinency of the matter to the occasion is that which is meant by probable cause, and probable cause is, in this class of absolutely privileged communications, what bona fides is to the class of conditionally privileged communications, which, we have seen, are protected unless there is

malice in fact." In the case of *Cooper v. Phipps*, 24 Or. 357, 22 L. R. A. 839, 33 Pac. 986, the court said: "While there is some conflict in the adjudged cases as to whether witnesses are absolutely exempt from liability to an action for defamatory words uttered or published in the course of judicial proceedings, it is agreed by all the authorities that they are presumptively so; and, before a witness can be held liable in a civil action, this presumption must be overcome by showing affirmatively that such statements were not only false and malicious, but that they were not pertinent to the issues, and not in response to questions asked by counsel." In the same case the court further said: "In this country many, and perhaps a majority, of the courts, have refused to adopt an absolute and unqualified privilege of a witness, as laid down by the English courts; but it is agreed that a witness is absolutely privileged as to everything said by him having relation or reference to the subject-matter of inquiry before the court, or in response to questions asked by counsel, and presumptively so as to all his statements." 24 Or. 357, 22 L. R. A. 840, 33 Pac. 986. In the case of *Hoar v. Wood*, 3 Met. 193, the court said: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice, and be actionable in themselves, are not actionable if they are applicable and pertinent to the subject of inquiry. The question, therefore, in such cases, is not whether the words spoken are true, not whether they are actionable in themselves, but whether they were spoken in the course of judicial proceedings, and whether they were relative and pertinent to the cause or subject of inquiry." In the case of *Gardemal v. McWilliams*, 43 La. Ann. 454, 9 So. 108, it is said: "Certain communications are absolutely privileged, and no person is liable, either civilly or criminally, in respect of anything published by him in the course of his duty in any judicial proceeding. This privilege extends to parties, counsel, witnesses, jurors, and judges in a judicial proceeding, to proceedings in legislative bodies, and to all who, in the discharge of public duty, or the honest pursuit of private right, are compelled to take part in the administration of justice or in legislation." Citing *Heard*, *Libel & Slander*, §§ 90, 103, 110; *Newell*, *Defamation*, p. 423, §§ 26, 27; *Fisk v. Soniat*, 33 La. Ann. 1400; *Vinas v. Merchants' Mut. Ins. Co.* 33 La. Ann. 1265. The case of *Shadden v. McElwee*, 86 Tenn. 146, 5 S. W. 602, is relied upon as supporting the position of the plaintiff, but it does not do so. That case was before this court upon the demurrer interposed by the defendant to the replication of the plaintiff to a plea averring that the words upon which the action was predicated were uttered while the defendant was being examined as a witness in a certain suit, in response to questions propounded to him, 60 L. R. A.

and that his answers were responsive and privileged, replying that the words were not uttered in response to questions asked defendant while on the witness stand, and that they were not pertinent to the issues in said suit, but were voluntarily injected into his testimony, and falsely and maliciously spoken for the purpose of injuring the plaintiff, and the demurrer was properly overruled. But it is there expressly held, upon the authority of *Lea v. White*, 4 Sneed, 113, 115, and *Odgers*, *Libel & Slander*, p. 191, which are quoted and approved in the opinion of the court, that, when the communications of a witness are fairly responsive to the questions propounded, or pertinent to the inquiry, they are absolutely privileged, although he may have entertained malice toward the plaintiff. It is immaterial that neither the plaintiff nor the defendant were parties to the cause in which the defendant was called to testify. The majority of witnesses are not parties to the cause in which they are examined, and facts in relation to other strangers to the litigation often become the subject of necessary inquiry. If the privilege was confined to parties, it would be reduced to narrow limits, and the proper administration of justice would be greatly embarrassed and made difficult.

Applying these principles to this case, the question is not whether the words spoken by the defendant were false and malicious, but, Were they spoken in a judicial proceeding, and were they relevant and pertinent to the subject of inquiry in that proceeding, or responsive to questions propounded to the defendant by counsel while being examined therein as a witness? If they were, they are absolutely privileged, and the plaintiff's action must fail. That the words were spoken in the course of a judicial proceeding is conceded; and the only question that remains to be determined is, Were the answers of the witness pertinent to the inquiry, or responsive to the questions asked by the counsel? The issue being tried in the chancery cause, in relation to which the defendant was examined as a witness for the Florence Crittendon Home, was what damages it had sustained by being delayed in building a house by the injunction issued against it; and defendant was called to testify as to the difference in the cost of material and construction at the time the injunction was issued and when the bill was dismissed, as bearing upon this issue. The plaintiff, Galyon, had offered to build the house for the same price for which the defendant had contracted it when enjoined, and the question arose whether he was a reliable contractor, and would and could comply with a contract to do the building if it were let to him; and, with a view of proving this, the witness was cross-examined by the solicitor for the complainants, and made the answers of which the plaintiff complains. These answers were clearly pertinent to the investigation. If Mr. Galyon was a reliable contractor, his proposition to build the house tended to prove that the defendant had sustained no

loss; and, if he was unreliable, the effect of the proposition as evidence was weakened. The answers were also fairly, and evidently intended to be directly, responsive to the questions propounded to the witness. If the plaintiff did not pay for the material he used in building, or did not use the character of material called for in his contract, he was not a reliable contractor.

We are of the opinion that the words

spoken by the defendant of the plaintiff were, on account of the occasion, absolutely privileged, and that no action can be maintained upon them. There is therefore no evidence to sustain a verdict against the defendant, and the demurrer to the plaintiff's evidence should have been allowed.

The judgment of the Circuit Court is reversed, the demurrer sustained, and the plaintiff's suit dismissed.

TEXAS SUPREME COURT.

SINGER MANUFACTURING COMPANY,
Appt.,
v.

Frank RIOS.

(.....Tex.....)

A stipulation in a chattel mortgage authorizing the mortgagee to take possession of the mortgaged property upon failure of the mortgagor to make payments secured thereby is not contrary to public policy, and will authorize the mortgagee to take peaceable possession of the property, even against the will of the mortgagor.

(January 8, 1903.)

CERTIFICATION by the Court of Civil Appeals for the Third Supreme Judicial District of questions arising upon appeal by defendant from a judgment of the Travis County Court in favor of plaintiff in an action brought to recover damages for alleged wrongful seizure of property in plaintiff's possession. Answer favorable to appellant returned.

The facts are stated in the opinion.

Messrs. Faulk & Patterson, for appellant:

A party who has the right to possession of property, by the express terms of a contract, upon the happening of a certain event named in the contract, is not required to resort to the courts for the purpose of securing or obtaining possession of the property so long as he can exercise his right to take possession of it without committing a breach of the peace or violating some criminal law.

White Sewing Mach. Co. v. Conner, 23 Ky. L. Rep. 1125, 64 S. W. 841; *Walsh v. Taylor*, 39 Md. 595; *Street v. Sinclair*, 71 Ala. 110; *Burns v. Campbell*, 71 Ala. 271; *Brown v. Phillips*, 3 Bush. 656; *Boone, Mortg.* § 276, p. 396; *Jones, Chat. Mortg.* § 434, p. 448.

The clause authorizing and empowering the defendant to take possession, in the capacity of mortgagee, of the mortgaged property upon failure of plaintiff to pay the unpaid purchase money when due, and to sell the same at public or private sale, is a valid contract stipulation which formed an essential part of the consideration of the mortgage, and which the parties to the mortgage had the legal right and power to insert in the mortgage.

NOTE.—As to right to take possession of and all mortgaged chattels, see *Robison v. Gray* (Iowa) 23 L. R. A. 780, and note. 60 L. R. A.

Wedig v. San Antonio Brewing Asso. (Tex. Civ. App.) 60 S. W. 567; *Harling v. Creech*, 88 Tex. 300, 31 S. W. 357; *White Sewing Mach. Co. v. Conner*, 23 Ky. L. Rep. 1125, 64 S. W. 841; *Andrews v. Singer Mfg. Co.* 20 Ky. L. Rep. 1089, 48 S. W. 976; *North v. Williams*, 120 Pa. 109, 13 Atl. 723; *Walsh v. Taylor*, 39 Md. 595; *Heath v. Randall*, 4 Cush. 195; *Street v. Sinclair*, 71 Ala. 110; *Burns v. Campbell*, 71 Ala. 271; *Scott v. Davis*, 4 Kan. App. 488, 44 Pac. 1001; *Flinn v. Ferry*, 127 Cal. 648, 60 Pac. 434; *Landenberger v. Rector*, 59 Ill. App. 550; *Baumann v. Cornez*, 15 Daly, 450, 8 N. Y. Supp. 480; *McNeal v. Emerson*, 15 Gray, 384; *Geiser Mfg. Co. v. Krogman*, 111 Iowa, 503, 82 N. W. 938.

Plaintiff having expressly agreed in the mortgage that the defendant should have the right to take possession of the mortgaged property upon his failure to pay the unpaid purchase money when due, it was not necessary for the defendant to obtain plaintiff's consent.

White Sewing Mach. Co. v. Conner, 23 Ky. L. Rep. 1125, 64 S. W. 841; *Walsh v. Taylor*, 39 Md. 595; *Francisco v. Ryan*, 54 Ohio St. 307, 43 N. E. 1045; *Street v. Sinclair*, 71 Ala. 110; *McNeal v. Emerson*, 15 Gray, 384; *Braley v. Byrnes*, 21 Minn. 482; *Boone, Mortg.* § 276; *Johnson v. Byler*, 38 Tex. 606; *Corzine v. Williams*, 85 Tex. 499, 22 S. W. 309; *Trimble v. State*, 4 Blackf. 435; *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Mallett v. Page*, 8 Ind. 364; *Maraible v. Moyer*, 78 Ga. 60.

Messrs. Brooks & Shelley, for appellee:

The provisions of the chattel mortgage relied upon were not sufficient to justify the taking possession.

Tex. Rev. Stat. art. 3327; *Loftus v. Macey*, 73 Tex. 242, 11 S. W. 272; *Gillett v. Moody* (Tex. Civ. App.) 54 S. W. 35; *Culver v. State* (Tex. Crim. App.) 62 S. W. 922.

Gaines, Ch. J., delivered the opinion of the court:

This case comes to us upon the following certificate:

"The court of civil appeals of the third supreme judicial district of Texas certifies that the above styled and numbered cause on appeal from the county court of Travis county, Texas, is now pending in the court of civil appeals, and states that the appellee's cause of action is for damages alleged to have been sustained by reason of the de-

defendant's agent entering the place of business of plaintiff, in the city of Austin, and there and then taking possession of a certain sewing machine which defendant had sold to the plaintiff on the instalment plan. The damages alleged are \$65, the value of the machine; that his business as a merchant tailor has been interfered with and obstructed, and that he has been deprived of the use of the machine; and that, on account of being deprived of the same, the work done by him has been greatly decreased,—with amount of actual damages alleged to be \$250, with also a claim for exemplary damages at \$200. Among other facts pleaded in the defendant's answer, there are averments to the effect that the sewing machine was sold to the plaintiff on the instalment plan, and that there was then due on the same a certain amount, which was unpaid, and that at the time of sale a mortgage was retained on the machine to secure the amount that may become due, and that there was a stipulation in the mortgage which authorized the defendant to take possession of the sewing machine, either with or without process of law; that the plaintiff had failed and refused to pay the unpaid purchase money when due; and that the machine was taken quietly and peaceably, without the use of force, by virtue of this stipulation in the mortgage, which is as follows: 'If said mortgagor shall fail to pay any instalment as it becomes due, then all said instalments unpaid shall at once become due and payable, and said mortgagee, or its representatives, shall have the right, and is hereby authorized and empowered, to take possession of said goods and chattels, with or without process of law; said mortgagor hereby waiving any claim or action for trespass or damage on account of said taking.' It is contended by the defendant that under this provision in the mortgage it took the machine, and that it was authorized to take the same, and this fact was pleaded as a defense to the plaintiff's cause of action. The trial court sustained a demurrer to so much of the defendant's answer as sought to justify the taking by virtue of the above provision in the mortgage, but submitted to the jury the issue as to whether or not the machine was taken from the possession of the plaintiff by and with the consent of the plaintiff, and, if such was the case, to find in favor of the defendant. The defendant, upon the trial of the case, asked a charge, which was by the court refused, presenting to the jury the issue as pleaded,—that the defendant had authority to take possession of the machine by virtue of the agreement contained in the mortgage, as above set out. There is evidence in the record which shows that the machine was taken from the building occupied by the plaintiff as a tailor shop without his consent, and against the express wishes of the party in whose possession it was at the time it was taken; that the machine was then in use by the plaintiff in his business as a tailor. And there is also evidence which tends to show that the defendant, in taking

the machine, used no force or violence, and no breach of the peace was committed at that time. It also appears as a fact that at the time the machine was taken there was a balance due the defendant, as a part of the purchase price of the machine. It is also pleaded, and there is evidence to sustain the averments, that the machine was taken by the defendant for the purpose of enforcing the provision of its mortgage and lien on the machine. Verdict and judgment in the trial court were in favor of the plaintiff on all of the items of damages claimed, with a credit in favor of the defendant for the balance due upon the machine; and for the balance remaining, judgment was rendered in plaintiff's favor.

"Under the above statement, the court of civil appeals for the third supreme judicial district of Texas certifies to the supreme court of Texas the following question: Although the taking of the machine at the time was without the consent of the plaintiff, did the stipulation contained in the mortgage, as above quoted, authorize the defendant to enter the place of business of the plaintiff and take actual possession of the machine, without then and there first obtaining the permission and consent of the plaintiff? In other words, did the consent given in the provision of the mortgage quoted authorize the taking, where it is, as here, shown by the facts that no force or violence or breach of the peace was committed in taking the machine? And, if such taking was justifiable under the terms of the mortgage as quoted, would such fact be a defense, either in whole or in part, to the plaintiff's cause of action?"

We are of the opinion that the question should be answered in the affirmative. Clearly, unless the stipulation in the mortgage, which purported to give to appellant the right to take possession of the sewing machine upon default of payment be held of no effect, its agent committed no wrong by a peaceable seizure of the property for the purpose of paying the debt. The stipulation is valid unless it is contrary to public policy. According to the well-known *dictum* of an English judge, public policy "is a very unruly horse, and, when you once get astride it, you never know where it will carry you." *Richardson v. Mellish*, 2 Bing. 229. This striking illustration admonishes us that the words "public policy" are vague in meaning and dangerous of application, and that, unless we exercise due discrimination, we are likely to fall into error when we come to apply them to the construction of a contract, with a view to determine the validity of its provisions. Freedom of contract is the rule, subject to the exception that a party cannot bind himself to do that which is by law prohibited or declared to be illegal, or which is manifestly detrimental to public morals or the public good. The question then arises, What consequence, injurious to the public, is a stipulation of the character of that under consideration calculated to produce? To this it may be vaguely answered that it tends to a breach

of the peace. But the reply is, so do many other contracts, the validity of which is never called in question. Certainly no breach of the peace is likely to occur provided the mortgagor in such case does what he has contracted to do and what it is his duty to do, namely, in case of default to surrender the property upon demand of the mortgagee. On the other hand, should he make forcible resistance, this does not justify the mortgagee in using force to overcome his resistance. The law hardly proceeds upon the assumption that either party will violate his agreement, and that therefore a breach of the peace may arise. The proposition that such a stipulation is valid, and that the mortgagee may take peaceable possession of the property without the consent, and even over the protest of the mortgagor, is sustained by the great weight of authority. The following cases are in point: *Street v. Sinclair*, 71 Ala. 110; *Burns v. Campbell*, 71 Ala. 271; *Walsh v. Taylor*, 39 Md. 592; *North v. Williams*, 120 Pa. 109, 13 Atl. 723; *White Sewing Mach. Co. v. Conner*, 23 Ky. L. Rep. 1125, 64 S. W. 841; *Heath v. Randall*, 4 Cush. 195; *Satterwhite v. Kennedy*, 3 Strobb. L. 457; *Nichols v. Webster*, 1 Chand. (Wis.) 203. Such is the rule recognized by the text-writers. Jones, Chat. Mortg. § 434; 1 Cobbey, Chat. Mortg. § 510; Pingrey, Chat. Mortg. § 989; Boone, Mortg. § 276. The authorities relied upon in support of the proposition that the stipulation in question did not justify the taking of the property against the consent of the mortgagor are from our own courts. The first is *Lofthus v. Maxey*, 73 Tex. 242, 11 S. W. 272. As to the evidence adduced upon the trial, the case is meagerly reported. The petition charged that, in connection with the taking, the defendants threatened the plaintiff with violence and committed an assault upon her. How these allegations were sustained by the proof, the report does not disclose. The court charged the jury that, if the property was taken without the consent of the plaintiff, and "if the manner of defendants, or either of them, in the taking, was by threats, or in an insolent, overbearing, and insulting manner, done in such a way as would naturally outrage the feelings of plaintiff," then they should find for plaintiff. It was held that this charge was correct. In the opinion the court says: "We think the charge of the court to the effect that, if the instrument alleged to have been executed by Sallie Maxey was genuine, as asserted by defendants, it furnished no justification or defense for the defendants, is correct. Without such an instrument they had the right to remove the property peaceably and with the consent of the parties having it in lawful possession, while with it they had no right to make such removal forcibly or against the will of plaintiffs." We think, in so far as the opinion asserts that a peaceable taking against the will of the mortgagor was wrongful, it is clearly a *dictum*. The petition alleged the taking of the property, but did not state its value, and we understand the suit was to

60 L. R. A.

recover damages for an assault and other insulting conduct. Judging by the report of the case, the question of the right to take the property peaceably without the consent of the plaintiff was not discussed in the briefs of counsel upon either side, and, as we think, was a point not necessarily involved in the determination of the suit. In *Gillett v. Moody* (Tex. Civ. App.) 54 S. W. 35, the court of civil appeals for the fourth district held that, under similar provision in a chattel mortgage, it was unlawful to enter a house by force and threats for the purpose of taking and carrying away the mortgaged property. That is not the question certified in this case. The case of *Culver v. State* (Tex. Crim. App.) 62 S. W. 922, was a conviction for an aggravated assault, in which the court of criminal appeals held that the fact that the assault was made in an attempt by the defendant to take mortgaged property under a like stipulation in a chattel mortgage was not a justification of the act. What is said in the opinion to the effect that the defendant had no right to take the property without the consent of the assaulted party was not involved in the decision of the case. Clearly, the right to take the property did not justify the assault. So far, we have not adverted to the case of *Harling v. Creech*, 88 Tex. 300, 31 S. W. 357. In that case, in answering a certified question, this court, after construing the instrument in controversy to be a chattel mortgage, said: "The instruments being chattel mortgages, the vendor had the rights of a mortgagee under a chattel mortgage containing the stipulations of right to take possession, which would be to take possession of the property if he deemed himself insecure, or the debt not being paid, and to hold or dispose of the property in the character of mortgagee, and not as owner." It is claimed by counsel for appellee that this was a *dictum*. Without pausing to inquire whether the remark was called for in a decision of the question there certified, we deem it sufficient to say that, if a *dictum*, it is, in our opinion, a correct announcement of the law.

FORT WORTH & RIO GRANDE RAILWAY COMPANY, Appt.,

v.

SOUTHWESTERN TELEGRAPH & TELEPHONE COMPANY.

(.....Tex.....)

1. Authority to condemn the right to construct a telegraph line along a railroad right of way is conferred by a

NOTE.—As to right to condemn right of way for telegraph line over railroad right of way, see *Mobile & O. R. Co. v. Postal Tele. Cable Co.* (Tenn.) 41 L. R. A. 403.

As to right of railroad company to compensation for location of telegraph line over its right of way, see *American Teleph. & Telegr. Co. v. Smith* (Md.) 7 L. R. A. 200, and *note*.

statute permitting the condemnation of any lands, whether owned by private persons in fee or in any less estate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation.

2. The condemnation of the right to construct a telegraph line along a railroad right of way is not prevented by the fact that a right of way for the line might be obtained over other property or in other ways.

(January 8, 1903.)

CERTIFICATION by the Court of Civil Appeals for the Third Supreme Judicial District of questions arising upon appeal by defendant from a judgment of the Brown County Court in plaintiff's favor in a proceeding to condemn a right of way. *Answers returned favorable to appellee.*

The facts are stated in the opinion.

Mr. N. L. Lindale, for appellant:

Under the statute of Texas, a telegraph and telephone line having the right to exercise the power of eminent domain, desiring to enter upon public or private lands for the purpose of constructing and operating its telegraph and telephone lines, "may appropriate so much of said lands as may be necessary," and no more.

Sayles's Civ. Stat. (Tex.) arts. 698, 699.

Appellee's authority to condemn is by legislative enactment, and it can exercise this right only in so far as the legislature, in express terms, provides.

Sayles's Civ. Stat. (Tex.) arts. 698, 699; *Sabine & E. T. R. Co. v. Gulf & I. R. Co.* 92 Tex. 164, 46 S. W. 784.

There must be shown an actual necessity for the taking, such as a physical impossibility of avoiding it, before there can be any taking at all.

Ibid.

There can be no taking of lands already devoted to a public use for the purpose of devoting it to another and wholly different use, unless it be shown that it is for the public benefit, and of a higher order than the use for which it is already used, as well as that it cannot be practically constructed in any other way.

Sabine & E. T. R. Co. v. Gulf & I. R. Co. 92 Tex. 166, 46 S. W. 784; 1 Rorer, Railroads, p. 284; *Sharon R. Co.'s Appeal*, 122 Pa. 533, 17 Atl. 234.

Where a railroad company has acquired a right of way 100 feet in width, and which is necessary for the use of said road, it cannot be appropriated to another and different use, except where the legislature in express terms has authorized it to be done, or where such authority arises from necessary implication.

10 Am. & Eng. Enc. Law, 2d ed. pp. 1075, 1094, 1096, 1097; 3 Elliott, Railroads, §§ 922, 964; Pierce, Railroads, pp. 155, 157; 1 Rorer, Railroads, p. 284; Mills, Em. Dom. §§ 45, 46, 209; Lewis, Em. Dom. § 276; *Re New York & B. R. Co.* 20 Hun, 204; *New York City & N. R. Co. v. Central Union Teleg. Co.* 21 Hun, 261; *Re Boston & A. R. Co.* 53 N. Y. 574; *Re Rochester Water* 60 L. R. A.

Comrs. 66 N. Y. 418; *Re Buffalo*, 68 N. Y. 167; *Prospect Park & C. I. R. Co. v. Williamson*, 91 N. Y. 561; *Valparaiso v. Chicago & G. T. R. Co.* 123 Ind. 467, 24 N. E. 249; *Seymour v. Jeffersonville, M. & I. R. Co.* 126 Ind. 466, 26 N. E. 188; *Ft. Wayne v. Lake Shore & M. S. R. Co.* 132 Ind. 558, 18 L. R. A. 367, 32 N. E. 215; *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 599; *Barre R. Co. v. Montpelier & W. River R. Co.* 61 Vt. 1, 4 L. R. A. 785, 17 Atl. 923; *State, Jersey City, Prosecutor, v. Montclair R. Co.* 35 N. J. L. 330; *New Jersey Southern R. Co. v. Long Branch Comrs.* 39 N. J. L. 28; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 263, 4 Am. Rep. 63; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, 15 N. W. 684; *Northwestern Telph. Exchange Co. v. Chicago, M. & St. P. R. Co.* 76 Minn. 334, 79 N. W. 316; *Oregon Cascade R. Co. v. Baily*, 3 Or. 164; *Springfield v. Connecticut River R. Co.* 4 Cush. 63; *Housatonic R. Co. v. Lee & H. R. Co.* 118 Mass. 391; *Boston & M. R. Co. v. Lowell & L. R. Co.* 124 Mass. 368; *Fidelity Trust & Safety Vault Co. v. Mobile Street R. Co.* 53 Fed. 687; *Chattanooga Terminal R. Co. v. Felton*, 69 Fed. 273; *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. 511, 6 Atl. 564; *Baltimore & H. de G. Turnp. Co. v. Union R. Co.* 35 Md. 224, 6 Am. Rep. 401; *Sharon R. Co.'s Appeal*, 122 Pa. 533, 17 Atl. 234; *Randolph, Em. Dom.* §§ 97, 98; *Minneapolis Western R. Co. v. Minneapolis & St. L. R. Co.* 61 Minn. 502, 63 N. W. 1037; *St. Louis, H. & K. C. R. Co. v. Hannibal Union Depot Co.* 125 Mo. 87, 28 S. W. 483.

Mr. George H. Fearons also for appellant.

Messrs. McLaurin & Wosencraft, for appellee:

A telegraph and telephone line designed for use by the public is held in Texas to have the same rights in acquiring right of way as if it were a telegraph line only, and is, under the law, a recognized public use for which property may be taken under the eminent domain power of the state.

Tex. Rev. Stat. arts. 698, 699; *San Antonio & A. P. R. Co. v. Southwestern Teleg. & Teleph. Co.* 93 Tex. 313, 49 L. R. A. 459, 55 S. W. 117.

All kinds of property, and every variety and degree of interest in property, may be taken under the power of eminent domain.

Tex. Const. art. 1, §§ 17, 26; *Randall v. Texas C. R. Co.* 63 Tex. 589; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; Lewis, Em. Dom. ed. 1888, 262.

The act of Congress of July 24, 1866, confers upon telegraph companies the right, privilege, and franchise to construct and operate its lines on all railways.

U. S. Rev. Stat. §§ 5263, 5268; U. S. Comp. Stat. 1901, pp. 3579, 3581; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 548, 31 L. ed. 790, 793, 8 Sup. Ct. Rep. 961; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 100, 37 L. ed. 380, 383, 13 Sup. Ct. Rep. 485; Joyce, Electric Law, § 62; *Hewett v. Western U. Teleg. Co.* 4 Mackey, 424;

Crowwell, Electricity, § 47; *Union Trust Co. v. Atchison, T. & S. F. R. Co.* 8 N. M. 327, 43 Pac. 704; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *United States v. Union P. R. Co.* 160 U. S. 41, 40 L. ed. 333, 16 Sup. Ct. Rep. 190; *Western U. Teleg. Co. v. American U. Teleg. Co.* 9 Biss. 72, Fed. Cas. No. 17,444; *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126.

The fact that the Federal telegraph act of July 24, 1866, grants a right to take property for telegraph purposes, but fails to provide a procedure for condemnation, will not defeat the act.

Western U. Teleg. Co. v. American U. Teleg. Co. 9 Biss. 72, Fed. Cas. No. 17,444; *Postal Teleg. Cable Co. v. Morgan's L. & T. R. & S. Co.* 49 La. Ann. 58, 21 So. 183; *Postal Teleg. Cable Co. v. Southern R. Co.* 89 Fed. 190; *United States v. Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346.

The Texas statutes authorize telegraph and telephone companies to condemn for the use of their lines a right of way over lands held by railways for right-of-way purposes.

Tex. Rev. Stat. art. 699; *San Antonio & A. P. R. Co. v. Southwestern Teleg. & Teleph. Co.* 93 Tex. 313, 49 L. R. A. 459, 55 S. W. 117; *Southwestern Teleg. & Teleph. Co. v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 52 S. W. 107; *Gulf, C. & S. F. R. Co. v. Southwestern Teleg. & Teleph. Co.* (Tex. Civ. App.) 52 S. W. 86; *Texas & N. O. R. Co. v. Postal Teleg. Cable Co.* (Tex. Civ. App.) 52 S. W. 108; *Gulf, C. & S. F. R. Co. v. Southwestern Teleg. & Teleph. Co.* 18 Tex. Civ. App. 500, 45 S. W. 152; *San Antonio & A. P. R. Co. v. Southwestern Teleg. & Teleph. Co.* (Tex. Civ. App.) 56 S. W. 201; *Texas Midland R. Co. v. Southwestern Teleg. & Teleph. Co.* (Tex. Civ. App.) 57 S. W. 312.

The right of way of railway companies may be taken under the eminent domain procedure provided by the laws of the several states as right of way for telegraph lines.

Postal Teleg. Cable Co. v. Oregon Short-Line R. Co. 23 Utah, 476, 65 Pac. 735; *Mobile R. Co. v. Postal Teleg. Cable Co.* 101 Tenn. 62, 41 L. R. A. 403, 46 S. W. 571; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 76 Miss. 731, 45 L. R. A. 223, 26 So. 371; *St. Louis & C. R. Co. v. Postal Teleg. Co.* 173 Ill. 508, 51 N. E. 382; *Postal Teleg. Cable Co. v. Morgan's L. & T. R. & S. Co.* 49 La. Ann. 58, 21 So. 183; *Savannah, F. & W. R. Co. v. Postal Teleg. Cable Co.* 112 Ga. 941, 38 S. E. 353; *Postal Teleg. Cable Co. v. Southern R. Co.* 90 Fed. 31.

The appropriation of so much of the right of way of a railway as is not essential to the enjoyment of its franchise and property for the construction of a telegraph line is to and for a more necessary public use.

Postal Teleg. Cable Co. v. Oregon Short-Line R. Co. 23 Utah, 476, 65 Pac. 735; *Southern P. R. Co. v. Southern California R. Co.* 111 Cal. 231, 43 Pac. 602.

A telegraph line constructed of poles set in the ground upon the right of way of a 60 L. R. A.

railway company, with wires suspended from pole to pole on cross arms, actually takes from the railway, if anything, only the spaces occupied by the poles, and, in addition, only deprives the owner of the right of way of the free and uninterrupted use of such space above the right of way as is actually occupied by the wires and cross arms.

Calcasieu Lumber Co. v. Harris, 77 Tex. 23, 13 S. W. 453; *Gulf, C. & S. F. R. Co. v. Southwestern Teleg. & Teleph. Co.* 18 Tex. Civ. App. 500, 45 S. W. 152; *St. Louis & O. R. Co. v. Postal Teleg. Co.* 173 Ill. 508, 51 N. E. 390; *St. Louis v. Western U. Teleg. Co.* 63 Fed. 76; *Mutual Union Teleg. Co. v. Katkamp*, 103 Ill. 420; *Mobile R. Co. v. Postal Teleg. Cable Co.* 101 Tenn. 62, 41 L. R. A. 403, 46 S. W. 572; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 76 Miss. 731, 45 L. R. A. 223, 26 So. 371.

Only nominal damages can be recovered for such taking.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 248, 41 L. ed. 988, 17 Sup. Ct. Rep. 581; *San Antonio & A. P. R. Co. v. Southwestern Teleg. & Teleph. Co.* (Tex. Civ. App.) 56 S. W. 201; *Texas & N. O. R. Co. v. Postal Teleg. Cable Co.* (Tex. Civ. App.) 52 S. W. 108; *Southwestern Teleg. & Teleph. Co. v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 52 S. W. 107; *Texas Midland R. Co. v. Southwestern Teleg. & Teleph. Co.* (Tex. Civ. App.) 57 S. W. 313; *Gulf, C. & S. F. R. Co. v. Southwestern Teleg. & Teleph. Co.* (Tex. Civ. App.) 52 S. W. 87; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* 76 Miss. 731, 45 L. R. A. 223, 26 So. 373; *St. Louis & C. R. Co. v. Postal Teleg. Co.* 173 Ill. 508, 51 N. E. 390; *Mobile R. Co. v. Postal Teleg. Cable Co.* 101 Tenn. 62, 41 L. R. A. 403, 46 S. W. 573.

A telegraph company authorized to exercise the power of eminent domain in acquiring a right of way is by law given the privilege of selecting the most advantageous location, and the courts have no right to deny the exercise of the power so vested in the company.

Tex. Rev. Stat. arts. 698, 699, 4424; *Crary v. Port Arthur Channel & Dock Co.* 92 Tex. 284, 47 S. W. 967; *Croley v. St. Louis S. W. R. Co.* (Tex. Civ. App.) 56 S. W. 615; *Backus v. Fort Street Union Depot Co.* 169 U. S. 568, 42 L. ed. 858, 18 Sup. Ct. Rep. 445; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206; *Kansas & T. Coal R. Co. v. Northwestern Coal & Min. Co.* 161 Mo. 288, 51 L. R. A. 945, 61 S. W. 684; 10 Am. & Eng. Enc. Law, 2d ed. p. 1057; *Pierce, Railroads*, 254; *Lewis, Em. Dom.* § 286.

The lands of a railway company, not actually in use by such company nor absolutely necessary for the enjoyment of its franchise, when sought to be condemned for telegraph purposes, must stand upon the same footing as the land of an individual, which may be taken even from the actual and profitable use of the owner.

Tex. Rev. Stat. art. 699; *Peoria, P. & J. R.*

Co. v. Peoria & S. R. Co. 66 Ill. 175; *Butte, A. & P. R. Co. v. Montana Union R. Co.* 16 Mont. 504, 31 L. R. A. 310, 41 Pac. 232.

The necessity which warrants the taking for a second public use of property already dedicated to another public use is not of that character which requires proof that the second use cannot be constructed without taking the property of the first.

Tex. Rev. Stat. arts. 699, 4424; *Orary v. Port Arthur Channel & Dock Co.* 92 Tex. 283, 47 S. W. 967; *M'Culloch v. Maryland*, 4 Wheat. 411, 4 L. ed. 602; *Legal Tender Case*, 110 U. S. 421, *sub nom. Juilliard v. Greenman*, 28 L. ed. 204, 4 Sup. Ct. Rep. 122; *Butte, A. & P. R. Co. v. Montana Union R. Co.* 16 Mont. 504, 31 L. R. A. 299, 41 Pac. 232.

Williams, J., delivered the opinion of the court:

Certified questions from the court of civil appeals for the third district, as follows:

"This is a condemnation proceeding instituted by the Southwestern Telegraph & Telephone Company against the Ft. Worth & Rio Grande Railway Company, and resulting in a judgment in favor of the telegraph and telephone company, in accordance with, and subject to, the limitations stated in its petition, and an appeal by the railway company. The essential averments of the plaintiff's petition are as follows:

"That the plaintiff is a corporation duly incorporated, and is duly authorized and empowered to do business as a telegraph and telephone company in the state of Texas, having complied fully with the requirements of the law relative to foreign corporations in that regard, and holding a permit from the state of Texas to do business therein. And plaintiff further says that it is duly and legally authorized and empowered to erect, own, operate, and maintain magnetic telegraph and telephone lines for the use of the public in the rapid transmission of intelligence in the states of Texas, Arkansas, New York, and elsewhere in the United States of America, being duly chartered for that purpose."

"(4) That the said defendant is a public highway and post road of the United States; and that plaintiff has, in all things, complied with the acts of Congress of the United States in such cases made and provided, and has filed its written acceptance of all the restrictions and obligations imposed by the acts of Congress with the Postmaster General of the United States, as is required by law, and that plaintiff is entitled to all the rights and privileges conferred upon telegraph companies by the acts of Congress of the United States in such cases made and provided.

"(5) That the defendant is a private corporation, duly incorporated and organized, and transacting the business usually conducted by railway companies in the public service of carrying passengers, freights, and the United States mails for hire, being a post road. This business defendant conducts through and over its railroad known 60 L. R. A.

as Ft. Worth & Rio Grande Railroad, by it owned and operated from and between the cities of Stephenville and Brownwood, in the state of Texas, and passing through the cities of Dublin, Comanche, and other towns in the state of Texas."

"(7) That plaintiff has already built and is maintaining a system of several thousand miles of telegraphs and telephone lines in the states of Texas, Arkansas, and New York, by it now owned and operated for the use of the public for the rapid transmission of intelligence for commercial purposes, and for other public purposes.

"(8) That, as an addition to the part of the said system of telegraph and telephone lines now maintained and operated by plaintiff as aforesaid, and to be used for the same purposes as said system (to wit, to the service of the public) and in connection therewith, plaintiff desires to build upon defendant's right of way a telegraph and telephone line, hereinafter called "additional line," from the said city of Stephenville, in Erath county, Texas, in a southerly direction, at a distance near to and parallel with (except as hereinafter shown) defendant's main line of railway, to the city of Brownwood, in Brown county, Texas.

"(9) That plaintiff and defendant, after considering this matter together, cannot agree upon a purchase by plaintiff of a right of way upon, along, and over said lands and property hereinafter more particularly described for said additional line, nor can they agree as to amount of damages that may be caused to the lands and property of defendant by the construction, operation, and maintenance thereon of the said additional line; hence plaintiff desires to have a right of way along, upon, and over the said lands and property condemned in accordance with law, in order that plaintiff may lawfully construct, operate, and maintain thereon its said additional telegraph and telephone line.

"(10) That plaintiff shall locate said telegraph and telephone (additional line) at a distance of 35 feet from and in a direction easterly of the center line between the rails of the main track of defendant's railway, and parallel with said center line of said railway, except where deflections are made as herein elsewhere shown; that, in order to do so, it will be necessary and most advantageous for plaintiff to build, operate, and maintain its said (additional) line in, along, upon, and over certain land owned and occupied by the defendant as a right of way for its said railroad, at the place and in the manner herein indicated, which land is hereinafter more fully described, and the points of entering upon and leaving the said land are hereinafter specially given.

"(11) That the poles, wires, and cross arms shall be so placed upon said land, and at all times thereon so kept and maintained, as not to obstruct any private roadway or railway crossing; and so as not to impede the free use by the said defendant of the said lands for the purpose of accommodating public travel upon said railway; and so as not to impede the defendant in the use of

said railroad for any other purpose as a common carrier; and so as not to obstruct the free use of, or come in contact with, any other telegraph or telephone line now existing upon the said land along and upon the right of way of the defendant over the same; and in such manner as not to interfere with any structure, drain, or ditch upon the defendant's right of way now there existing and by defendant used in its railway purposes, or that may hereafter be there placed by defendant in the necessary use of its right of way for railway purposes.

"And plaintiff shall only have an easement in defendant's right of way for the purpose of building, operating, and maintaining thereon its said telegraph and telephone line, having ingress and egress to and from said lands for that purpose; and the building, operating, and maintaining of said line shall not prevent free passage under the wire to defendant, nor the use of timbers, soil, rock, gravel, or any other material between the poles or beyond the wires from the railway; and if the defendant shall at any time desire to change the location of its tracks, or to construct any new tracks or sidetracks, or erect any depots or other structures, or to open any gravel pits or rock quarries, or to remove any material or soil, or in case the poles and wires shall be found to interfere with the running or operating of cars or trains upon the defendant's tracks, or to endanger the safety of employees of defendant or passengers traveling on defendant's trains,—then the plaintiff shall remove the poles and wires from the point of interference, at its own cost, to any point on defendant's right of way, or on the same side of defendant's main track of railway, near and adjacent to the former position occupied by said poles and wires as may be designated by defendant, such removal to take place after written notice for a reasonable time to be given plaintiff by defendant, stating why the removal is desired and the place to which the removal shall be made.

"(12) That, in erecting the said telegraph and telephone line in, along, upon, and over the said tracts of land, it will be necessary and most advantageous for plaintiff to set its poles in the ground in a single line with each other, and parallel with (except as hereinafter shown) the center line, between the rails of the main track of defendant's said railroad, at the distance of 144½ feet each from the next preceding pole in the line, except where different distances between the poles are hereinafter specially given. The poles are to be 25 feet long, 7 inches in diameter at the top, and not exceeding 18 inches in diameter at the lower end, except those poles for which different length and sizes are hereinafter specially given. The poles are to be erected perpendicular to the ground, except as to those hereinafter specified, and set into it 6 feet. To each of these poles, at right angles to it, and at right angles to the center line between the rails of the main track of defendant's railway, are to be firmly and securely attached three cross arms, each to be 6 feet 60 L. R. A.

long and 4 inches by 4 inches in size, and made fast to the poles at a point equidistant from the ends of the cross arms; the top edges of the three cross arms shall be 3 inches, 30 inches, and 52 inches respectively below the top of the poles; and upon each side of the poles plaintiff will string wires attaching them to insulators, made fast to strong and durable wooden pins, which pins are to be attached securely to the cross arms; and the wires shall be so strung that each cross arm shall support six wires, three on each side of the pole; and the wires shall be strung taut, as above indicated, from pole to pole, for the transmission of plaintiff's telegraph and telephone messages in the service of the public. In measuring the distance to the said poles, in all cases the measurement shall be made to the center of the pole at the ground. In locating the distance, the telegraph and telephone line is to be built from the railroad, the measurement is to be to the several poles at the ground, from the center line, between the rails of the main track of defendant's railway, along lines drawn at right angles to said center line, and reaching from said center line to the center of the poles which are to support the wires of the said telegraph and telephone line. All poles that are longer than 30 feet shall be set in the ground to the depth of 7 feet. Into each cross arm shall be securely fastened a durable and strong wooden pin at the point where the wire is to be supported on the cross arm, and on each pin, protecting it from the wire, shall be securely fastened an insulator, to which the wire shall be attached. The poles will each occupy a space of 18 inches square, or 2¼ square feet of land.'

"The petition accurately describes the boundaries of appellant's property, and embraces allegations as follows:

"The appellant's property upon which appellee seeks to condemn a right of way is certain property held by appellant for right of way purposes for its railway, in the counties of Erath, Comanche, and Brown, in the state of Texas.

"That the lands over which appellee seeks to condemn a right of way "are connected throughout their entire length and constitute one entire and continuous tract or strip of land held by defendant as a right of way for its said railway, and along and upon which the defendant's said railway is built and operated." Within the said strip of land, defendant's right of way, said strip being 100 feet wide from end to end thereof, and practically at the center line thereof, from end to end, lengthwise said strip, is built the main track of defendant's railway.'

"The petition then gives the exact distance from the center of appellant's main track of every one of the few poles not occupying the pole line's specified distance of 35 feet from said main track. It gives also the length of every pole not of the specified height of the poles in the line. It further gives the number and dimensions of the cross arms, the number of wires, and all the plans,

specifications, details, and measurements for the location and structure of the line.

"The petition further stipulates that appellant shall not be liable in damages for injury by fire to appellee's poles, and relieves appellant of any possible obligation to clear away combustible material from about the poles.

"The petition prays that damages be assessed for the condemnation as sought in the petition, and for the building, operating, and maintaining the line at the place and in the manner indicated in the petition, and for such other orders and judgments as the case may warrant.

"The defendant interposed, and the court overruled, the following special exception:

"Because plaintiff has no authority and right under the laws of this state to exercise the power of eminent domain in, along, on, and over the right of way of this defendant railway corporation, and parallel with its track, unless not to do so would defeat the object and purpose of its grant; because, before there can be a taking such as prayed for by the plaintiff, it must be shown that it is not practical to construct its line between said points in any other way than upon defendant railway company's right of way."

"The action of the trial court in overruling this exception is a material question properly presented in appellant's brief for decision, and the court of civil appeals hereby certifies that question to the supreme court for decision. In other words, stating the question in a different form: Can there be a condemnation of property already devoted to a public use in the manner described in the plaintiff's petition, for the purpose of devoting it to another and a different use in the manner and under the limitations prescribed in the plaintiff's petition, unless it be shown that it is for the public benefit and of a higher order than the purpose for which it is already used, as well as that it cannot be practically constructed in any other way?"

In the case of *San Antonio & A. P. R. Co. v. Southwestern Teleg. & Teleph. Co.* 93 Tex. 313, 49 L. R. A. 459, 55 S. W. 117, it was held by this court that telephone companies were invested with the same power to condemn property for the construction of their lines as that given by the Revised Statutes to telegraph companies. The extent of that power is the subject presented for consideration by the present certificate. It is granted by articles 698 and 699 of the Revised Statutes as follows:

"Art. 698. Corporations created for the purpose of constructing and maintaining magnetic telegraph lines are authorized to set their poles, piers, abutments, wires, and other fixtures along, upon, and across any of the public roads, streets, and waters of this state, in such manner as not to incommode the public in the use of such road, streets, and waters."

"Art. 699. Such companies are also authorized to enter upon any lands, whether owned by private persons in fee or in any less es- 60 L. R. A.

tate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation, for the purpose of making preliminary surveys and examinations with a view to the erection of any telegraph lines, and from time to time to appropriate so much of said lands as may be necessary to erect such poles, piers, abutments, wires, and other necessary fixtures for a magnetic telegraph, and to make such changes of location of any part of said lines as may from time to time be deemed necessary, and shall have a right of access to construct said line, and, when erected, from time to time as may be required to repair the same, and may proceed to obtain the right of way and to condemn lands for the use of the corporation in the manner provided by law in the case of railway corporations."

The objection urged by appellant to the attempt to condemn a portion of the land previously acquired by it for a right of way is that the property has already been devoted to public use; that the grant of the power of eminent domain in general terms to another corporation does not, upon established principles, include the right to take such property unless it be absolutely necessary to the exercise of the privilege granted; and that, as the statute has not expressly conferred the right of condemnation asserted, the plaintiff must show such absolute necessity, i. e., that its line cannot, in the language of the question certified, "be practically constructed in any other way."

The doctrine of the law upon which this contention is founded is thus very well stated by Justice Brown in *Sabine & E. T. R. Co. v. Gulf & I. R. Co.* 92 Tex. 162, 166, 168, 46 S. W. 784, 786: "The law [conferring power of condemnation upon railway companies] does not authorize the condemnation of property which has already been dedicated to a public use when such condemnation would practically destroy the use to which it has been devoted. No express authority is given [to railroad companies] by our statutes to condemn such property, and the authority cannot be implied from the general power conferred by the law, unless the necessity be so great as to make the new enterprise of paramount importance to the public, and it cannot be practically accomplished in any other way." The doctrine is further stated on page 168, 92 Tex. and on page 786, 46 S. W.: "The authorities before cited fully sustain the proposition that such property will not be taken in condemnation proceedings when the taking will destroy the use to which it is devoted, unless it be found that the constructing road or the connection sought to be made is of so great importance to the public as to demand that another public use of less importance shall be set aside for its benefit, and that the new enterprise cannot be accomplished in any other practical way. The first occupier of the ground is entitled to all the advantages derived from the establishment of the public use therein, and no question of convenience nor expense to the company seeking

condemnation can be considered, unless it be such as to render the performance of the duty enjoined by law practically impossible by any other means which can be used by the constructing company." Obviously, the first question which occurs in the consideration of such cases is whether or not the legislature has expressly conferred the power asserted. The rule of construction laid down in the quotation, and in the authorities generally, is applied in cases where the second use to which the property is sought to be put will destroy, or, at least, materially interfere with, that to which such property has been previously devoted. When this is the situation, courts refuse to hold that the legislature, by a mere general grant of the power to enter upon and condemn land, intended to authorize the destruction or material impairment of an already established public use, unless it appears that the power last conferred can be exercised in no other practical way. In such cases the power is to be implied, and cannot be implied from anything less than practical necessity. But all authority concedes the power of the legislature to authorize the taking of property which has already been condemned to public use, and we must therefore look to the law to see if the power here in question has been conferred.

The power of condemnation granted to telegraph companies is expressed in language both general and specific. The statute authorizes the construction of telegraph lines upon and across public roads, streets, etc., showing that the legislature thought it proper to grant the privilege with respect to some lands already in use by the public. It then authorizes the condemnation of "any lands, whether owned by private persons in fee or in any less estate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation." It is plain that the characters of estates in lands of corporations thus made subject to the power are the same as those of private persons, i. e., "either in fee or in any less estate." It is equally plain that such estates are meant as have been acquired by corporations in any manner whatsoever. All lands owned by corporations in any kind of estate must have been acquired either by "purchase" or "by virtue of some provision in their charters." If lands are acquired "by virtue of any provision in the charter," they are expressly subjected to such proceedings as this. Rights of way of railroad companies acquired by condemnation proceedings are acquired "by virtue" of provisions either of special charters or charters founded upon the general law, and therefore come within the express provision of the statute. If it be said that the power given is only a general one, and cannot, under the rule of condemnation stated, be held to refer to property held by corporations for public purposes, how can we account for the use of this language, at once so comprehensive and so particular? Other provisions of the statute conferring the power of eminent domain up-

on other kinds of corporations give the right to take any lands of persons or corporations, and some of them give the right to construct works along and across public roads, streets, waters, etc.; but in none of them did the legislature take the pains to use the specific language employed in favor of telegraph companies. Unless it was foreseen that questions as to the extent of the power might arise out of the characters of estates held and the modes of their acquisition, and ought to be settled by the statute, why should the legislature have referred to those incidents at all? We must assume that this language was used for a purpose, and it can best be subserved by giving to the words of the statute their true and legitimate meaning, rather than by frittering them away by construction. The reasons which actuated the legislature are easily conjectured. Telegraph lines were in existence upon rights of way of railway companies throughout the country, and it was common knowledge that they did not impede, but rather facilitated, the business of the carriers. Whatever might be the effect of the construction of great numbers of such lines along railroads, there have not been at any time such conditions existing in this state as to cripple or impede the carrying business, and to call for closer restrictions by legislation upon the rights granted to telegraph companies. So general has been the opinion that telegraph lines can exist upon the rights of way of railroad companies, consistently with the rights of the latter, that Congress in 1866 gave permission for the construction of such lines along the national post roads, some of which are railroads. The legislature acted upon the knowledge of these well-known facts and conditions, and, in granting powers to telegraph companies, employed language materially differing from that used in conferring the right of condemnation upon corporations whose objects required different uses of property employed in their business,—language well chosen to express the power in controversy. Authority to burden such property with another railroad, or a turnpike, or a canal, would involve consequences very different from those flowing from a grant to a telegraph company of authority to maintain its line on the same property, and hence the kinds of estates to be subjected to the power are differently specified in the statute. And, at last, the provisions applicable to telegraph companies, when interpreted as we interpret them, authorized only the doing of that, by authority of law, which was being done every day in various parts of the country either under such authority or by contract. Another evidence that the legislature meant what we hold it to have meant is found in article 700:

"Art. 700. No corporation shall have power to contract with any owner of land for the right to erect and maintain a telegraph line over his lands to the exclusion of the lines of other companies."

The history of the litigation of the country makes it well known to us, as it was

doubtless well known to the legislature, that contracts of the character here prohibited were being made between railroad companies and one telegraph company for the exclusive use of rights of way. This was the evil to be prevented by this provision, which presupposes that the legislature intended to confer upon telegraph companies generally the right to use the rights of way of railway companies for the construction of telegraph lines.

Our conclusion does not impute to the legislature a purpose to destroy or impair the use by railway companies of their property for all the purposes for which it is needed, but rather a recognition of the fact that such use will not be interfered with by the legitimate exercise of the privileges granted to telegraph companies. From this conclusion it results that the appellee has the same authority to condemn a right of way over the property in question that it would have to condemn the property of others, and that the mere fact that it could obtain such right of way over other property or in other ways furnishes no defense to the proceeding. The legislature having itself determined and enacted that such a use of the property is one to which it may be applied consistently with

the prior use, no question as to the comparative importance of the two uses is left open for the courts to determine. Many such condemnations have been had in this state, and have been sustained by the courts of civil appeals, which are the courts of last resort in such cases. In some of the decisions, the point under consideration has been expressly decided adversely to appellant, and in others it was necessarily involved. *Southwestern Teleg. & Teleph. Co. v. Gulf, C. & S. F. R. Co.* (Tex. Civ. App.) 52 S. W. 107; *Gulf, C. & S. F. R. Co. v. Southwestern Teleg. & Teleph. Co.* (Tex. Civ. App.) 52 S. W. 86; *Texas & N. O. R. Co. v. Postal Teleg. Cable Co.* (Tex. Civ. App.) 52 S. W. 108; *Houston & T. C. R. Co. v. Postal Teleg. Cable Co.* 18 Tex. Civ. App. 502, 45 S. W. 179; *Gulf, C. & S. F. R. Co. v. Southwestern Teleg. & Teleph. Co.* 18 Tex. Civ. App. 500, 45 S. W. 152; *San Antonio & A. P. R. Co. v. Southwestern Teleg. & Teleph. Co.* (Tex. Civ. App.) 56 S. W. 201; *Texas Midland R. Co. v. Southwestern Teleg. & Teleph. Co.* (Tex. Civ. App.) 57 S. W. 312.

We answer that the exception was properly overruled by the trial court. What we have said sufficiently answers the question as otherwise stated.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

S. A. GIBBS, *Plff. in Err.*,
v.

E. J. MCNEELEY *et al.*

(118 Fed. 120.)

A combination of the manufacturers of a product of a state, the market for four fifths of which is found in other states, to limit production and raise the price, is a violation of the anti-trust act of July 2, 1890.

(October 13, 1902.)

ERROR to the Circuit Court of the United States for the Western Division of the District of Washington to review a judgment in favor of defendants in an action brought to recover damages for injuries alleged to have been inflicted on plaintiff by a fraudulent combination among defendants. *Reversed.*

Statement by Gilbert, Circuit Judge:

The plaintiff in error brought an action to recover damages against the defendants in error under the act of Congress known as the "Sherman anti-trust act," of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), and alleged in

his complaint, as his first cause of action: That for more than ten years he had been a dealer in Washington red-cedar shingles at the city of Tacoma in the state of Washington, conducting a general business in such shingles, purchasing them of the various manufacturers thereof within the state of Washington, and selling them to purchasers in other states of the United States and in certain foreign countries. That his business was valuable; and that he was solely dependent upon it for his livelihood, and that he had acquired a wide clientage, and had transacted a business amounting to \$100,000 a year, and had derived an annual profit therefrom of \$3,000; that the said Washington red-cedar shingle is solely manufactured in the state of Washington, and has become an article of prime necessity and indispensable use to the people in the various states and countries named; and alleged that, during the first ten months of the year 1899, 4,000,000,000 shingles were manufactured, of which 3,300,500,000 were manufactured for the purpose of selling and delivering to purchasers outside the state of Washington, and were so sold and delivered. That the defendant the Washington Red-Cedar Shingle Manufacturers' Association was a

NOTE.—For other cases in this series as to combinations to restrict trade or regulate prices in violation of the Federal anti-trust act, see *United States v. Jellico Mountain Coke & Coal Co.* (C. C. M. D. Tenn.) 12 L. R. A. 753; *Waterhouse v. Comer* (C. C. S. D. Ga.) 19 L. R. A. 403; *United States v. E. C. Knight Co.* (C. C. App. 3d C.) 24 L. R. A. 428, Affirmed in 156 60 L. R. A.

U. S. 1, 39 L. ed. 325; *United States v. Workington's Amalgamated Council* (C. C. E. D. La.) 26 L. R. A. 158; *United States v. Trans-Missouri Freight Assn.* (C. C. App. 8th C.) 24 L. R. A. 73, Reversed in 166 U. S. 290, 41 L. ed. 1007; and *United States v. Addyston Pipe & Steel Co.* (C. C. App. 8th C.) 46 L. R. A. 122, Affirmed in 175 U. S. 211, 44 L. ed. 188.

voluntary association of the various manufacturers and dealers in said shingles in the state of Washington, comprising a total of 108; that the association has a constitution and by-laws; that membership is secured by paying a certain initiation fee graded according to the number and character of shingle machines in use by the applicant for membership; that its officers are president, vice president, secretary, treasurer, and a central committee; that the defendants specifically named in the complaint are respectively such officers; that the powers of the committee were to hold meetings "and issue, from time to time, a minimum price below which all members agree not to sell shingles to dealers or wholesalers," "to establish a system of prices at which shingles must be sold to retail dealers," etc., "to order the closing down of all mills, and to take other necessary steps to curtail the output of Washington red-cedar shingles, when in their judgment the supply should exceed the demand." For a second cause of action, the plaintiff in error alleged, in addition to the facts above set forth, that on or about August 15, 1899, the central committee adopted a schedule of prices for shingles, whereby the members of said association were required to and bound themselves to sell at the price so fixed, to wit: Extra A, \$1.35 per 1,000, clears, \$1.50 per 1,000, which price the plaintiff alleged was above the market price; the market price then being extra A, \$1.20 per 1,000, and clears, \$1.35 per 1,000. That by reason of the said increase in prices the plaintiff was unable to carry on his business and supply the natural and ordinary demand for such shingles, or to purchase shingles at any other than the price so fixed, and he was injured thereby in his business in the sum of \$1,200. For a third cause of action, the plaintiff, in addition to the facts above alleged, set forth that on November 11, 1899, for the purpose of further increasing the price of said shingles, the association ordered its mills to close down for the period of sixty days, which order was obeyed, whereby the trade in shingles was interrupted, and he was unable to purchase shingles with which to fill his orders, to his damage in the sum of \$1,000. For a fourth cause of action, in addition to the facts already set forth, the plaintiff alleged that the president, vice president, treasurer, and secretary, together with the central committee, for the purpose of destroying the plaintiff's business published resolutions adopted at a meeting of the central committee, charging the plaintiff with endeavoring to injure the market for Washington red-cedar shingles, and with having no money invested in his business, and as being without credit and irresponsible, and not an honorable and legitimate dealer in such shingles, and that, for the purpose of inducing all wholesale and retail dealers in shingles in the states and foreign countries aforesaid to refuse to buy shingles of the plaintiff, and to induce the manufacturers of shingles to refuse to sell him shingles, they printed and circulated through the mails the said resolutions, and published

them in newspapers. And the plaintiff in error set forth in the complaint the names of 253 persons to whom such circulars were sent. He alleged that the result of the conspiracy was to destroy his business, to his damage in the sum of \$15,000. On February 2, 1900, the defendants in the action, by their attorneys, filed a general appearance with the clerk on behalf of all the defendants named in the complaint. The defendants McNeeley and Beckman subsequently appeared separately, and demurred to each cause of action in the complaint for want of jurisdiction of the persons of the defendants, want of jurisdiction of the subject-matter, defect of parties defendant, and the insufficiency of the facts pleaded to constitute causes of action. Upon the last of these grounds of demurrer, the cause was presented in the circuit court before Hanford, District Judge, and the demurrer was sustained as to all except the fourth cause of action. 102 Fed. 594. Upon that cause the case afterward went to trial before Bellinger, District Judge, who directed the jury to return a verdict for the defendants in error upon the ground that the proofs did not sustain the causes of action, and that the combination described in the complaint is not one in restraint of interstate commerce, so as to give a right of action, under the provisions of the act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), to one who has been injured by a resolution, passed and circulated, denouncing him for cutting prices, and also upon the ground that in the opinion of the court the allegations in the fourth cause of action were insufficient to constitute a cause of action. 107 Fed. 210.

Argued before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

Messrs. T. O. Abbott and T. L. Stiles, for plaintiff in error:

Plaintiff has been damaged in his business, which is interstate in its character, by an unlawful combination in restraint of trade and commerce.

Lowry v. Tile, Mantel & Grate Asso. 106 Fed. 38; *United States v. Coal Dealers' Asso.* 85 Fed. 252.

Any association or combination of persons organized for the purpose of regulating prices is an unlawful combination.

Central Ohio Salt Co. v. Guthrie, 35 Ohio St. 666; *Emery v. Ohio Candle Co.* 47 Ohio St. 320, 24 N. E. 660; *Distilling & Cattle Feeding Co. v. People ex rel. Moloney*, 156 Ill. 488, 41 N. E. 188; *Jackson v. Akron Brick Asso.* 53 Ohio St. 303, 35 L. R. A. 287, 41 N. E. 257; *Bishop v. American Preservers' Co.* 157 Ill. 284, 41 N. E. 765; *Santa Clara Valley Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391; *Vulcan Powder Co. v. Hercules Powder Co.* 96 Cal. 510, 31 Pac. 581; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 100; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159; *India Bagging Asso. v. Kock*, 14 La. Ann. 164; *Chapin v. Brown Bros.* 83 Iowa, 297, 12 L. R. A. 428, 48 N. W. 1074;

People v. Milk Exchange, 145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062; *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *Pacific Factor Co. v. Adler*, 90 Cal. 110, 27 Pac. 36; *Judd v. Harrington*, 139 N. Y. 105, 34 N. E. 790; *De Witt Wire-Cloth Co. v. New Jersey Wire-Cloth Co.* 16 Daly, 529, 14 N. Y. Supp. 277; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 50 N. Y. Supp. 1064; *Merz Capsule Co. v. United States Capsule Co.* 67 Fed. 414; *Cravens v. Carter-Crume Co.* 34 C. C. A. 479, 92 Fed. 479.

It is not material whether the price is increased, or whether it is reduced, or whether the price fixed is a reasonable one or an unreasonable one.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Harding v. American Glucose Co.* 182 Ill. 551, 55 N. E. 577; *National Harrow Co. v. Bement*, 21 App. Div. 290, 47 N. Y. Supp. 462; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 516, 30 N. E. 279; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 39 N. E. 1062.

Nor is it necessary to establish a complete monopoly.

United States v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Texas Standard Oil Co. v. Adoue*, 83 Tex. 650, 15 L. R. A. 598, 19 S. W. 274, 279.

The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce.

Robbins v. Shelby County Taxing Dist. 120 U. S. 497, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *National Harrow Co. v. Quick*, 67 Fed. 130; *United States v. Coal Dealers' Asso.* 85 Fed. 252; *Lowry v. Tile, Mantel, & Grate Asso.* 106 Fed. 38.

A conspiracy to injure a person in his business by assaults upon his good name and reputation creates a cause of action.

Smith v. Nippert, 76 Wis. 86, 44 N. W. 846; *Wildee v. McKee*, 111 Pa. 335, 56 Am. Rep. 271, 2 Atl. 108; *State v. Hickling*, 41 N. J. L. 208, 32 Am. Rep. 198; 6 Am. & Eng. Enc. Law, p. 887; *Ryan v. Burger & H. Brewing Co.* 59 Hun, 625, 13 N. Y. Supp. 660; *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 296.

A conspiracy to injure another in business by inducing third parties to withdraw their patronage and to refuse to trade with him is actionable.

Hawarden v. Youghiogheny & L. Coal Co. 111 Wis. 545, 55 L. R. A. 828, 87 N. W. 472; *Murray v. McGarigle*, 69 Wis. 483, 34 N. W. 60 L. R. A.

522; *Olive v. Van Patten*, 7 Tex. Civ. App. 630, 25 S. W. 428; *Van Horn v. Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Jackson v. Stanfield*, 137 Ind. 592, 23 L. R. A. 588, 36 N. E. 345, 37 N. E. 14; *Old Dominion S. S. Co. v. McKenna*, 24 Blatchf. 244, 30 Fed. 48; *Casey v. Cincinnati Typographical Union No. 3*, 12 L. R. A. 193, 45 Fed. 135; *Toledo, A. A. & N. M. E. Co. v. Pennsylvania Co.* 19 L. R. A. 387, 5 Inters. Com. Rep. 522, 54 Fed. 730; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* 4 Inters. Com. Rep. 788, 62 Fed. 803; *Hopkins v. Osley Stone Co.* 28 C. C. A. 99, 49 U. S. App. 709, 83 Fed. 912.

Messrs. Charles O. Bates, Charles A. Murray, and John H. McDaniels, for defendants in error:

The object of vesting in Congress the power to regulate commerce with foreign nations and among the several states was to insure uniformity of regulation against conflicting and discriminating state legislation.

Kidd v. Pearson, 128 U. S. 1, 21, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Gibbons v. Ogden*, 9 Wheat. 196, 6 L. ed. 70; *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412; *Smith v. Turner*, 7 How. 398, 12 L. ed. 750; *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Miller v. New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *New Orleans, M. & T. R. Co. v. Mississippi ex rel. District Attorney*, 112 U. S. 12, 28 L. ed. 619, 5 Sup. Ct. Rep. 19; *Pound v. Turck*, 95 U. S. 459, 24 L. ed. 525; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423.

The authority of Congress does not begin until interstate commerce begins; and it can be exercised no longer than to protect the transportation of merchandise among the states from obstructions or impediments.

There is nothing in the Constitution that justifies the assumption by Congress of the power to regulate or prohibit agreements or combinations between manufacturers to maintain prices.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Kidd v. Pearson*, 128 U. S. 1, 21, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *United States v. Dewitt*, 9 Wall. 41, 19 L. ed. 593.

Prior to the time when articles become subjects of interstate commerce, they are part of the general mass of property of the state of their origin. Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.

The Daniel Ball, 10 Wall. 557, *sub nom. The Daniel Ball v. United States*, 19 L. ed. 999; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Re Greene*, 52 Fed. 104.

Even though Congress could be held to have power to prohibit monopolies of manufactures, the amended complaint shows not

tempt to create a monopoly. Anyone can enter the business of manufacturing and selling shingles under fully as favorable conditions as if no such association existed.

The maintenance of prices has been the salvation of the owners of mills, small and large. And the maintenance of prices is the principal aim of the association.

United States v. Greenhut, 50 Fed. 469; *United States v. Hopkins*, 82 Fed. 529, 171 U. S. 599, 43 L. ed. 298, 19 Sup. Ct. Rep. 40.

Gilbert, Circuit Judge, delivered the opinion of the court:

The case having gone to trial before a jury on the fourth cause of action, and having been determined adversely to the plaintiff in error on the facts, and it being conceded that the demurrer to the first cause of action was properly sustained, the question which is here presented is whether the facts alleged in either the second or the third cause of action in the complaint constitute a cause of action under the act of July 2, 1890, commonly known as the "Sherman anti-trust act" (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200). The combination which is described in the complaint consists of a combination of manufacturers and wholesale dealers in Washington red-cedar shingles, who reside and carry on their business within the state of Washington, and sell and deliver goods to residents of other states. It is not charged that the defendants in error, or any of them, have entered into any combination or contract with residents of other states. The alleged right of the plaintiff in error to recover is based substantially upon the fact that the combination comprises all the manufacturers and wholesale dealers within the state of Washington, and that they have combined and conspired together to fix an arbitrary price to wholesale and retail dealers for an article of merchandise used in interstate commerce, below which no one is permitted to buy or to sell, and that the price so fixed marks a distinct increase of the market price as it had stood theretofore, and that the association has assumed and exercised, and will continue to exercise, the power to shut down all mills within the state at will, and for so long a time as it may deem necessary. Is this a combination in restraint of interstate commerce, such as is denounced by the statute? There can be no doubt that at common law it is an unlawful combination in restraint of trade. It has the effect to diminish production, abolish competition, and enhance prices. Its illegality is not relieved by the fact that it was induced by the keen competition and the unprofitable condition of the shingle manufacturing business which existed before it was entered into, or by the fact that the prices fixed by the combination may have been reasonable. *American Biscuit & Mfg Co. v. Klotz*, 44 Fed. 721; *Richardson v. Buhl*, 77 Mich. 632, 6 L. R. A. 457, 43 N. W. 1102; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L. R. A. 145, 30 N. E. 279; *People v. Milk Exchange*, 145 N. Y. 267, 27 L. R. A. 437, 39 N. 60 L. R. A.

E. 1062; *National Harrow Co. v. Hench*, 39 L. R. A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 36; *Cravens v. Carter-Crume Co.* 34 C. C. A. 479, 92 Fed. 479.

The anti-trust act goes as far, if not farther, than the common law, and declares unlawful all combinations in restraint of interstate trade. In order, therefore, to bring the combination which is under consideration within the interdiction of the act, it must appear that it is more than a mere combination in restraint of trade; it must involve the restraint of interstate or international commerce. It is urged by the defendants in error that merchandise is not subject to the power of Congress to regulate commerce until it is in actual transit from one state to another, and that matters occurring prior to the commencement of this final movement are not matters of interstate commerce, but are within the authority of the state, and are wholly unaffected by other authority. *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; and other cases are cited in support of that view. But in *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 497, 30 L. ed. 697, 7 Sup. Ct. Rep. 596, it was said: "The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce;" and the case of *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, is authority for the proposition that the power of Congress to regulate commerce is not confined to goods that have begun their movement out of the state in which they are manufactured, but that it extends to negotiations and contracts made preliminary to the manufacture, sale, and shipment of goods in interstate commerce. The court in that case had under consideration a combination between manufacturers located in different states. The combination comprised six corporations, and it was entered into for the purpose of raising prices of steel pipe in certain designated states. Their method of business required the delivery of pipe by the seller at the place where it was to be used by the buyer, and included in the price the cost of delivery. By the terms of the combination, contracts were to be made, after public letting, at the home and in the state of the buyer. Requests for bids were to be submitted to a central committee, which was to fix a price, and the contract was to be awarded to that member of the combination who would agree to pay, for the benefit of the other members, the largest bonus. This was the method of business except in certain designated reserved states, in which the successful bidder was to be designated, and the price and bonus were to be fixed by the association. The agreement of the association restrained every defendant, except the one selected to receive the contract, from making a contract for pipe with the intended purchaser. With respect to the sales in the states in which the mills of

the defendant were situated, the effect of the agreement was to bind at least three, if not more, of the defendants to make no contract at all in those states for the sale and delivery of pipe in another state. In short, the agreement had the effect to restrain at least three, sometimes four, sometimes five, and sometimes all, of the defendants in interstate trade, which otherwise they would have been permitted to engage in, in selling in one state pipe to be delivered from another state at prices to be determined upon from competition and at market rates. There were other restrictions in the combination, not necessary here to be further specified. The court held that the association was a contract, combination, or conspiracy in restraint of trade, as the terms are understood in the act, and that the subject-matter of the restraint was not articles of merchandise or their manufacture, but contracts for the sale of such articles to be delivered across state lines, and the negotiations and bids preliminary to the making of such contracts; all of which are interstate commerce. The court said: "If, therefore, an agreement or combination directly restrains, not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute."

The defendants in error rely upon the case of *United States v. E. O. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249. That case arose upon a bill in equity filed by the United States under the anti-trust act to enjoin the defendants from continuing a combination which comprised substantially all the sugar refineries of the country for refining raw sugar. The bill alleged that the American Sugar-Refining Company had purchased the stock of four other sugar-refining companies with shares of its own, and that thereby it acquired almost the complete control of the manufacture of refined sugar in the United States. It was the object of the suit to cancel the agreements of purchase, to cause the redelivery of the stock to the former owners thereof, and to enjoin the further performance of the agreement. The court denied the relief which was prayed for, and held that the combination was not within the prohibition of the statute for the reason that the agreement related only to the manufacture of refined sugar, and not to its sale. The chief justice, in delivering the opinion of the court, said: "Commerce succeeds to manufacture, and is not a part of it. The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly. But it may operate in repression of monopoly whenever that comes within the rules by which commerce is governed, or whenever the transaction is itself a monopoly of commerce. . . . The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the 60 L. R. A.

control of the state, and belongs to commerce." The chief justice proceeded to say, further: "What the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several states or with foreign nations, but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the states or with foreign nations. The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. . . . There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected, was not enough to entitle complainants to a decree."

The purport of this language of the court is to mark a distinction between a restraint upon manufacturing and a restraint upon interstate commerce in a manufactured article, and to hold that the power of Congress to regulate commerce extends only to the latter. If the defendants in that case had combined for the purpose of not only regulating the manufacture of refined sugar, but the price at which it should be furnished to purchasers in other states, a different case might have been presented. There was nothing in the case as it was presented to show that the combination contemplated a regulation of prices of merchandise which was to enter into interstate commerce, or a restraint of the trade in merchandise in such commerce. There was before the court only a combination to manufacture, which might or might not result in an increase of prices, and the court held, therefore, that commerce was only indirectly affected. Mr. Justice Peckham, in delivering the opinion of the court in the *Addyston Pipe & Steel Co. Case*, said: "It is the sale and delivery of a certain kind and quality of pipe, and not the manufacture, which is the material portion of the contract, and a sale for delivery beyond the state makes the transaction a part of interstate commerce;" and, distinguishing that case from the *E. O. Knight Co. Case*, said, of the combination in the latter case, that its direct purpose was the control of the manufacture of sugar; and added: "There was no combination or agreement in terms regarding the future disposition of the manufactured article,—nothing looking to a transaction in the nature of interstate commerce."

In these words the court marked the limit of the doctrine of the *E. O. Knight Co. Case*. The plain intimation from the language of the court is that, if there had been in that case a combination or agreement in terms regarding the future disposition of the manufactured article across state lines, there would have been added the essential element to make it a combination affecting interstate commerce.

The ground upon which the court held that the combination of manufacturers in

the *Addyston Pipe & Steel Co. Case* restrained interstate commerce was the fact that it was made in contemplation of the transaction of future business between citizens of different states and the negotiation of sales, to be made in one state, of goods to be delivered therein from another. While there was in that case no particular contract for furnishing pipe or fixing its price in the contemplation of the parties to the combination at the time when it was made, the court referred to the fact that it was the purpose of the combination to abolish all competition, and said: "The direct and immediate result of the combination was, therefore, necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it, to be transported beyond the state in which they were made."

The present case differs in important aspects from both the *E. C. Knight Co. Case* and the *Addyston Pipe & Steel Co. Case*. It occupies a ground intermediate between. The combination which it presents is more than a mere combination to manufacture, such as was before the court in the *E. C. Knight Co. Case*, and it lacks some of the features of the *Addyston Pipe & Steel Co. Case*, in that it contains no express provision for the transaction of business across state lines; it does not by its terms refer to the sale or delivery of shingles elsewhere than in the state of Washington. But can it be said that such sales and delivery were not within its contemplation, and are not directly affected by it? The defendants in error were engaged in manufacturing a product of which, as they well knew, more than 80 per cent was to be sold, delivered, and used in states other than that of its manufacture. They were in the business of selling and delivering shingles to purchasers in other states. In fixing a list of prices they fixed it, not alone for domestic trade, but for external commerce as well. The inevitable result of the combination is to enhance the price and restrain the trade of shingles in all the states. In the *E. C. Knight Co. Case* it was held that a monopoly to manufacture did not necessarily affect interstate commerce. The reason for so holding is apparent. From the creation of a monopoly to manufacture, it does not necessarily follow that interstate commerce in the monopolized article will in any degree be interfered with. The total production of the manufactured article and its price may, notwithstanding the monopoly, remain unaffected. In that case it was said: "There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce." But this cannot be said of a combination of manufacturers in one state who agree to arbitrarily increase the price and diminish the total output of a manufactured product which is made only in that state, but which is principally bought and used in other states. The intention to put a restraint upon interstate-commerce in such a case is evident, and the restraint is not indirect, but

direct, and it is the necessary and inevitable result of the combination.

We do not think that the act contemplates that the combination therein made unlawful must be one which shall by its terms refer to interstate commerce. It is enough if its purpose and effect are necessarily to restrain interstate trade. If it were otherwise, all combinations in restraint of interstate trade might be so expressed in words as to avoid the statute. The true test would seem to be, not what the agreement professes, but what it accomplishes. This combination must be dealt with in view of the known facts which surrounded it when it was formed, and which still attend it. It is impossible that the parties to it had in view only domestic trade. They must have had in contemplation the market which they had theretofore had, and which they would continue to have, and which, as they well knew, was principally without the limits of their own state. It is immaterial that all the parties to the agreement were residents of the same state. It is not the place where the parties reside that distinguishes the combination, and lends to it the features of a combination in restraint of interstate trade. A case in point is *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed. 610, recently decided by the circuit court of appeals for the sixth circuit, in which the court held illegal under the anti-trust law, both as in restraint of interstate commerce and as tending to create a monopoly, a combination between a fuel company, a corporation of the state of West Virginia, and 14 corporations, persons, and firms of that state, who were independently engaged in producing coal and coke in a district on the line of a railroad. The combination stipulated that the company was to handle for a term of years the entire output of the members of the association, which was to be shipped to the western market over said road, and that it should sell the product of no competing mines, and it provided that a minimum price for the sale of the coal and coke should be fixed from time to time by a committee of the association, which price the fuel company agreed to pay, and in addition thereto agreed to obtain as large a profit as possible, and to account to the association for all thereof above a fixed sum per ton, which it was to retain as its compensation. We have not overlooked certain expressions of the court in the *E. C. Knight Co. Case*, where it was said that Congress did not attempt, by the act of July 2, 1890, "to limit and restrict the rights of corporations created by the states, or the citizens of the states, in the acquisition, control, or disposition of property, or to regulate or prescribe the price or prices at which such property or the products thereof should be sold;" and where it was further said that contracts "to raise or lower prices or wages might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the

object of the contract, combination, or conspiracy." We think the court, in using this language, had in view combinations to raise prices which might be made without special reference to interstate trade, and which would only indirectly affect it. The combination in the case before the court is more than a combination to regulate prices; it is a combination to control the production of a manufactured article more than four fifths of which is made for interstate trade, and to diminish competition in its production, as well as to advance its price. These features, we think, determine its object, and bring it under the condemnation of the law. The plaintiff in error is in the business of buying the manufactured article in the state where it is manufactured, and selling it to purchasers in other states. The acts charged against the defendants in error interfere with his "contracts to buy, sell, or exchange goods to be transported among the several states,"—contracts which are made and ne-

gotiated between the plaintiff in error and his customers in various states,—and the acts of the defendants are in restraint of the interstate commerce in which he is engaged. We think the complaint states a cause of action. We find no error in the ruling of the circuit court in denying the motion of the plaintiff in error for an order granting the default of all the defendants in error except E. J. McNeeley and Victor H. Beckman, and granting Bates & Murray leave to withdraw their general appearance entered on behalf of all of the defendants in error, and to so amend the same as to make said appearance for and on behalf of McNeeley and Beckman only.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings not inconsistent with the foregoing views.

Petition for rehearing denied.

WISCONSIN SUPREME COURT.

Charles EUTING, by Norman L. Baker,
Guardian ad Litem, *Appt.*,
v.

CHICAGO & NORTHWESTERN RAIL-
WAY COMPANY, *Respt.*

(.....Wis.....)

1. A railroad company is liable for the act of its engineer, in whose custody it has placed signal torpedoes, in placing one on the track, in dangerous proximity to bystanders, and moving the engine over it for his own amusement, in consequence of which one of the bystanders is injured.
2. Moving an engine forward to pull a car onto the track, with knowledge that a torpedo lies on the track in front of the engine, the explosion of which will be dangerous to bystanders, is negligence on the part of the engineer, and the railroad company is liable for injuries resulting therefrom.

(November 28, 1902.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Kenosha County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by Winslow, J.:

This is an action for personal injuries. Many of the facts are undisputed. It appears that in May, 1899, the defendant com-

NOTE.—As to liability of master for injury caused by malicious blowing of whistle by engineer to frighten horse, see, in this series, *Texas & P. R. Co. v. Scoville* (C. C. App. 5th C.) 27 L. R. A. 179.

As to liability for injury by engineer's blowing off steam to frighten children, see *Alsever v. Minneapolis & St. L. R. Co.* (Iowa) 58 L. R. A. 748.

60 L. R. A.

pany constructed a temporary spur track along one of the streets of the city of Kenosha running into a public park in that city (in which a library building was being constructed) for the purpose of delivering materials for the construction of the building; that the track was not fenced; that on the morning of July 6, 1899, a switch engine operated by an engineer and fireman ran over said track into the park for the purpose of pulling a freight car, which had run off the end of the track, back upon the track; that the engine was attached to the car, and made several attempts to pull it; that some boys were standing in the park nearby, watching the operation, and that a delayed celebration of the Fourth of July was going on; that the plaintiff was one of the boys thus watching, and that he was about nine years of age; that either the fireman or the engineer descended from the cab of the engine, and placed a railroad torpedo on the track about a foot from one of the driving wheels; that the man who placed the torpedo on the track immediately got into the cab again, and the engine was moved over the torpedo, exploding it; and that a flying piece of metal therefrom buried itself in plaintiff's leg, inflicting a serious injury; and that the plaintiff did not know what it was that the man put upon the track. The engineer testified that he did not place the torpedo on the track, and did not know it was there, and the fireman testified that he placed the torpedo on the track for his own amusement, and that the engineer did not direct him to do so, nor know that it was done. On the other hand, testimony was given tending to show that the engineer himself placed the torpedo on the track. At the close of the evidence the court directed a verdict for the defendant, and from judgment thereon the plaintiff appeals.

Messrs. Baker & Baker, for appellant:
The question whether the servant acted within the scope of his employment is one for the jury.

1 Thomp. Neg. § 615, p. 564.

And the burden of proof is on the defendant to show that the servant was not acting in the course of his employment.

1 Thomp. Neg. § 613, p. 563; 1 Shearm. & Redf. Neg. § 147.

It is immaterial whether the employee disregarded or violated any direction, instruction, regulation, or customs of defendant.

Bergman v. Hendrickson, 106 Wis. 434, 82 N. W. 304; *Rogahn v. Moore Mfg. & Foundry Co.* 79 Wis. 573, 48 N. W. 689; *Reinke v. Bentley*, 90 Wis. 457, 63 N. W. 1055; 1 Shearm. & Redf. Neg. § 146, p. 226.

If the employees of defendant used its torpedoes and engine while intrusted to them for use in its business for their amusement by negligently running the engine over the torpedoes, causing injury, the defendant would be liable, because it has been negligent in the performance of its duty to guard and safely keep such dangerous appliances.

1 Thomp. Neg. § 522; Shearm. & Redf. Neg. § 683; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Chicago, B. & Q. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114; *Nashville & C. R. Co. v. Starnes*, 9 Heisk. 52, 24 Am. Rep. 296; *Skipper v. Clifton Mfg. Co.* 58 S. C. 143, 36 S. E. 509; *Texas & P. R. Co. v. Scoville*, 27 L. R. A. 179, 10 C. C. A. 479, 23 U. S. App. 506, 82 Fed. 730; *Dinsmoor v. Wolber*, 85 Ill. App. 152; *Ritchie v. Waller*, 63 Conn. 155, 27 L. R. A. 161, 28 Atl. 29; *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922; *Pittsburgh, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387, 8 L. R. A. 464, 24 N. E. 658; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451; *Craker v. Chicago & N. W. R. Co.* 36 Wis. 657, 17 Am. Rep. 504; *Bryan v. Adler*, 97 Wis. 124, 41 L. R. A. 658, 72 N. W. 368; *Fick v. Chicago & N. W. R. Co.* 68 Wis. 469, 60 Am. Rep. 878, 32 N. W. 527.

Mr. Edward M. Hyzer, for respondent:

The master is liable for the negligent acts of his servant within the scope of the latter's employment. If the servant steps aside, however, from his master's business, even though but temporarily, to do some act outside the business of his master, the relation of master and servant during such time is suspended; and, whatever the latter does during such time, the consequences are not chargeable to the former.

Winkler v. Fisher, 95 Wis. 355, 70 N. W. 477; 1 Thomp. Neg. §§ 526, 527; *Guille v. Campbell*, 200 Pa. 119, 55 L. R. A. 111, 49 Atl. 938; *Chicago, B. & Q. R. Co. v. Epperson*, 26 Ill. App. 72; *Smith v. New York C. & H. R. R. Co.* 78 Hun, 524, 29 N. Y. Supp. 540; *Cousins v. Hannibal & St. J. R. Co.* 66 Mo. 572; *Bowler v. O'Connell*, 162 Mass. 319, 27 L. R. A. 173, 38 N. E. 498; *Missouri, K. & T. R. Co. v. Edwards* (Tex. Civ. App.) 25 Am. & Eng. R. Cas. N. S. 431, and note, 67 S. W. 891.
60 L. R. A.

Winslow, J., delivered the opinion of the court:

The respondent's contention (which seems to have been adopted by the trial court) is, in brief, that the uncontradicted evidence shows that there was no occasion for the use of the torpedo in the transaction of the defendant's business; that it was placed in the care of the engineer, and the fireman had no authority to take it; that the fireman took it without the knowledge of the engineer, and placed it upon the track for his own amusement; that in so doing he was entirely outside the scope of his employment; and hence, that his principal is not responsible for the results of his act. If this contention were fully justified by the facts, it is difficult to see how the conclusion could be avoided. We agree with counsel that the evidence shows that there was no occasion for the use of the torpedo at this time in the transaction of the defendant's business. It is clear that, under the rules of the company, it was only to be used as a signal, to be put on the track when it was desired to stop an approaching train. We also agree that the evidence shows that it was placed in the care of the engineer, and that the fireman had no right to use it, or authority to take it from the engine, save as directed by the engineer. We cannot, however, admit that the uncontradicted evidence proves that the fireman placed the torpedo on the track without the authority or knowledge of the engineer. It is true that the fireman testifies to this effect, and that the engineer denies that he put the torpedo on the track, or knew of its being placed there, but there is evidence on the part of the plaintiff tending directly to show that the engineer himself placed the torpedo on the track. The nature of the evidence was as follows: The plaintiff and his two companions testified that a man jumped from the cab, placed something on the track, the character of which they did not know, and climbed back into the cab, pulled the lever, and started the engine, when the explosion took place. The engineer testified that the fireman did nothing about the operation of the engine, but that he himself pulled the throttle, and started it. Again, the plaintiff at the trial identified the engineer (both fireman and engineer standing before him) as the man who put the torpedo on the track. We regard this evidence as amply sufficient to carry the question to the jury. So, in considering the motion to direct a verdict, it must be taken as though it were proved that the engineer placed the torpedo on the rail, and moved the engine over it, causing the explosion; and the question is whether a verdict against the defendant could be sustained upon this state of facts. That railroad torpedoes are, in their nature, dangerous agencies, cannot be doubted. It is common knowledge that they are loaded with some high explosive, and with a sufficient amount thereof to cause a loud explosion; and the danger which exists, even in the explosion of toy torpedoes, is too well understood to admit of doubt that railroad torpedoes should be considered as

dangerous agencies as matter of law. So the situation to be considered upon the motion is this: The defendant placed these dangerous explosives in the custody of its servant, to be placed on the track in certain contingencies as a warning to approaching trains. The servant, however, placed one on the track when not contemplated by the employer, evidently for his own amusement, and in dangerous proximity to third persons, and moved the engine over it, causing it to explode, and inflict injury on one of such persons; and the question is whether a verdict for the injured person against the principal can be sustained under such circumstances. We think this question must be answered in the affirmative. The principle that a master is not responsible for the torts of his servant when the servant has departed from his employment is well understood. If this principle were as easy for application as it is of statement, we should have little difficulty; but, like many another simple and plain principle, its application to construe facts is sometimes very difficult. The question, generally, is whether the servant has departed from his employment, or whether he has departed from or neglected a duty in the line of that employment. In the first case the principal is not responsible for his acts, and in the second case he is. Applying the principle to the present case, supposing that the jury had found that the engineer placed the torpedo on the track, it seems quite plain that a verdict for the plaintiff might be sustained. The engineer's duty was to operate the engine; to take care of the torpedoes, and see that they were used only at proper times and places. The company had placed in his charge these dangerous agencies, and authorized him to use them at proper times. In placing one of them upon the track as he did, he was doing what the company had directly authorized him to do; but he was not doing it at the time or place authorized by the master. He was not beyond the scope of his employment, but he was wilfully or wantonly violating a duty resulting from his employment, namely, his duty to safely keep and properly use the torpedoes. There have been many cases involving the application of this principle, and they cannot be said to be entirely harmonious; but the principle above stated is believed to be substantiated by the great weight of authority. The doctrine is quite well stated in *Pittsburgh, C. & St. L. R. Co.* 60 L. R. A.

v. Shields, 47 Ohio St. 387, 8 L. R. A. 464, 24 N. E. 658, as follows: "A servant may depart from his employment without making his master liable for his negligence when outside the employment of the master, and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own. But he cannot depart from the duty intrusted to him, when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences; for the first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes at once the negligence of the master." The cases upon this subject will be found quite fully cited in the case of *Alsever v. Minneapolis & St. L. R. Co.* 115 Iowa, 338, 56 L. R. A. 748, 88 N. W. 841. This was a case where an engineer blew off steam from a blow-off cock solely for the purpose of frightening some children, and one of the children, by reason of her fright, fell, and broke her leg, and it was held that a verdict for the plaintiff could be sustained under the principles herein stated.

There is, however, another view which may be taken of the case as made by the plaintiff's evidence, which also leads to the conclusion that it was a proper case for the jury to pass upon. If it be true, as the evidence tends to show, that the engineer placed the torpedo on the track, then he knew that a dangerous explosive was on the track immediately in front of the driving wheel at the moment he moved the engine, and that third persons were in close proximity. If, under such circumstances, and with that knowledge, he moved his engine in the attempt to pull the car upon the track, the master would unquestionably be liable for injuries to such third persons which were proximately caused by the engineer's negligent act. Upon the plainest principles, the engineer could not, in prosecuting his master's business, move his engine over an obstacle or dangerous place upon the track which was known to him, when such movement was plainly imminently dangerous to third persons, without rendering his master liable for the proximate result of his negligent act. These views necessitate reversal of the judgment.

Judgment reversed, and action remanded for a new trial.

MINNESOTA SUPREME COURT.

STATE of Minnesota *ex rel.* John UTICK
et al.

v.

BOARD OF COUNTY COMMISSIONERS
OF POLK COUNTY.

(.....Minn.....)

*1. In cases of imperfectly drawn statutes, the court, rather than pronounce them unconstitutional and void, will draw inferences from the evident intent of the legislature, as gathered from the whole statute, supplying by implication technical inaccuracies in expression and obviously unintentional omissions, from the necessity of making them operative and effectual as to specific things which are included in the broad and comprehensive terms and purposes thereof; and such

inferences and implications are as much a part of the statute as what is distinctly expressed therein.

2. Chapter 258, Gen. Laws 1901,—an act providing for the drainage of wet and overflowed lands in certain cases,—construed, and held a valid, constitutional legislative enactment.

3. A petition in proper form, filed as required by the above statute, is a jurisdictional prerequisite to the authority of the county commissioners to entertain a proceeding thereunder; but the description of a proposed ditch need not be stated with precise accuracy. It is sufficient that the starting point, course, and terminus be stated with approximate accuracy; the board, in ordering the construction of a ditch under such statute, being finally guided by the description as contained in the surveyor's report.

*Headnotes by BROWN, J.

(November 7, 1902.)

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I. General observations as to right to establish.

It being settled with very little protest that drainage is one of the things which come legitimately within the powers of the government, and that the power and duty to provide drainage may be conferred and imposed upon municipal corporations and other local subdivisions of the state (see note on *Liability of municipality for drainage*, post, —), and it being settled, also, that drainage is a public purpose for which

PETITION for a writ of certiorari to review proceedings laying out a drain. *Writ discharged.*

The facts are stated in the opinion.

Messrs. Gideon S. Ives and Harvey W. Stark, for petitioners:

The legislature has no power to exercise the right of eminent domain, the police power, or the power of taxation for private purposes.

2 Kent, Com. p. 424; *Lien v. Norman County*, 80 Minn. 63, 82 N. W. 1094; *Re Jacobs*, 93 N. Y. 98, 50 Am. Rep. 636; *Re Theresa Drainage Dist.* 90 Wis. 301, 63 N. W. 288.

The courts have invariably held such an act, either in violation (by inference) of the rule that private property cannot be taken for a public use, etc., or of the Bill of Rights, which provides that no citizen shall

be deprived of his rights unless by the law of the land, etc.

Coster v. Tide Water Co. 18 N. J. Eq. 54; *Lewis*, Em. Dom. § 157.

The drainage of lands does not ordinarily constitute a public purpose, so as to bring the same within the principles of eminent domain, police power, or the power of taxation.

Cooley, Const. Lim. 532; *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389; *Re Theresa Drainage Dist.* 90 Wis. 301, 63 N. W. 288; *Lake Erie & W. R. Co. v. Hancock County*, 63 Ohio St. 23, 57 N. E. 1009; *Hull v. Baird*, 73 Iowa, 528, 35 N. W. 615; *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. 672.

Nor does the taking of lands for purposes of this character under former laws afford any precedents upon which a public purpose

the power of eminent domain may be exercised (see *note* to *Re Tuthill* [N. Y.] 49 L. R. A. 781); and that the expense of it may be met by taxation, general or local (see *note* to *Heffner v. Cass & Morgan Counties* [Ill.] 58 L. R. A. 353).—It becomes a very important question to the person whose property is to be taken for a right of way, to the person who is to be charged with the expense, and to the public, what procedure is necessary to acquire the right of way, and to charge the taxpayer with the expense. In general, the procedure is prescribed by statute, and the decisions will not be sufficient to indicate fully what must be done. But frequently the statute needs harmonizing with the Constitution, and needs supplementing where constitutional rights are not protected. Furthermore, while the statutory plan is to be followed, certain steps are regarded as essential, so that without them the proceedings will be of no avail; while others are merely directory, and may be dispensed with and the taxpayer is still held liable. The local statutes cannot be set out or harmonized, but one proceeding with a statute before him may be shown what the courts have said with reference to the steps indicated by the statute.

A reference to the *note* in 49 L. R. A. 781, will show that, to enlist the powers of government in a drainage enterprise, the purpose of it must be for the public good. The prerogative powers of eminent domain and taxation cannot be invoked for a private purpose. In elaboration of that principle, attention is called to the following case:

In the case of the *Isle of Ely*, 10 Coke, 141a, involving the powers of commissioners of sewers, it was said that, by the common law, before the statute of 6 Hen. VI. chap. 5, creating the commissioners of sewers, the King ought, of right, to save and defend his realm as well against the sea as against the enemy,—that it should not be drowned or wasted; and also provided that his subjects have free passage through the realm by bridges and highways in safety; and therefore, if the sea walls be broken, or the sewers or gutters are not scoured, that the fresh waters cannot have a direct course, the King ought to grant a commission to inquire into and hear and determine these defaults. That at common law the ancient walls, gutters, and sewers might be repaired or new made, but no new walls, gutters, or sewers by force of the said commission might be made. The same power, and no greater power, was given to commissioners of sewers. No one could be taxed by the commissioners of sewers for the reparation of a sea wall or sewer but those who

had prejudice, damage, or disadvantage by such nuisance or defaults, and who might have benefit and profit by the reformation or removing of them. The tax ought to be of the quantity of lands, tenements, and rents, and by the number of acres and perches. The commissioners of sewers cannot levy a tax in gross upon a town, but it must be particular, according to the express words, upon every owner or possessor of land, tenements, rents, etc.

The courts of Massachusetts have elaborated a theory of drainage which is somewhat different from the generally received ideas upon the subject. That theory has been stated as follows:

The statutes for the improvement of meadows are sometimes ascribed to the right of eminent domain. But there is no taking for public use. It is a proceeding of a semi-judicial nature in which all those whose lands are to be affected are joined as parties. The action taken therein relates to that in which all have a common interest, or in reference to which all are affected by a common necessity. That common necessity is met, and that common interest secured, by subjecting the individuals' rights to such modification as the authorities may judge to be most practicable to secure the best advantage of all. This is under the general principle that the particular right of the individual must yield to a greater right, in the same degree, of the whole. There is no exercise of the right of eminent domain, or of governmental power of taxation. *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39.

This theory upholds drainage proceedings which are not for the general public good. It is usually considered unwise for the government to interfere in private affairs unless it has some interest in so doing. The idea usually held of drainage proceedings is that they are in the nature of public improvements and that they are merely an exercise of the police and taxing powers.

What is a drain.

The meaning of the words used in connection with drainage proceedings has undergone some slight change in the course of years. *Callis* says: A sewer is a common public stream, and a gutter is a straight, private running water. The use of a sewer is common.

In a Rhode Island case it is said: Formerly the word "sewer" was used for "a fresh-water trench, compassed in on both sides with a bank; a small current or little river. So, the statute 25 Hen. VIII. chap. 5, *Concerning Commissioners of Sewers*, was to remedy damage from

may be predicated, for the reason that in all such acts the public purpose must be specifically found before the drain can be established.

Minn. Laws 1883, chap. 108; Minn. Laws 1887, chap. 97.

The power to take private property for public use, which resides in the legislature, must be clearly set forth in the act conferring such authority.

People ex rel. Herrick v. Smith, 21 N. Y. 598.

If there is no declaration by the legislature of the public purpose or use, and no authority delegated to the commissioners to pass upon this question, the act must necessarily be unconstitutional and void.

Elliott, Roads & Streets, p. 148; *Dill, Mun. Corp.* § 468; *Cooley, Const. Law*, 530; *Reeves v. Wood County*, 8 Ohio St. 333; *Re*

the "flowing surges and course of the sea in and upon marsh grounds;" also land waters and springs upon meadows, and other watercourses. More recently, however, and probably from the appropriation of the word, in acts and ordinances, to the common conduits of liquid filth, it is usually associated with such a use. Thus, Webster defines "sewers:" "A drain or passage to convey off water and filth underground." For "drain" he gives: "A watercourse; a sewer." Kent speaks of the right of drainage (3 Com. *436) as a "right to convey water in pipes through or over the estate of another." In *Goldthwait v. East Bridgewater*, 5 Gray, 61, 64, the court says: "The words 'ditch' and 'drain' have no technical or exact meaning. They both may mean a hollow space in the ground, natural or artificial, where water is collected or passes off." So in *Queen v. Godmanchester Local Bd. of Health*, 5 Quest & S. 886, 34 L. J. Q. B. N. S. 13, 11 Jur. N. S. 63, 13 Week. Rep. 155, a distinction is made between a drain and a sewer, but the distinction is based upon a statute. *Wetmore v. Fiske*, 15 R. I. 354, 5 Atl. 375, 10 Atl. 627, 629.

So, the statute of 23 Hen. VIII., which was passed for reclamation of marsh lands, and which provided for a system of drainage, did not provide for a system of sewers in the modern sense in which the word "sewers" is used. *Bishop v. Tripp*, 16 R. I. 198, 14 Atl. 79.

Sewers are closed or covered waterways, and ditches are drains which are or may be open and so arranged as to take surface water. *State ex rel. State Bd. of Health v. Jersey City*, 55 N. J. Eq. 116, 35 Atl. 835.

But the word "drain," as used in a general law authorizing a municipal corporation to construct local improvements, is broad enough to include sewers. *Charleston v. Johnston*, 170 Ill. 336, 48 N. E. 985.

Origin of drainage.

Commission of sewers to defend the Kingdom against the sea is very ancient, and even by special prescription in some cases; but sewers for amelioration of land are by act of Parliament. *Shandrigamy v. Sholedam*, 12 Mod. 331, Holt, 643.

The commission of sewers was created by statute of Hen. VI. chap. 5. *Rooke's Case*, 5 Coke, 100.

The statute 23 Hen. VIII.—which was designed for the reclamation and protection of certain low and marshy parts of England, and for lands there which were subject to overflow and injury by floods and freshets, and to that end provided for the appointment of commis-

Theresa Drainage Dist. 90 Wis. 301, 63 N. W. 288; *Jehal v. Green Island Draining Co.* 12 Neb. 163, 10 N. W. 547; *State ex rel. Witte v. Curtis*, 86 Wis. 140, 56 N. W. 475; *Fleming v. Hull*, 73 Iowa, 598, 35 N. W. 673; *Re Buffalo*, 78 N. Y. 337; *Gifford Drainage Dist. v. Shroer*, 145 Ind. 572, 44 N. E. 636; *Kinnie v. Bare*, 68 Mich. 628, 30 N. W. 672; *Price v. Wisconsin State Land & Improv. Co.* 93 Wis. 534, 33 L. R. A. 645, 67 N. W. 918; *Re Niagara Falls & W. R. Co.* 108 N. Y. 375, 15 N. E. 429; *Re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781, 57 N. E. 303; *Lien v. Norman County*, 80 Minn. 58, 82 N. W. 1094.

It would make no difference with the question of the constitutionality of this law if the commissioners should find in each case that the taking would conduce to the public

sioners to construct and have charge of extensive systems of drainage, conferring upon them the necessary powers, and subjecting them to certain duties,—was never in force in Rhode Island, as it was inapplicable to the situation of that state. *Bishop v. Tripp*, 16 R. I. 198, 14 Atl. 79.

Power to drain.

The police power of a state, so far as it relates to the public health, includes the making of sewers and drains for the removal of garbage and filth. *Wilson v. Sanitary Dist.* 133 Ill. 443, 27 N. E. 203.

It is in the power of the state to require local improvements to be made which are essential to the health and prosperity of the community within its borders, such as the construction of canals for the drainage of marshy and malarious districts, and of levees to prevent inundations. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

But the only ground upon which the right of eminent domain can be exercised in constructing a ditch over the lands of others is that of public utility. *Anderson v. Baker*, 98 Ind. 587.

Public health, convenience, or welfare, the conduciveness to which of a drain is essential to its establishment, mean the effect upon the people of the neighborhood or the vicinity of the proposed ditch, in contrast to private rights or benefits of the individual,—that which relates to the many in contradistinction to the few. *Thomas v. County Comrs.* 5 Ohio N. P. 449.

Gen. Laws 1901, chap. 258, providing for the drainage of wet and overflowed lands, is constitutional, being an act operating beneficially to the public, and provision being made for the consideration in each particular case, by the board of county commissioners, of the necessity of the improvement, and ample opportunity being afforded for parties interested to appear and raise objections. *STATE ex rel. UTICK v. POLK COUNTY*.

So, the Indiana ditching law is constitutional and valid. *Tinder v. Duck Pond Ditching Asso.* 38 Ind. 555.

And is not void as violating the provisions in the Bill of Rights and the Federal Constitution forbidding the taking of private property without due process of law. *Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144.

The Michigan drain law of 1885, chap. 227, is not in violation of the state Constitution, art. 14, § 9, providing that the state shall not engage in works of internal improvement. *Gillett v. McLaughlin*, 69 Mich. 547, 87 N. W. 551.

health, or that it would drain wet or overflowed lands.

Fleming v. Hull, 73 Iowa, 598, 35 N. W. 673.

The petition does not contain a description of the point of commencement of the ditch, nor is the route sufficiently described to comply with the provisions of the statute; and, therefore, all subsequent proceedings under such petition were absolutely void.

Lewis, Em. Dom. § 352.

Mr. W. E. Rowe, for respondent:

The fact that the law requires the petition to specify the public use, and imposes upon the commissioners the duty of making a determination as to its existence as a matter of fact, is all that is required of any drainage law.

Re Theresa Drainage Dist. 90 Wis. 301, 63 N. W. 288.

The drainage of fresh-water lakes is not within the purview and scope of the Indiana drainage act of 1881 as amended by the act of 1883, but such statute applies only to wet and marshy lands, swamps, ponds, and the like. *Baltimore & O. & C. R. Co. v. Ketring*, 122 Ind. 5, 28 N. E. 527.

A provision in the drainage law of Illinois making the commissioners of highways of a town also the drainage commissioners thereof, is not invalid as an assumption of an appointing power which the legislature does not possess, but is the imposing by law of new duties, merely statutory, upon officers already chosen, and is by no means the appointment or selection of such officers by the legislative department. *Kilgour v. Montmorency Twp. Drainage Comrs.* 111 Ill. 342.

In order to make the construction of a ditch for the drainage of agricultural lands a public use sufficient to justify the exercise of the right of eminent domain, it is not necessary that the public at large shall be benefited, but only that a part of the public be affected by want of proper drainage; and the public has an interest beyond that of the mere sanitary condition of land, which is founded upon other and different principles than the controlling and abatement of nuisances, where any considerable number of persons are concerned, or tract of land is useless, and improvements may be made commensurate to the benefits received, and the lands taxed for such benefits. *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779.

The drainage of land by means of the organization of a drainage district under constitutional authority is not a mere private benefit, to aid in which public property cannot be appropriated. *Heffner v. Cass & Morgan Counties*, 193 Ill. 439, 58 L. R. A. 353, 62 N. E. 201.

Drainage ditches are public improvements for which the legislature has full power to provide, and may use local boards as convenient instrumentalities. *State ex rel. Holtz v. Henry County*, 41 Ohio St. 423.

The construction of a sewer is a local improvement where its cost is raised upon the property supposed to be benefited by it. A public improvement is one where the expense is charged upon all the taxable property within the municipality. *Kinsella v. Auburn*, 26 N. Y. S. R. 884, 7 N. Y. Supp. 317.

It is not necessary, in determining the public benefit of a proposed ditch, so as to justify the levying of special assessments for the cost thereof, to show the number of persons who, or that any particular person, will be benefited in health or comfort thereby; but, if it can be 60 L. R. A.

The act in question contemplates drainage for only a public purpose.

Lien v. Norman County, 80 Minn. 58, 82 N. W. 1094; *Bloomfield & R. Natural Gas-light Co. v. Richardson*, 63 Barb. 437; *Hartwell v. Armstrong*, 19 Barb. 166.

When a statute is susceptible of two constructions, one constitutional and the other not, the former shall be adopted, even though the latter may be the more natural interpretation.

23 Am. & Eng. Enc. Law, p. 349.

Mr. H. F. Stevens, also for respondent:

A statute must be assumed, if its language will admit, to have been intended to be within the constitutional power of the legislature.

Ames v. Luke Superior & M. R. Co. 21 Minn. 241; *State ex rel. Railroad & W. Commission v. Chicago, M. & St. P. R. Co.* 38

justly concluded, from the nature of the system of drainage adopted, that there will be a material element of public good in the result, then the purpose is a public one, and property may be assessed, even though the pond or marsh to be drained is wholly on the land of one citizen, which he is under no duty to drain at his own expense for the benefit of the community, although he may be compelled to pay the entire benefit which thereby accrues to his property. *Zigler v. Menges*, 121 Ind. 99, 22 N. E. 782.

The drainage laws in force prior to the adoption of the Constitution of 1894, and of the general drainage act passed in pursuance thereof in 1895, were upheld only for the purpose of preserving the public health; and where, in a proceeding instituted thereunder, the proposed drain was determined not to be necessary for the public health, the commission should be dissolved. *Re Drainage in Penfield*, 3 App. Div. 30, 37 N. Y. Supp. 1056.

The provisions of N. Y. Laws 1867, chap. 372, for the draining of certain swamp lands, which empower the commissioners to enter on lands and construct ditches, and require them, upon making the assessments, to give notice of a day for their payment; and which authorize the sale of the lands assessed on the same day in case of nonpayment,—are unconstitutional as taking private property for private use without the consent of the owner; since they contain no reference to public health, nor to any other public purposes, but are solely for the benefit of the owners of the land to be drained; and also as taking property without due process of law, since they provide for no grievance day. *People ex rel. Pulman v. Henlon*, 64 Hun, 471, 19 N. Y. Supp. 488.

A municipal corporation is vested with the power of drainage and to organize drainage districts for that purpose solely by reason of the sanitary benefits to the public and the improvement of the streets which will result from the drainage, and a drainage district so organized is a public, and not a private, corporation; and, although it incidentally is of great benefit to the owners of contiguous real estate, and it is solely by reason thereof that such owners may be taxed by special assessment for the costs of the drainage, yet such fact does not change the character of the corporation. *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761.

A drainage act is unconstitutional and void which authorizes the formation of drainage districts upon the signing of an agreement by two thirds of the landowners owning two thirds of the land in the proposed district, but which does not require that the drainage shall benefit the

Minn. 281, 37 N. W. 782; *Sweet v. Rechel*, 159 U. S. 389-392, 40 L. ed. 193, 16 Sup. Ct. Rep. 43.

The right of eminent domain not only invades no private right, but, because essential to the welfare of society, is paramount to the interests of any individual.

State ex rel. Ryan v. Ramsey County Dist. Ct. (Minn.) 91 N. W. 300; *Shoemaker v. United States*, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361.

Only the validity of the act can be considered in this proceeding.

The legislature may well have considered that its opinion of what was expedient and proper was paramount to that of any board of county commissioners or other inferior body.

Carpenter v. St. Paul, 23 Minn. 232; *State ex rel. Cunningham v. St. Paul Bd. of Pub-*

lic health or otherwise be of public utility, or even that the lands shall be swamp or wet lands, for it is only by virtue of its public utility that the legislature has the power to compel landowners benefited to pay for the construction of public ditches. *Gifford Drainage Dist. v. Shroer*, 145 Ind. 572, 44 N. E. 636.

But an act of the legislature authorizing the owner of wet lands to drain and reclaim the same by constructing a drain over the lands of others, and to assess the benefits and damages incident thereto on the lands affected, is not unconstitutional as delegating the power of eminent domain to one citizen, to be exercised over another citizen for a private advantage without declaring on its face that the drain will be in some way of public utility, as a ditch cannot be established under the statute without proof that it is of public utility,—and especially where the omission in that respect has been supplied by a later act, in conjunction with which the former act must be construed. *Chambers v. Kyle*, 67 Ind. 206.

The question of public utility of a proposed ditch is not to be split up and the drain defeated by showing that it will not be of public utility in one of the counties into which it extends. The public utility of a drain has reference to the ditch in its entirety, without regard to the counties that may be crossed by it. *Meranda v. Spurlin*, 100 Ind. 380.

The use of land sought to be condemned for municipal sewer purposes is none the less public because the city agrees to allow a hotel outside the corporate limits to share in the benefit of the improvement. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

Whether or not the use for which property is proposed to be taken for a ditch is a public use is a question of law, to be determined by the judicial power, and the fact that a proposed ditch would enable two parties to raise larger crops would not authorize a verdict in favor of establishing the ditch. *McQuillen v. Hatton*, 42 Ohio St. 202.

But whether or not a particular drain proposed to be established will be of public utility is a question of fact for the jury, which the court will not set aside unless the facts are insufficient to support their verdict. *Zigler v. Menges*, 121 Ind. 99, 22 N. E. 782.

The condemnation of land by a municipality for sewer purposes cannot be defeated on the ground that the proposed sewer will be a nuisance, injuriously affecting public health, where there is no evidence that the sewer, as it is proposed to be constructed, will be more of a nuisance than any sewer would be; if it becomes a

nuisance it may be abated. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

lio Works, 27 Minn. 442, 8 N. W. 161; *St. Paul, M. & M. R. Co. v. Minneapolis*, 35 Minn. 141, 27 N. W. 500; *Hurst v. Martinsburg*, 80 Minn. 40, 82 N. W. 1099; *Crossley v. O'Brien*, 24 Ind. 323, 87 Am. Dec. 329; *Baltimore & O. S. W. R. Co. v. Jackson County*, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856; *Whitacre v. St. Paul & S. O. R. Co.* 24 Minn. 311; *Knoblauch v. Minneapolis*, 56 Minn. 321, 57 N. W. 928; *Eldridge v. Smith*, 34 Vt. 484; *Tyler v. Beach*, 44 Vt. 648, 8 Am. Rep. 398; *McKusick v. Stillwater*, 44 Minn. 372, 46 N. W. 769; *Kelly v. Minneapolis*, 57 Minn. 294, 26 L. R. A. 92, 59 N. W. 304; *Spencer v. Merchant*, 125 U. S. 353, 31 L. ed. 766, 8 Sup. Ct. Rep. 921.

It is sufficient if the petition shows on its face that the use or purpose is a public one.

State v. Engelmänn, 106 Mo. 628, 17 S. W. 759; *Simpson v. Kansas City*, 111 Mo. 237,

nuisance it may be abated. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

The legislature may provide for, and compel, the clearing out of all such water courses and drains as are not, and never were, navigable, but which are necessary for carrying off the surplus rain water, thereby promoting the public health, and enabling a considerable portion of territory otherwise uninhabitable to be brought into cultivation. *Brown v. Keener*, 74 N. C. 714.

The whole of a ditching act must fall with that portion thereof providing for the condemnation of the right of way for the ditch which has been declared unconstitutional, where the authority to acquire such right of way by any other means is not given, and cannot be implied without destroying the force of other provisions of the act. *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116.

An exercise of police power.

The particular branch of governmental power to which the power of drainage is to be referred is undoubtedly the police power. But, by referring it to that power, as some courts have done, the authority over private property is not enlarged. The restrictions of the Constitution are still applicable.

Neither the United States Constitution, nor its Amendments, were designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having this object in view, must often be had in certain districts, such as for the draining of marshes and irrigating arid plains. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. *Barber v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Wis. drainage law 1885, chap. 442, providing for drainage upon petition of owners of swamp and overflowed land, stating that the land will be benefited and the public health promoted, and for the assessment of the costs to those whose lands are benefited, may be upheld as an exercise of the police power. *Bryant v. Robins*, 70 Wis. 258, 35 N. W. 545.

20 S. W. 38; *St. Louis, H. & K. C. R. Co. v. Hannibal Union Depot Co.* 125 Mo. 83, 28 S. W. 483.

The title of the act expresses a public purpose.

Lien v. Norman County, 80 Minn. 58, 82 N. W. 1094.

The language of the act, the duties imposed, the official character of the persons by whom they are to be performed, the manner in which they are enjoined, the system and method adopted, are all characteristic of a public work.

State ex rel. Holtz v. Henry County, 41 Ohio St. 423; *Boston & M. R. Co. v. York County*, 79 Me. 386, 10 Atl. 113; *Thompson v. Polk County*, 38 Minn. 130, 36 N. W. 267; *Talbot v. Hudson*, 16 Gray, 417.

The mode of exercising the right of eminent domain, whether by the state itself or

its delegates, rests in the discretion of the legislature, in so far as the legislature is not restrained by the Constitution.

Wilkin v. First Div. of St. Paul & P. R. Co. 16 Minn. 274, Gil. 244; *Hursh v. First Div. of St. Paul & P. R. Co.* 17 Minn. 439, Gil. 417.

It is competent for the legislature, by a general law, to authorize the selection by corporations of property deemed by them necessary for their purposes, and such selection will be conclusive upon that question, in the absence of fraud.

Weir v. St. Paul, S. & T. F. R. Co. 18 Minn. 159, Gil. 139; *Warren v. First Div. of St. Paul & P. R. Co.* 21 Minn. 424; *Cotton v. Mississippi & R. River Boom Co.* 22 Minn. 372; *State Park v. Henry*, 38 Minn. 266, 36 N. W. 874.

The presumption is that the commissioners

for their construction, impliedly empowers the sanctioning of the building of such sewers at private expense. *State, Hunt, Prosecutor, v. Lambertville*, 45 N. J. L. 279.

Drainage laws in the interest of the public health and welfare are a proper exercise of the police power, and the fact that large tracts of otherwise waste lands may be thus reclaimed and made suitable for agricultural purposes is deemed and held to constitute a public benefit. *Lien v. Norman County*, 80 Minn. 58, 82 N. W. 1094.

A drainage law is in the interest of the public and for exclusively public purposes, and therefore a valid exercise of police power, when it provides that no ditch can be established or laid out thereunder unless the county commissioners expressly find that it will be of "public utility, or conducive to public health, or of public benefit or convenience." *Ibid.*

Local drains.

There is nothing in the Illinois Constitution which prohibits local or special legislation in respect to drainage where the direct prohibition of special legislation does not enumerate "drainage" as one of the subjects included, and the general clause at the end of § 22, that, "where a general law can be made applicable no special law shall be enacted," addresses itself to the general assembly alone. *Owners of Lands v. People, ex rel. Stookey*, 113 Ill. 296.

A municipal corporation has the power, under the Illinois general incorporation act, to construct a system of drainage in a district having its limits fixed and bounded by the ordinance providing for the improvement. *Mason v. Chicago*, 178 Ill. 499, 53 N. E. 354.

A municipal corporation may, under the general powers given it to make local improvements by special assessments, construct sewers in and drain a certain portion of its territory having its limits accurately bounded and defined by the ordinance providing for the same. *Gray v. Cicero*, 177 Ill. 459, 53 N. E. 91.

The laying of a sewer in a street by a private concern does not make the sewer public property, and a city, subsequently incorporated, does not, upon its incorporation, take title thereto. *Oak Cliff Sewerage Co. v. Marshall* (Tex. Civ. App.) 69 S. W. 176.

A municipal corporation does not adopt a private sewer as a public one by connecting its outlet with a public sewer. *Re Evans Ave. Sewer*, 32 Pittsb. L. J. N. S. 24.

Statutory authority.

Express authority to cause public sewers to be constructed, and money to be raised and paid 60 L. R. A.

for their construction, impliedly empowers the sanctioning of the building of such sewers at private expense. *State, Hunt, Prosecutor, v. Lambertville*, 45 N. J. L. 279.

An act to provide for sewerage in townships in which there is a public water supply applies wherever the supply of water is available for public use, although not owned by the municipality. *State, Gibbs, Prosecutor, v. Northampton Twp.* 52 N. J. L. 496, 19 Atl. 975.

Drainage laws are to be liberally construed. *Osborn v. Maxinkuckee Lake Ice Co.* 154 Ind. 101, 56 N. E. 33.

A statute providing for the construction of sewers in any city of a specified class whenever the citizens thereof shall vote to adopt the provisions of the statute violates the provision of the Constitution providing that all cities of the same class shall have the same powers and be subject to the same restrictions. *Owen v. Baer*, 154 Mo. 434, 55 S. W. 644.

A ditch located and constructed under color of the statute, the expense of which has been paid for by the parties assessed without objection, and which has been in use for fifteen years or more, must be regarded and recognized by the township drain commissioner as a public drain duly and legally established. *Zabel v. Harshman*, 68 Mich. 273, 42 N. W. 44.

The right of highway commissioners in each town in the several counties adopting township organization to be a corporate body as drainage commissioners, under the drainage laws giving them that right, is a franchise. *People v. O'Hair*, 128 Ill. 20, 21 N. E. 211, Reversing 29 Ill. App. 239.

II. Institution of proceedings.

a. By petition of landowner.

The method of instituting proceedings for the establishment of drains is different under different statutes, and a different procedure is usually provided for different kinds of drains. The initiative with respect to city sewers usually lies with the legislative body of the municipality, and the consent of the taxpayers may or may not be required, at the will of the legislature. If a sewer is urgently demanded for the good of the public, the municipal authorities may be empowered to construct it, even against the protest of those upon whom the burden will fall. In the case of farm drainage, the initiative is usually given to those who are most interested in the proceeding, and assent of a majority in interest is required to start the proceedings for the establishment of the drain. Such assent may, of course, be required in case

proceeded rightly and according to the statute, until the contrary appears.

Abel v. Minneapolis, 68 Minn. 89, 70 N. W. 851; *Lewis, Em. Dom.* § 242; *Curran v. Sibley County*, 56 Minn. 432, 57 N. W. 1070; *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 354, 28 L. ed. 173, 175, 4 Sup. Ct. Rep. 48, 52; *State ex rel. Simpson v. Rapp*, 39 Minn. 65, 38 N. W. 926; *St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. 59; *Fairchild v. St. Paul*, 46 Minn. 540, 49 N. W. 325; *Knoblauch v. Minneapolis*, 56 Minn. 321, 57 N. W. 928.

With respect to the construction of ditches for draining wet and swampy lands in the interest of the public welfare, and assessing the expense thereof to the lands benefited, a county has been held to be a municipal corporation, and such ditches, local improve-

of city sewers, and a provision in a system of legislation regulating the construction of sewers, requiring action by the municipality only upon the presentation of a petition of the taxpayers, cannot be dispensed with by the legislature only in cities having a certain specified population, such legislation being special within the meaning of the Constitution. *State, Tyler, Prosecutor, v. Plainfield*, 54 N. J. L. 529, 24 Atl. 494.

But petitioners for a public sewer cannot complain if the council exceeds their request by extending the desired sewer onto another street, as their individual liability is not increased thereby, and some latitude must necessarily be allowed public officials in doing such work. *Re Maple Ave. & G. Street Sewer*, 30 Pittsb. L. J. N. S. 377.

The words "greatest part of them in interest," in a statute providing for the improvement of swamp lands and giving those having the greatest interest power to act, relate to proprietors having the greatest interest in value, and not to those owning the largest territorial area. *Henry v. Thomas*, 119 Mass. 583.

While the holder of any real or substantial interest is an owner of land affected or interested, within the meaning of the statute enacting that any owner of land to be benefited thereby may file a requisition for a drain upon obtaining the assent of the majority of the owners affected or interested, a mere tenant at will can neither file the requisition, nor be included in the majority required. *Osgoode Twp. v. York*, 24 Can. S. C. 282.

A lessee of land with an option to purchase the fee is not an owner within the meaning of the statute providing that the owner of land affected may institute proceedings for the construction of a drainage ditch. *McKillop Twp. v. Logan Twp.* 29 Can. S. C. 702.

A constitutional clause authorizing the passing of laws permitting the owners or occupants of lands to construct drains or ditches for agricultural or sanitary purposes across the lands of others implies that the community whose property is to be taxed may have the right of election in the matter, and a law authorizing a drainage system and the imposition of a special tax or special assessments therefor, without any previous vote of the persons affected thereby, is unconstitutional. *Udike v. Wright*, 81 Ill. 49.

In Michigan a township drain tax is illegal and void where it does not appear that five freeholders residing in the township presented a petition for its construction as required by statute. *Frost v. Leatherman*, 55 Mich. 33, 20 N. W. 705.
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ments, within the meaning of the Constitution.

Dowlan v. Sibley County, 36 Minn. 430, 31 N. W. 517; *Sperry v. Flygare*, 80 Minn. 325, 49 L. R. A. 757, 83 N. W. 177; *Lien v. Norman County*, 80 Minn. 58, 82 N. W. 1094; *Lewis, Em. Dom.* pp. 10, 237, 242, 246, 393; 10 Am. & Eng. Enc. Law, p. 1070.

It is for the legislature to judge the degree of public necessity, and to what extent, on what occasion, and under what circumstances the power of eminent domain shall be exercised, and the courts cannot control the decision of the legislature on these points; but whether the use is public or private is for the judiciary.

Hartwell v. Armstrong, 19 Barb. 166; *Re Boston, H. T. & W. R. Co.* 79 N. Y. 64; *Re Niagara Falls & W. R. Co.* 108 N. Y. 375, 15 N. E. 429; *Pocantico Waterworks Co. v.*

However, a statutory provision that the petition to establish a drain must be signed by not less than five freeholders of the township or townships in which the drain or lands to be drained thereby may be situated, does not require the signatures of five freeholders of each township. *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233.

A venire issued by the chairman of drainage commissioners, under the Michigan drainage laws of 1857, 1859, is invalid, and proceedings taken thereunder are void, where no application in reference to the construction of the drain was made to the commissioners by resident freeholders, as provided by the act. *Palmer v. Rich*, 12 Mich. 414.

A board of supervisors can order a construction of drainage ditches under the Iowa Code, authorizing the construction of drains which will be conducive to the public health, convenience, or welfare only after a petition is presented signed by a majority of the persons residing in the county and owning land adjacent to the proposed improvement. *Patterson v. Baumer*, 43 Iowa, 477.

When it sufficiently appears by the record of the county board in a drain case that there was a petition signed by one or more landowners who would be affected by the proposed ditch; that an undertaking was signed by them, as required by the statute; that the proposed improvement is necessary and will be conducive to the convenience, health, and welfare of the public; and that the statutory notice has been given,—the board has sufficient jurisdiction, although it does not find expressly that the petitioners are owners of land which would be benefited by the ditch, when that fact may be gathered from the petition, and is not made jurisdictional by the statute. *Dakota County v. Cheney*, 22 Neb. 437, 35 N. W. 211.

A provision in a drainage law authorizing only the owners of lands which will be benefited by drainage to institute proceedings for the establishment of a ditch does not make the ditch one intended only for private benefit, so as to render the law unconstitutional, where the statute requires the petition to state, and the commissioners to find, that the public health will be improved, or the public highways will be benefited, or the ditch will be of public utility, and authorizes landowners to remonstrate against the establishment upon the ground that the proposed work will not improve the public health, nor benefit the public highways, nor be of public utility, and authorizes a dismissal of the proceedings if the court finds in favor of the remonstrance, and also provides for keeping

Bird, 130 N. Y. 249, 29 N. E. 246; *Re Burns*, 155 N. Y. 23, 49 N. E. 246; *West Jersey R. Co. v. Camden, G. & W. R. Co.* 52 N. J. Eq. 32, 29 Atl. 423; *Coster v. Tide Water Co.* 18 N. J. Eq. 54; *State, Slingerland, Prosecutor, v. Newark*, 54 N. J. L. 62, 23 Atl. 129; *Wulzen v. San Francisco*, 101 Cal. 15, 35 Pac. 353; *Concord R. Co. v. Greely*, 17 N. H. 47; *Pierce v. Southbury*, 29 Conn. 490; *Van Witsen v. Gutman*, 79 Md. 405, 24 L. R. A. 403, 29 Atl. 608; *Dingley v. Boston*, 100 Mass. 544; *Eastern R. Co. v. Boston & M. R. Co.* 111 Mass. 125, 15 Am. Rep. 13; *Lynch v. Forbes*, 161 Mass. 302, 37 N. E. 437; *Paxton & H. Irrig. Canal & Land Co. v. Farmers' & M. Irrig. & Land Co.* 45 Neb. 884, 29 L. R. A. 853, 64 N. W. 342; *Roanoke City v. Berkowitz*, 80 Va. 616; *Re Rhode Island Suburban R. Co.* 22 R. I. 455, 48 Atl. 590; *Lewis County v. Gordon*, 20

Wash. 80, 54 Pac. 779; *Pittsburgh v. Scott*, 1 Pa. St. 309; *Re Road*, 4 Pa. 337; *Parke's Appeal*, 64 Pa. 137; *Re Walnut Street*, 90 Pa. 207; *Pennsylvania R. Co.'s Appeal*, 93 Pa. 150; *State ex rel. Simpson v. Rapp*, 39 Minn. 65, 38 N. W. 926; *National Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 755; *State ex rel. Ryan v. Ramsey County Dist. Ct.* (Minn.) 91 N. W. 300; *Consumers' Gas Trust Co. v. Harless*, 131 Ind. 446, 15 L. R. A. 505, 29 N. E. 1062; *Baltimore & O. S. W. R. Co. v. Jackson County*, 156 Ind. 260, 58 N. E. 837, 59 N. E. 856.

The determination as to whether or not the right of eminent domain should be exercised, and as to what lands are necessary to be taken in the exercise of that right, is a political and legislative question, and not a judicial one. Its determination rests exclusively with the legislature, or with such

such drains in repair and free from obstructions after construction, at public expense. *Ross v. Davis*, 97 Ind. 79.

But a drainage act is unconstitutional, as permitting the taking of private property for private purposes, where it allows condemnation of land for a ditch or drain upon the petition of two or more landowners, if it is found that the construction of the ditch will be conducive to the general welfare of the landowners so petitioning. *Nickey v. Stearns Ranchos Co.* 126 Cal. 150, 58 Pac. 439.

It is no legal ground for the dismissal of ditch proceedings that all the land of the petitioners affected by it is situate within a comparatively short distance from its mouth or outlet, leaving the larger proportion of its length to be constructed at the cost of persons opposed to its establishment, and along the line of which is an old ditch sufficient to drain their lands if repaired; as the question as to whether the proposed ditch is more comprehensive, or embraces or affects more land, than is necessary to accomplish the drainage in the cheapest and best manner, is one exclusively for the viewers, and is not reviewable by the courts. *Bonfoy v. Goar*, 140 Ind. 292, 39 N. E. 56.

The trial court held in a case reversed in 49 L. R. A. 781, that the right of eminent domain for drainage purposes for the benefit of private owners of agricultural lands, conferred by N. Y. Const. 1894, art. 1, § 7, may be exercised by any number of land owners against all the parties affected to secure the drainage of an enlarged area; that the provision that general laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain, for the drainage thereof, necessary drains, ditches, and dikes upon the lands of others, under proper restrictions, upon payment of just compensation, authorizes the passage of general drainage laws which would permit the drainage of more or less extended area upon the application of one or more persons and without the consent of others, but at the expense of all who may be affected thereby. *Re Tuthill*, 50 N. Y. Supp. 410.

That decision would have done away with the well-settled rule that the drainage must be for public benefit to authorize the proceedings; but the court, on appeal, held that the Constitution contemplated that the expense should be borne by the petitioner, and Judge Gray went further, and held that the provision for the drainage of private property violated the provision of the Federal Constitution against depriving a person of his property without due process of law, holding that drainage for pri-

vate benefit was a taking of private property for private benefit.

The petitioner for the establishment of a ditch cannot dismiss his petition after the report of the commissioners has been filed and confirmed, and rights have been acquired, and money expended thereunder, although the order approving the report has been vacated for additional notice to omitted parties. *Carr v. Boone*, 108 Ind. 241, 9 N. E. 110.

After the presentation of a petition for the construction of a drain by a majority of those to be benefited thereby, and after surveys and estimates, followed by a withdrawal of enough of the petitioners to bring the number remaining below a majority, a by-law passed by the council after it had altered the original plans, reciting that a majority of those to be benefited had petitioned, and providing for the construction of the work according to the altered plans, should be quashed, as the council had no power to authorize the undertaking of any work other than that petitioned for, and, a sufficient number of the petitioners having withdrawn to reduce the number below the majority, the by-law, in reciting that a majority petitioned, was untrue. *Misener v. Wainfleet Twp.* 46 U. C. Q. B. 457.

b. By municipal ordinance.

Where authority is given to originate proceedings by municipal ordinance, certain requisites must be complied with. The ordinance, of course, must be regularly adopted, and may be impeached for any cause which would invalidate ordinances generally.

An order to construct sewers is a legislative act within the meaning of a charter requiring such acts to be adopted by ordinance; a mere resolution is insufficient. *State ex rel. Paterson v. Barnet*, 46 N. J. L. 62.

Sewers erected prior to legislative authorization for the erection of sewers by municipalities are private drains, even though constructed in a street, or though subsequently repaired by the municipality under legislative grant. *Bangor v. Lausli*, 51 Me. 521.

It is not a valid objection to a resolution of the Jersey City common council for a proposed sewer that it was not signed by the mayor, as the charter only requires that official to sign resolutions affecting the interest of the city, and, as the city at large pays no part of the expenses for the improvement, but these are borne by the property benefited, the city's interests are not affected. *State, Plard, Prosecutor, v. Jersey City*, 30 N. J. L. 148.

An ordinance authorizing the construction of

subordinate legislative bodies as it may be properly devolved upon; and the question whether the exercise of the power is wise or not is one with which the judicial department has no concern.

Contra Costa Coal Mines R. Co. v. Moss, 23 Cal. 324; *Davies v. Los Angeles*, 86 Cal. 37, 24 Pac. 771; *Re Fowler*, 53 N. Y. 62; *People ex rel. Herrick v. Smith*, 21 N. Y. 595; *State ex rel. Cape Girardeau v. Engelmann*, 106 Mo. 628, 17 S. W. 759.

Whether the land proposed to be taken under the power of eminent domain is to be applied to a public use can, in general, be determined from an inspection of the petition or other pleading by which the proceeding is instituted.

Lewis, Em. Dom. § 162; *Dickey v. Tension*, 27 Mo. 373; *St. Louis County Ct. v. Griswold*, 58 Mo. 189; *Savannah v. Hancock*,

91 Mo. 54, 3 S. W. 215; *Lake Koen Nav. Reservoir & Irrig. Co. v. Klein*, 63 Kan. 484, 65 Pac. 684; *Coster v. Tide Water Co.* 18 N. J. Eq. 55, 518, 90 Am. Dec. 634; *Lynch v. Forbes*, 161 Mass. 302, 37 N. E. 437; *Barrett v. Kemp*, 91 Iowa, 296, 59 N. W. 76; *Varick v. Smith*, 5 Paige, 137, 28 Am. Dec. 417; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 679; *Ford v. Chicago & N. W. R. Co.* 14 Wis. 610, 80 Am. Dec. 791; *People ex rel. Herrick v. Smith*, 21 N. Y. 595; *Re Tuthill*, 163 N. Y. 133, 49 L. R. A. 781, 57 N. E. 303; *Fort Street Union Depot Co. v. Backus*, 92 Mich. 33, 52 N. W. 790; *Parke's Appeal*, 64 Pa. 137.

The authority that makes the laws has large discretion in determining the means through which they shall be executed.

Shoemaker v. United States, 147 U. S. 282, 37 L. ed. 170, 13 Sup. Ct. Rep. 361.

a sewer, adopted at a special meeting, is not rendered invalid by reason of the fact that the mayor, in his message submitted at such meeting, declared the purpose of the meeting to be the consideration of an ordinance to establish a sewer district, and made no reference to the construction of the sewer, where it was clear that he intended to include such construction in the purpose of the meeting. *Dollar Sav. Bank v. Ridge*, 62 Mo. App. 324.

When a municipal assembly is vested with the power to pass an ordinance for the construction of a sewer, its acts under that power, in the absence of fraud, are conclusive upon the courts, whether the attack made thereon be collateral or direct. *Akers v. Kolkmeier* (Mo. App.) 71 S. W. 536.

A sewer built in pursuance of a resolution of the city council, and paid for out of money in the city treasury provided for that purpose, is a public sewer in law, as much as if it had originally been established by ordinance. *Ibid.*

The fact that an ordinance authorizing the construction of a sewer took effect at the same time as an ordinance establishing the district in which it was to be constructed did not invalidate it, although the municipal charter authorized the construction of sewers only in established districts. *Eyerman v. Blaksley*, 78 Mo. 145.

Although the Constitution providing that the legislature may vest cities, towns, and villages with the power to make local improvements by special assessments of the cost upon property benefited does not mention counties, an act of the legislature authorizing counties to construct drains by levying the cost upon lands benefited is not void as violative of the Constitution. *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819.

c. By organisation of drainage district.

Under the statutes of some of the states, drainage proceedings are instituted by the organization of drainage districts, which are a form of governmental corporation with very limited powers, and the actual creation of the drains and the collection of the funds to pay for them and other necessary work are done by the officers of the district.

The effect of an amendment to the Illinois Constitution authorizing the creation of drainage districts and the levy of special assessments for the construction of the drainage therein is to invest drainage districts with power to make local improvements by special assessments, which prior to such amendment was confined to towns, cities, and villages; and the power of 60 L. R. A.

the legislature to authorize the formation of sanitary districts, and to invest other corporate authorities with power to levy and collect general taxes for sanitary purposes, is unaffected by such amendments. *Wilson v. Sanitary Dist.* 133 Ill. 443, 27 N. E. 203.

It is said that a reclamation district is a public corporation which may be created, not only by the means and in the manner provided by the general law, but also by special act, or by implication of law, legislative recognition of a corporation in many cases being sufficient proof of its existence. *People v. Reclamation Dist. No. 108*, 53 Cal. 346; *Reclamation Dist. No. 124 v. Gray*, 95 Cal. 601, 30 Pac. 779.

The legislature has the authority, under its police power, to authorize the organization of companies for the purpose of draining swamp and wet lands, with the reasonable exercise of which the courts cannot interfere. *O'Reiley v. Kankakee Valley Draining Co.* 32 Ind. 169.

An act of the legislature authorizing the organization of draining companies composed of the landowners interested, to construct levees, dikes, and drains, and to reclaim wet and overflowed land, the cost thereof to be paid by special assessment, is a reasonable exercise of the police power of the state, and is valid. *Ibid.*

An act authorizing the creation of a corporation for the purpose of constructing drains and levees to be made for the public benefit, with power to exercise the right of eminent domain, and taxation for that purpose, leaving it for the court to determine in each particular case whether the levee or drain in that case is for public use or benefit, is constitutional and valid. *Anderson v. Kerns Draining Co.* 14 Ind. 199, 77 Am. Dec. 63.

An act of the legislature creating a sanitary district with power to secure the public health by means of sewers and channels, or drains, is within the police power of a state. *Wilson v. Sanitary Dist.* 133 Ill. 443, 27 N. E. 203.

An act of the legislature authorizing the drainage of wet land in certain townships of a county, and constituting certain persons therein named a corporation with power to levy a tax, under the name of an assessment, upon the lands therein deemed by the corporation to be benefited by the proposed improvement, is unconstitutional and void as being contrary to the constitutional provisions prohibiting the levying of a local tax by other than the corporate authorities,—such corporation not being “corporate authorities” because its members were neither directly elected by the inhabitants of the district nor appointed in some mode to

That which is implied in the statute is as much a part of it as that which is expressed.

Minard v. Douglas County, 9 Or. 206; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

The court, in passing upon the propriety of any assessment, has the right, also, to set it aside entirely for want of power to make any assessment at all.

Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825.

It is the fact, not the finding, of public use, that is decisive.

Lien v. Norman County, 80 Minn. 58, 82 N. W. 1094; *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707.

The number of persons benefited does not affect the character of use.

Chicago, B. & N. E. Co. v. Porter, 43

Minn. 527, 46 N. W. 75; *Talbot v. Hudson*, 16 Gray, 417; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

Drainage is prima facie a public use, as matter of law.

Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Secombe v. Milwaukee & St. P. R. Co.* 23 Wall. 108, 23 L. ed. 67; *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449; *Sweet v. Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427; *Re Rhode Island Suburban R. Co.* 22 R. I. 455, 48 Atl. 590; *Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5

which they had given their assent. *Hessler v. Drainage Comrs.* 53 Ill. 105.

But, under a provision of the Constitution of Illinois authorizing the general assembly to pass laws permitting the owners of lands to construct drains, ditches, and levees for agricultural, sanitary, or mining purposes across the lands of others, and provide for the organization of drainage districts, and to vest the corporate authorities thereof with power, etc., the general assembly, and not the owners of lands, may provide for the organization of such districts, and vest the corporate authorities thereof with power, and no limitation or restriction exists as to the agencies to be used in the creation of the corporation; and a statute investing the county court with power to inquire into and find the existence of certain preliminary facts deemed important as prerequisites to the corporation is valid. *Blake v. People use of Caldwell*, 109 Ill. 504.

The fact that a drainage law provides that the county court shall find certain essential facts preliminary to the creation of a drainage district and the formation of the corporate authorities thereof does not make that body, when formed, the creature of the court, but it is merely the creation by the legislature of such court as its agent to make investigations and determine facts not convenient for it to perform,—which it has the right to do in the absence of limitation upon it in the constitutional clause authorizing the creation of such drainage districts,—as to the mode of forming the districts; and, inasmuch as such constitutional provision does not require that the corporate authorities shall be elected by the people of the district, their appointment by the county court is not unconstitutional, since this clause in the Constitution, being an amendment so far as it invades the former limitations of the Constitution, must prevail, and such limitations must be held not to apply to the subject-matter of the levying of special assessments upon lands within a drainage district for benefits thereby conferred. *Huston v. Clark*, 112 Ill. 344.

A drainage act is not unconstitutional as violating the constitutional provision prohibiting the legislature from appointing or electing any person to an office because it provides that the county commissioners shall be the drainage commissioners of their respective counties. No new office is created, but new duties are added to an office already created and whose officers are elected by the people, and, being the corporate authorities before the passage of that act, the addition of new duties, and declaring that, as to such duties, such corporation shall be known 60 L. R. A.

by a different name, do not change the constituents thereof. *Owners of Lands v. People ex rel. Stookey*, 118 Ill. 296.

A drainage law, providing that the county commissioners shall be the drainage commissioners in their respective counties is not unconstitutional because they are not elected by the people of the drainage district or appointed by any mode to which they have given their assent, where no clause in the Constitution contains such a requirement, and no clause of that instrument prohibits making the county commissioners the corporate authorities for every drainage district in the county, although they are elected by the votes of others in the county as well as those of the drainage district; and the constitutional provision prohibiting the state from creating a debt exceeding a certain sum without the consent of the people does not apply in this case, because the only debt authorized by such act to be created must be paid by a special assessment upon the property specially benefited by the proposed improvement, which is not a personal charge, but one only against the property specially assessed, which property may belong to a very few voters of the district, and whose rights are protected by a provision in the act requiring, as a condition precedent to the organization of the district, that a majority in number of the adult owners of lands lying in the proposed district, and who are the owners in the aggregate of more than one third of the lands lying in such district, shall petition for its formation, and allowing other landowners to appear and contest the formation thereof. *Ibid.*

Under a provision in the Constitution authorizing the general assembly to pass laws permitting the owners of lands to construct drains, etc., for agricultural, sanitary, or mining purposes, across the lands of others, and to provide for the organization of drainage districts, and to vest the corporate authorities thereof with power to construct and maintain drains, etc., by special assessments upon the property benefited thereby, the general assembly may pass a law making the corporate authorities of cities and villages the drainage commissioners thereof with power to determine what portion of the lands within such cities or villages shall be drained, which portion, when so determined, thereby becomes a drainage district, and vesting in such corporate authorities the power to construct and maintain such drains and pumping works as are necessary for the purpose of draining the lands in such district, and to levy special assessments for the cost thereof upon the lands benefited thereby. *Hyde Park v. Spencer*, 118 Ill. 440, 8 N. E. 846.

Sup. Ct. Rep. 441; *Miller v. Troost*, 14 Minn. 365, Gil. 282; *Doulan v. Sibley County*, 36 Minn. 430, 31 N. W. 517; *Sperry v. Flygare*, 80 Minn. 325, 49 L. R. A. 757, 83 N. W. 177; *Lien v. Norman County*, 80 Minn. 58, 82 N. W. 1094; *McGee v. Hennepin County*, 84 Minn. 472, 88 N. W. 6; *Beekman v. Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 679; *Tide Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Lewis*, Em. Dom. 185; *Tiedeman, State & Federal Control*, § 154, Randolph, Em. Dom. 427; 10 Am. & Eng. Enc. Law, p. 1082.

The proceedings are not void for uncertainty of description.

State ex rel. St. Paul, M. & M. R. Co. v. Hennepin County Dist. Ct. 35 Minn. 461, 29 N. W. 60; *Re Road*, 114 Pa. 627, 7 Atl. 765; *State, Slingerland, Prosecutor, v. Newark*, 54 N. J. L. 62, 23 Atl. 129; *Jamaica v. Den-*

ton, 70 N. Y. Supp. 837; *Kinnie v. Bars*, 68 Mich. 625, 36 N. W. 672; *Hursh v. First Div. of St. Paul & P. R. Co.* 17 Minn. 439, Gil. 417; *Ames v. Lake Superior & M. R. Co.* 21 Minn. 241; *Cotton v. Mississippi & R. River Boom Co.* 22 Minn. 372; *State Park v. Henry*, 38 Minn. 266, 36 N. W. 874; *Tiedeman, State & Federal Control*, § 154.

The word "necessary" does not mean "absolutely necessary," but expedient, reasonably convenient, or useful to the public.

Aurora & G. R. Co. v. Harvey, 178 Ill. 477, 53 N. E. 331; *Stuyvesant v. New York*, 7 Cow. 588.

There is no constitutional right of appeal.

Minneapolis v. Wilkin, 30 Minn. 140, 14 N. W. 581; *Tierney v. Dodge*, 9 Minn. 166, Gil. 153; *Weir v. St. Paul, S. & T. F. R. Co.* 18 Minn. 155, Gil. 139; *State ex rel. Cunningham v. St. Paul Bd. of Public Works*,

A landowner may object to the consideration of a petition for the organization of a drainage district by the commissioners upon the express ground that the statutory notice had not been given all the landowners whose lands are proposed to be included within the boundary of the district, and may insist that such organization shall be valid as a whole. *Sanner v. Union Drainage Dist.* 175 Ill. 575, 51 N. E. 857.

A statute creating a corporation including both city and county, and investing it with power to secure public health by means of sewers and channels and drains, is valid. *Wilson v. Sanitary Dist.* 133 Ill. 443, 27 N. E. 203.

The drainage laws of Illinois do not authorize the organization into one drainage district of lands so related with respect to drainage as to require four main ditches as outlets to four separate areas of low and wet land, having divides or swells of higher land between them, each ditch having a different direction, the construction of which necessarily does not benefit the lands of the other three areas, and in effect being four entirely separate and independent drainage districts under one organization,—especially where such district also includes an incorporated village, having by law independent powers of its own in respect to drainage, also much land needing no drainage, and that will not be drained by any of the proposed systems. *Klinger v. People ex rel. Conkle*, 130 Ill. 509, 22 N. E. 600, Affirming 28 Ill. App. 575.

Merely because the channel of a sanitary district, when constructed, will be capable of answering the purpose of navigation, and the driving of machinery, does not imply that the scheme was undertaken with the view of constructing a navigable waterway, and of creating a water power, as well as that of promoting and preserving the public health by furnishing a suitable and efficient means of carrying off the drainage and sewage of the district; and that a statute, creating such district, provides for the three subjects, does not render the creation of such sanitary district unconstitutional because the other two subjects are not expressed in the title, since they may be disregarded without affecting the legality of the drainage district. *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217.

A statute providing that any number of persons not less than three, owners of land wet and liable to be overflowed, may organize a company for the purpose of draining such lands, and authorizing the assessment of benefits along the line of the drain, and permitting the company, upon payment of compensation, to appropriate any land, stone, timber, gravel, or 60 L. R. A.

other material necessary for the right of way, for the construction, maintenance, or improvement of the work,—because it permits an entry upon the lands and construction of drains whenever the private interest of the corporation requires it, without reference to the public welfare is an infringement of the right of private property, and is void. *Jenal v. Green Island Draining Co.* 12 Neb. 163, 10 N. W. 547.

The general assembly has the power, under a constitutional clause authorizing the formation of drainage districts, to provide for the organization of such districts embracing territory already within the boundary of a pre-existing municipal corporation, where the same is so constituted as to require a combined system of drainage. *People ex rel. Scheuber v. Nibbe*, 150 Ill. 269, 37 N. E. 217.

Under the drainage laws of Illinois, a new and independent drainage district may be organized, constructed, and maintained by owners of land within the limits and boundary of another drainage district previously organized, constructed, and maintained, and in full operation. *People ex rel. Miller v. Scott*, 132 Ill. 427, 23 N. E. 1119.

The legislature of California has power, under the Constitution of the state, to authorize the formation of districts for the reclamation of swamp lands within the state, irrespective of the source from, or channel through which the title to the lands was derived. *Reclamation Dist. No. 108 v. Hagar*, 6 Sawy. 567, 4 Fed. 366; *People v. Hagar*, 52 Cal. 171.

In Indiana it has been held that it is a good defense to an action by a ditching company to collect an assessment against lands for benefits conferred by a drain that the company was not legally organized, and is not a corporation. *Excelsior Draining Co. v. Brown*, 47 Ind. 19.

But a land owner within a drainage district cannot, upon application for judgment for taxes and special assessments against his land, collaterally call in question the regularity of the organization of the district. *Tucker v. People ex rel. Wall*, 156 Ill. 108, 40 N. E. 451.

And in the absence of anything to affect the jurisdiction of commissioners to organize a drainage district, it will be assumed that the district was legally organized, in a collateral proceeding to enjoin the collection of an assessment. *Morrell v. Union Drainage Dist. No. 1*, 118 Ill. 139, 8 N. E. 675.

And in California it is held that the validity of the organization of a reclamation district cannot be collaterally attacked in an action to recover an assessment levied upon land therein. *Reclamation Dist. No. 124 v. Gray*, 95 Cal. 601,

27 Minn. 442, 8 N. W. 161; *State Park v. Henry*, 38 Minn. 266, 36 N. W. 874; *State ex rel. Simpson v. Rapp*, 39 Minn. 65, 38 N. W. 926; *St. Paul v. Nickl*, 42 Minn. 262, 44 N. W. 59; *Kelly v. Minneapolis*, 57 Minn. 294, 26 L. R. A. 92, 59 N. W. 304.

Brown, J., delivered the opinion of the court:

Certiorari to the board of county commissioners of Polk county to review the proceedings had by them in the matter of laying out a ditch or drain under and pursuant to the provisions of chapter 258, Gen. Laws 1901. It appears from the record before us that a petition in due form, dated September 18, 1901, signed by persons whose lands would be affected by the proposed ditch, was filed in the office of the county auditor of Polk county, praying for the construction of

a ditch or drain which was described therein, and extends for a distance of several miles. The petition was in all respects in compliance with the statute, and, in terms, represented to the board of commissioners "that the public health, convenience, and welfare" would be promoted by the establishment of the proposed ditch. Whereupon, and after due notice, given as required by the statute, the board of commissioners convened in special session, heard and considered the petition, and caused the appointment of a civil engineer to make a survey of the route of the ditch, and to report the same to the board for its further action. The survey was duly made and reported, whereupon the commissioners, as provided by the statute, made an order appointing viewers, who duly examined the proposed improvement, and reported the result there-

30 Pac. 779; *Swamp Land Dist. No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866.

A landowner within a drainage district cannot resort to the common-law writ of certiorari for the purpose of determining the legality of the organization of such district,—especially where, by statute, a complete remedy by quo warranto is provided. *Lees v. Drainage Comrs.* 125 Ill. 47, 16 N. E. 915, Affirming 24 Ill. App. 487.

The New Jersey statute (1870, Pamph. Laws, 815) incorporating a private drainage company, authorized, under a contract with a commission named by a supreme court justice, to drain swamps and marshes in Essex, Union, and Middlesex counties, construct dikes, ditches, dams, etc., and set up pumps and engines, the expense thereof, and of the commission, with an annual compensation to the company, to be assessed by the commission on the lands reclaimed in just proportions, is unconstitutional, because it takes private property for private emolument contrary to the limited right of eminent domain; and because the proceedings to drain are not limited to such as the owners themselves initiate, nor are the assessments restricted to benefits conferred. *State, Kean, Prosecutor, v. Driggs Drainage Co.* 45 N. J. L. 91.

A power in a municipal corporation to create special improvement districts does not prohibit the inclusion of the whole municipality in one district. *Minnesota & M. Land & Improv. Co. v. Billings*, 50 C. C. A. 70, 111 Fed. 972.

Inclusion of lands.

The right of drainage commissioners to annex lands to the district when the owners thereof connect with the district drain or will be benefited thereby is purely a statutory right unknown at common law. *Allman v. Lumsden*, 48 Ill. App. 17.

Lands having their drains connected with the ditches of a drainage district may, under the Illinois drainage law, be annexed to that district, although they may also lie within another district. *Ibid.*

Though the act of owners of lands lying outside of a drainage district in connecting their lands by ditches with the ditches of the district amounts to an application for their lands to be taken into the district, and the commissioners of the district may make an order annexing such lands, still one landowner, by making a ditch across his land which carries water from the lands of a third person to the district ditch, cannot thereby give the district jurisdiction over the lands of such 60 L. R. A.

third person. *People ex rel. Phillips v. Drainage Dist. No. 5*, 191 Ill. 623, 61 N. E. 381.

Landowners who have connected drains on their lands with those of a drainage district, thereby voluntarily applying to be included within the district, cannot, in a quo warranto proceeding against the drainage commissioners, be heard to say that such connection was of no benefit to their lands. *People ex rel. Caldwell v. Wild Cat Drainage Dist.* 181 Ill. 177, 54 N. E. 923.

See further, on this question, *note* to *Heffner v. Cass and Morgan Counties*, 58 L. R. A. 353.

III. Jurisdiction over proceedings.

a. In general.

The general rule is that the question of jurisdiction over the proceedings depends upon the language of the statute; but some questions have arisen as to the right of the legislature to clothe a particular tribunal with authority, and as to conflicting authority under different statutory provisions.

Of course the question of jurisdiction is very important, for, if no jurisdiction is obtained, no title can be acquired for a right of way, and no valid assessment can be laid to pay for it or for the labor expended upon the improvement.

The commissioners of sewers have no power to create and cause to be maintained new rivers which did not exist at the time of *Magna Charta*. *Isle of Ely's Case*, 10 Coke, 141.

The sewer commissioners have no jurisdiction over streams at points more than 2 miles distant from London, unless they are navigable. *Yeaw v. Holland*, 2 W. Bl. 717.

The statutory provision that the collection of assessments shall not be defeated by reason of any defect in the proceedings occurring prior to the judgment confirming and establishing the assessment, but that such judgment shall be conclusive of the legality thereof, is not applicable to the proceedings that confer jurisdiction. *Scott v. Brackett*, 89 Ind. 413.

The legislature may delegate the exercise of the right of eminent domain to town supervisors or overseers of highways. *Smeaton v. Martin*, 57 Wis. 364, 15 N. W. 403.

The legislature may constitutionally delegate to police juries the power to open ancient natural drains and remove obstructions therefrom. *Avery v. Police Jury*, 12 La. Ann. 554.

So, the legislature may delegate to a municipal corporation power to tax for a sewer to be constructed under direction of certain officers of the corporation. *Re Zborowski*, 68 N. Y. 88.

of, and the commissioners formally made an order that the ditch be constructed. The final order recites all the facts essential to authorize the same to be made, *viz.*, the filing of the petition, notice of hearing thereon, the appointment of a civil engineer and viewers, their report that the estimated benefits to be derived from the ditch were greater than its cost, including damages awarded, and, further, that, in the opinion of the board, the construction of the ditch "will be of public utility, and conducive to the public health and public benefit and convenience." Upon the making and filing of the order, relators sued out this writ, upon the theory and contention that the act of the legislature referred to, and under which the proceedings in question were conducted, is unconstitutional and void, because it provides for the taking of private property of

individuals for a private purpose, and, further, that the description of the proposed ditch, as contained in the petition therefor, is so indefinite and uncertain as to confer no jurisdiction upon the commissioners, if the statute be held constitutional. The main question in the case is the constitutionality of the statute, and we proceed at once to its consideration.

Section 1 of the act vests in the board of county commissioners authority, and makes it their duty, to construct any ditch, drain, or water course, when they find to exist the conditions specified in § 2. Section 2 provides and requires that the petition praying for the establishment of the ditch must set forth, among other things, the necessity for it, its general course and distance, and the lands through which it will pass. It further provides for the appointment of a civil

But the power of the legislature to regulate the construction of public sewers cannot be foreclosed by a contract of a municipal corporation. *Re Protestant Episcopal Public School*, 46 N. Y. 178, Reversing 58 Barb. 161.

A statute providing for the drainage of lands in a certain county, and clearly indicating the nature and extent of such drainage, and delegating to drainage commissioners the power to determine what lands shall be drained and what lands assessed therefor, is not invalid as a delegation to them of the legislative power of creating and defining districts for drainage purposes. *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 6 L. R. A. 394, 43 N. W. 947.

The legislature is not prevented from granting to a board of drainage commissioners, by a special act, authority to exercise the police power of the state for the drainage of lands of a county, by a constitutional provision prohibiting it from enacting a special or private law granting corporate powers or privileges except to cities. *Ibid.*

An act authorizing cities acting under special charters, and containing more than a designated population, to establish a system of sewerage, and to construct, establish, and keep in repair sewers, culverts, and drains, is not within the constitutional inhibition of special legislation. *Rutherford v. Heddens*, 82 Mo. 388.

The drainage of swamp lands, when made under the general provisions of the New York statutes, is a state work, and, when completed, the title to the land acquired is in the state. *Re Swan*, 35 Hun, 625.

The constitutional provision forbidding the passage of a local bill for the drainage of swamps or other low lands does not invalidate a local statute designed to provide means for disposing of the sewage of a thickly populated section, a portion of which is within the limits of a city and the remainder of which will soon need such accommodations, although much surface water will flow through the drain, and many low pieces of ground be drained by it. *Swikehard v. Michels*, 81 Hun, 325, 29 N. Y. Supp. 777, 30 N. Y. Supp. 1135.

An act of the legislature vesting the corporate authorities of cities and villages with power to construct, maintain, and keep in repair drains, ditches, levees, dykes, and pumping works for drainage purposes, and to levy special assessments upon the property benefited thereby for the cost thereof, is not in contravention of any of the provisions of the Illinois Constitution. *McChesney v. Hyde Park* (Ill.) 28 N. E. 1102.

Commissioners appointed by an act of the legislature to levy special taxes upon lands lying

in a designated district for the purpose of drainage, such act providing that the same shall be submitted to a vote of the inhabitants of such district, and that, unless adopted, it shall be of no force,—if the act is adopted by the voters, as required, may be regarded as corporate authority, and have the power, under the Constitution, to assess and collect taxes for the cost of such drainage. *Lee v. Ruggles*, 62 Ill. 427.

A district carved out of two or more towns, over which a statutory commission, to be continued by elections, is constituted with power to repair, work, and grade streets, to regulate the width and grade of sidewalks, the manner of paving streets, and constructing sewers, to borrow money, appoint superintendents of roads, establish a fire department and purchase fire apparatus and land and engine houses, and to impose taxes to carry out the purposes of the act constituting them,—is a political division, and not a mere taxing district of narrower bounds; and the commission is invested with political and governmental powers and functions; hence, it has the legal power to levy an assessment for sewers. *State, Auryansen, Prosecutor, v. Hackensack Improvement Commission*, 45 N. J. L. 113.

A petition for a drain, under Iowa Code 1873, chap. 2, title 10, and chap. 186, Acts 20th Gen. Assem., is the basis of the jurisdiction to order a drain, and, if it contain the requisite number of signatures when filed, the jurisdiction attaches to order the drain; and a subsequent withdrawal of the names, or a protest or remonstrance against the drain by the petitioners, although proper to be taken into consideration by the board of supervisors, does not prevent the jurisdiction to order the drain attaching. *Selbert v. Lovell*, 92 Iowa, 507, 61 N. W. 197.

After the board of supervisors has been properly petitioned to establish a drain for certain territory, it has jurisdiction to establish such drainage within the territory and through such land as it deems proper, to effect the reclaiming of the swamp and overflow lands in the locality to be drained, under acts 20th Iowa Gen. Assem. chap. 186. *Butts v. Monona County*, 100 Iowa, 74, 39 N. W. 284.

Jurisdiction for the assessment of private property for a sewer may be obtained when the plan is completed and filed, the district is established, and notice given to property owners of the fact, and requiring them to appear and file objections to the proposed work. *Hennessy v. Douglas County*, 90 Wis. 120, 74 N. W. 983.

It is not a ground of objection to commissioners to assess for drainage as being interested

engineer by the board to make a survey of the proposed ditch, and that such engineer shall take and subscribe an oath for the faithful performance of his duties. Upon the filing of his report the board is required by § 5 to appoint viewers, who are also required to take and subscribe an oath of office, and whose duties are to examine into the merits of the contemplated improvement, and to estimate and report the damages and benefits to each tract of land through or adjacent to which the ditch may pass. Upon their report being made and filed, and after due notice of hearing is given, the board is required to hear and determine the matter. Other sections provide in detail the necessary steps to be taken in carrying out its objects and purposes. Section 6 expressly limits the levying of assessments to the construction of

public ditches. There is no express provision in the statute making it the duty of the board to find whether the proposed ditch will be a public benefit, nor is there any express declaration in the act itself that such fact must exist before a ditch may be ordered constructed; and it is argued from this that the act was not intended by the legislature for the public welfare, but, on the contrary, to authorize the construction of ditches for purely private purposes, to enhance the value of individual farms. If this be the true interpretation or construction of the act, it must be held unconstitutional and void; for the legislature has no power to authorize the taking of private property for a private use, nor to compel the payment of assessments for the construction or erection of any public improvement, if such improvement furthers private inter-

that they are only shown to own lands not far from the drainage ditch and to share in the benefits accruing to the neighborhood from increased healthfulness; they must be shown to own lands directly and certainly benefited by the drainage alone. *State, Shinkle, Prosecutor, v. Clinton*, 39 N. J. L. 656.

Public benefit being essential to the right to take private property for a drainage ditch, if the viewers find that there will be no public benefit from a proposed ditch the drainage commissioners acquire no jurisdiction; and their order dismissing the proceeding is not subject to review by the courts, unless the fact on which jurisdiction exists is absent. *Oathout v. Seabrooke (Ind.)* 65 N. E. 521.

Power given drainage commissioners to continue a main ditch for the drainage of swamp lands through lands adjoining the swamp if necessary does not permit them to construct a ditch through the swamp to a pond or reservoir used for a water supply, and then lower the outlet of the pond so as to drain it and the surrounding swamp to the destruction of mill sites located on it. *Belknap v. Belknap*, 2 Johns. Ch. 463, 7 Am. Dec. 548.

The location and construction of one ditch by the township trustees to drain certain territory does not exhaust the power of draining over that territory, nor confine it to the deepening and widening of such previously constructed ditch, since the only limitation under the Ohio statute as to the number, course, and location of township ditches is that they shall be conducive to the public health, convenience, and welfare. *Miller v. Weber*, 1 Ohio C. C. 130.

The right of a board of drainage commissioners to organize and assume the functions of a corporate body cannot be questioned in a proceeding to enjoin the collection of an assessment. *Kelgwin v. Hamilton Twp. Drainage Comrs.* 115 Ill. 347, 5 N. E. 575.

Two members of the board of county commissioners have no authority to order the construction of a drain upon a consideration by them of a petition therefor in a meeting with the county surveyor on a day to which the commissioners had not adjourned, and when a special session had not been called; and the special assessments for the ditch are absolutely void. *Morris v. Merrell*, 44 Neb. 423, 62 N. W. 865.

Highway commissioners, exercising the special and added authority of drainage commissioners, do so, in contemplation of the law authorizing it, not as highway commissioners, but as a body of men to whom are delegated the power and authority of commissioners of the drainage districts organized by and under the 60 L. R. A.

statute. *People ex rel. Hardy v. Young America Drainage Dist.* 143 Ill. 417, 32 N. E. 686.

A proceeding under the county drain law to determine the necessity of a drain and to assess damages is void where it appears that a person not appointed as a commissioner by the court acted as such, although the person who served was the one the court intended to appoint, but was mistaken as to his name. *Bench v. Otis*, 25 Mich. 29.

Under a statute authorizing the board of supervisors to appoint drain commissioners, and to supervise their action, the board has no right to appoint its own members as drain commissioners, and such appointment, as well as the drain tax levied by such commissioners, is void. *Kinyon v. Duchene*, 21 Mich. 498.

b. Of courts.

The establishment of drains being a governmental duty, some question has been raised as to the right of the legislature to impose the duty of supervision upon the courts. But it is generally held that such course is proper if the actual minutiae of the work are in the hands of political officers, while the duty of the court is merely to guard the legal rights of the parties.

A drainage act does not impose legislative and executive duties upon the court because the commissioners upon whom such duties are imposed are appointed by the court, report to and are liable to removal by the court, as such act does not render them mere agents of the court, nor impose upon it the duties discharged by them, so as to render the act unconstitutional for that reason. *Scott v. Brackett*, 89 Ind. 413.

That the court determines whether the proposed work shall be undertaken, and that such judicial determination is the foundation of the assessment made by the commissioners upon the land benefited by a drainage system, cannot be said to be a direct exercise by the court of the power of taxation which will render void the act providing for such drainage system, as attempting to confer such power upon the court. *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545.

The judgment of a court having jurisdiction over the subject-matter of the construction of public drains, establishing a particular ditch, cannot be collaterally attacked, although it had no jurisdiction over the subject-matter of that particular case, because the petition showed on its face that the effect of its construction would be to lower certain fresh-water lakes, which is a purpose outside the scope of the drainage law. *Perkins v. Hayward*, 182 Ind. 95, 81 N. E. 670.

ests only. It may be observed, further, in reference to the terms and provisions of the act, that ample notice is given and opportunity afforded all interested parties to appear and be heard at every step in the proceedings. An appeal is provided upon the question of damages and benefits, and from an order refusing to lay out the ditch, though none is provided from an order directing its construction.

The question as to the propriety and necessity of legislation such as that here under consideration, if it only authorizes the taking of private property for public use, is one exclusively for legislative cognizance, and with the exercise of its judgment in that behalf the courts have no power to interfere; and in respect to whether a statute providing a general system for draining wet and overflowed lands of the state is a public

necessity, and the interests and welfare of the people demand it, the courts are not concerned. But the question whether a particular improvement under such a statute will inure to the public health, convenience, or welfare is a judicial one, which the legislature cannot determine to the exclusion of the courts. Such statutes usually submit that question to local tribunals in express terms, but no such provision, in express language, is found in the act under consideration. Two main contentions are made against the constitutionality of this act: First, that it does not expressly and in so many words declare that the public health, convenience, and welfare are intended to be subserved and promoted; and, second, that no provision is made for the determination of that question by the county commissioners.

The jurisdiction of a court of general jurisdiction to establish a public drain partly within the corporate limits of a city cannot be collaterally attacked in a proceeding to enforce the assessment levied on lands within the municipality for the construction of the ditch, where the court, having exclusive jurisdiction of the drainage proceedings by virtue of the act under which it was prosecuted, had jurisdiction of the cause, and authority to determine what property was subject to assessment, although its judgment establishing the ditch within the corporate limits might be erroneous. *State ex rel. Wilcox v. Jackson*, 118 Ind. 563, 21 N. E. 321.

c. Conflicting authority.

There has been considerable conflict between different bodies claiming jurisdiction over a particular drain, both as between different organizations within the same territory and between authorities constituted over different sections of territory. The conflict, for the most part, grows out of the interpretation of the statutes, and is emphasized by implications which are sought to be drawn from partial authority actually conferred.

Highway commissioners may not, under color of power to preserve, repair, and improve a highway, enter upon the construction of a ditch for drainage purposes, and thereby usurp the power of drain commissioners. *Conrad v. Smith*, 32 Mich. 429.

The laying of a sewer or a water main in a boulevard under the control of a park board, for the supply of sewer and water service to residents on the boulevard, is not an improvement to the boulevard, within the meaning of a statutory provision authorizing park boards to make assessments for the purpose of improving any boulevard, driveway, or street. *Lingle v. Chicago*, 172 Ill. 170, 50 N. E. 192.

Statutory authority to make assessments for the purpose of improving boulevards, etc., does not confer upon a park board the power to levy an assessment for sewers and water mains intended solely to supply sewer and water service to residents on a boulevard, and not for the purpose of draining or benefiting the boulevard itself. *West Chicago Park v. Baldwin*, 162 Ill. 87, 44 N. E. 404.

In North Dakota, the county commissioners cannot, under their general powers given them by a general law to transact the "affairs" and "fiscal affairs" of the county, engage in the work of constructing drains, and exercise the powers of eminent domain for that purpose. This is a special purpose, and its accomplishment 60 L. R. A.

ment requires special legislative authority which may be placed wherever the legislature regards proper. *Martin v. Tyler*, 4 N. D. 278, 25 L. R. A. 838, 60 N. W. 392.

The establishment of a township ditch by the trustees thereof, further action in reference to which cannot be taken by them of their own volition, but only on petition presented therefor, does not give them such a continuing and exclusive jurisdiction of the line thereof as to prevent the establishment of a county ditch over the same line, where necessary for drainage purposes and conducive to public health, convenience, or welfare. *Marsh v. Clark County*, 11 Ohio Dec. Reprint, 290.

The legislature has the power to give the circuit court jurisdiction to construct drains partly within a city's limits, notwithstanding the exclusive jurisdiction of cities over drainage within their limits, since their jurisdiction is subject to legislative withdrawal or modification; and furthermore, the matter of drainage in county and city conjointly is a new subject-matter, previously unprovided for. *Sauntman v. Maxwell*, 154 Ind. 114, 54 N. E. 397.

But drainage commissioners have no lawful authority to construct a drain in whole or in part within the limits of a municipal corporation, where the latter has the exclusive jurisdiction over the subject of drains and streets within its limits, notwithstanding a clause in the drainage act which provides that a petition for drainage shall state that, in the opinion of the petitioner, either the public health will be improved or one or more highways of the county or streets of a town or city will be benefited by the proposed drainage; as a city street may be benefited by a drain constructed adjacent thereto and not within its limits. *Anderson v. Endicutt*, 101 Ind. 539.

Where lands affected by a proposed ditch and embraced in an assessment therefor are located in different counties, a provision in the drainage act giving the courts of the county in which the petition for the construction of the ditch is filed, and where part of the lands to be affected lie, jurisdiction of all the lands assessed, is constitutional and valid. *Shaw v. State use of Whitmore*, 97 Ind. 23.

The fact that lands affected and assessed for the construction of a ditch lie in two or more counties does not affect the authority and duty of the commissioner appointed by the court of the county where the proceedings were instituted to construct the ditch in its entirety, and assess all lands affected, whether in that or adjoining counties, in accordance with a provision of the drainage law under which the ditch is

The act is entitled to a fair and reasonable construction, and one that will give effect to the intention of the legislature. As remarked in the case of *State ex rel. Railroad & W. Commission v. Chicago, M. & St. P. R. Co.* 38 Minn. 281, 37 N. W. 782: "Legislative enactments are not to be defeated on account of mistakes, omissions, or inaccuracies of language, any more than other writings, provided the intention of the legislature can be ascertained from the whole act. In construing a statute, we must assume, if its language will admit, that the legislature intended to act within its constitutional power. We must also, if possible, so construe the language as to make it effectual." The rule thus laid down is one of general application, followed and applied by all the courts. *Sutherland, Stat. Constr.* 234 *et seq.* It is urged by relators

that from the fact that all prior statutes of this character in terms expressly declared that a proposed improvement might be ordered by the authorities when the public health, convenience, or welfare would be promoted thereby, and from the further fact that the court in *Lien v. Norman County*, 80 Minn. 58, 82 N. W. 1094, held, in construing the general statutes on the subject of drainage, that such statutes can only be sustained when enacted in the interests of the public welfare, the omission of this provision from the act under consideration shows an intent on the part of the legislature to depart from that rule. It has always been the law in this state that private property may not be taken for a private use, though by the Constitution the legislature may authorize it to be taken for a public use upon just compensation being first paid

established. *Crist v. State ex rel. Whitmore*, 97 Ind. 389.

As the authority to construct drains or ditches, or change water courses, as possessed by the board of supervisors under Iowa Code 1873, § 1207, has not been conferred on incorporated towns, and as its exercise is not inimical or repugnant to any of the powers granted to such corporations, it was not the purpose of the legislature to restrict such authority, by implication or otherwise, to that portion of the county outside of their limits. *Aldrich v. Paine*, 106 Iowa, 461, 76 N. W. 812.

Where jurisdiction of the construction of a ditch is given to commissioners of the county in which its head is located, such commissioners will not have jurisdiction of an entire system, consisting of a main ditch and a branch with a head in another county, where the branch is in fact a separate ditch. *Bondurant v. Arney*, 152 Ind. 244, 53 N. E. 169.

The legislature may confer upon the supervisors of one county the power to include within a reclamation district lands within another county. *Reclamation Dist. No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945.

The courts of one county have the power and jurisdiction, under the Indiana drainage act, to establish a drain a portion of which extends into an adjoining county. *Meranda v. Spurlin*, 100 Ind. 380.

The court of the county in which drainage proceedings are instituted has jurisdiction and authority to establish a ditch extending into another county, and to make assessments against lands situate in that county, by virtue of a statute conferring that power. *Hudson v. Bunch*, 116 Ind. 63, 18 N. E. 390.

Where a ditch extends into or through two or more counties, proceedings to establish it may, under the Indiana drainage act, be prosecuted in either county. *Updegraff v. Palmer*, 107 Ind. 181, 6 N. E. 353.

Where no suitable outlet for a sewer can be found in the town making the same, its extension into an adjoining town to a proper outlet cannot be regarded as a violation of a statute against the assessment of property in one town for the making of local improvements in another town. Such extension cannot be regarded as a local improvement in another town. *Shreve v. Cicero*, 129 Ill. 226, 21 N. E. 815.

The courts of one county have the power, under a drainage act authorizing it, to establish a ditch extending into an adjoining county, and to order assessments on lands in that county affected thereby. *Buchanan v. Rader*, 97 Ind. 603.
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The fact that swamp lands are located in more than one county will not prevent the legislature from delegating authority to establish a reclamation district to the supervisors of that county in which the greater part of the lands is situated. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

The joint action, under the Ohio statutes, of the several boards of commissioners of adjoining counties in establishing a ditch which is partly located in each of their respective counties is held, in *Engle v. Defiance County*, 25 Ohio St. 425, to be equivalent to a finding of a jury as to the necessity and conduciveness to public health, convenience, and welfare, and is final.

But joint action by different township drain commissioners is not authorized by statute in Michigan and such action extending over more than one township is not legal. *Alger v. Slaght*, 64 Mich. 589, 31 N. W. 531.

The joint action of township drain commissioners in the construction of drains extending over more than one township is illegal and without statutory authority. *Hubbell v. Robinson*, 65 Mich. 538, 32 N. W. 811.

So, a township drain commissioner has no power, under the Michigan statute, to lay out a drain through other townships than his own, or to assess the cost of construction against lands in such other township. *Robertson v. Baxter*, 57 Mich. 127, 23 N. W. 711.

A drainage district organized under the drainage laws of Illinois must be deemed to be existing and located, for all purposes of jurisdiction, in every part of its territory; and the fact that the original organization of the district was effected in one county, or that the custodian of the records thereof resides in that county, will not affect the jurisdiction of the courts of another county in which the boundaries of such district extend. *Mason & T. Special Drainage Dist. v. Griffin*, 134 Ill. 330, 25 N. E. 995.

IV. Plans and specifications.

a. Practicability.

1. In general.

Taxpayers have a right to demand that before a drainage improvement is entered upon it shall have been determined to be practicable, and that the general character of the improvement shall be designated. When they are entitled to pass upon the question whether or not the improvement shall be made, they can ex-

or secured; and it should undoubtedly appear, either from the express language of the statute authorizing such an appropriation, or from a fair and reasonable interpretation of the whole enactment, that the interests of the public health, convenience, or welfare are intended to be promoted. We are bound to assume, as held in the case just cited, that the legislature intended to keep within constitutional limits in the passage of this act, and this presumption cannot be rebutted except by the clearest and most persuasive language showing to the contrary. We are not authorized to indulge in the presumption that the legislature willfully intended by the passage of this act to depart from the settled law of the land. *Robinson's Case*, 131 Mass. 376, 41 Am. Rep. 239. The inferences are to the contrary, and in favor of an intention on the part of

the lawmakers to keep within constitutional limits. This is elementary. Black, Interpretation of Laws, 87.

That the drainage of large tracts of wet and overflowed lands will operate beneficially to the public, there can be no serious doubt. Statutes authorizing and providing for such drains have been enacted and in force in this country for over a century, and have been sustained on various grounds. Some have been upheld where large tracts of agricultural lands have been reclaimed and made suitable for cultivation, independent of any effect the drainage of such lands might have upon the public health; it being held in those cases that draining considerable portions of the public domain, and benefiting all lands through which the drain may pass, and others adjacent, perhaps, is a public benefit, within the meaning of the

exercise no intelligent judgment until they know the plan; and, if they are entitled to no voice in the matter, they may make effective opposition in case the plan is defective. Again, they have a right to have the plans fixed so that no departure shall be effected during the progress of the improvement.

The choice of the mode of drainage of a particular district of a village or city is within the legislative discretion of the corporate authorities thereof, with which the courts will not interfere unless it has been clearly abused; and the fact that a particular tract of land within that district is somewhat higher than the adjoining lands thereof, and could have been drained by the ordinary "gravity system," is no evidence of such abuse, where the system adopted appeared to be that best adapted to the drainage of the whole district, and does not lessen the benefits such lands will receive by the construction of the sewer, and therefore cannot affect the amount of its assessment. *McChesney v. Hyde Park (Ill.)* 28 N. E. 1102, 151 Ill. 634, 37 N. E. 858.

Where a system of sewerage of the ordinary kind cannot be used to advantage for want of sufficient fall to carry away the contents of the mains and pipes by the force of gravitation, a municipal corporation, under a grant of power in its charter to construct main drains, sewers, etc., without any limitation or restriction as to the mode in which they shall be built or operated, has the power to construct pumping works, to be used as a necessary part of the plan adopted by the municipal authorities for the carrying away of the sewage. *Drexel v. Lake*, 127 Ill. 54, 20 N. E. 38.

The discretion of a city in regard to the mode of constructing sewers will not be interfered with by injunction, when it is acting within the scope of the authority vested in it by the legislature. *Bell v. Rochester*, 61 N. Y. S. R. 721, 30 N. Y. Supp. 365.

A temporary injunction will not be granted to restrain the exercise by county commissioners of their judgment as to the sufficiency of the size of a ditch for drainage purposes,—especially where there is an adequate remedy at law, in view of a provision giving such commissioners authority to alter, widen, or deepen any ditch or drain. *Vornholt v. Gordon*, 30 Ohio L. J. 33.

The plan for the construction of a sewer is not shown to be defective by the fact that the city engineers expect that there will be some injury to sidewalks and stoops from its construction. *Uppington v. New York*, 165 N. Y. 222, 53 L. R. A. 550, 59 N. E. 91.

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Statutes authorizing municipal authorities to provide for common sewers, and to take and divert the water of a stream within the city and devote the same to sewerage purposes, may be complied with by erecting a single structure so as to render one who enters his private sewer into the resulting structure liable to pay his proportionate part of the expense of construction as provided by statute requiring the payment of expense of sewers. *Gray v. Boston*, 139 Mass. 328, 31 N. E. 734.

An ordinance of a municipal corporation providing for the construction of a sewer and pumping works to be used in connection therewith, the latter being an essential and integral part of the system adopted and necessary in order that the former may be made to serve its proper purpose, and providing for the levy of a special assessment to defray the expenses of the combined improvement, is not invalid as providing for two distinct improvements, or as being double. *Drexel v. Lake*, 127 Ill. 54, 20 N. E. 38.

A municipal corporation vested with legislative judgment in causing sewers of all kinds to be constructed or reconstructed can adopt a system of sewerage for each sewer district; and, in doing so, can determine the location of the main, as distinguished from merely local or lateral sewers, so that, whether a main sewer or a merely local or lateral one is necessary on a particular street or portion of a street, is a question vested exclusively in the council, and not reviewable except under extraordinary circumstances. *Oil City v. Oil City Boiler Works*, 152 Pa. 348, 25 Atl. 549; *Philadelphia v. Thomas*, 152 Pa. 494, 25 Atl. 873.

The owner of land sought to be taken for a sewer outlet cannot attack the determination of the trustees of a village as to the system of sewerage to be adopted on the ground that some other system would be better, where, by statute, the trustees are empowered to adopt and establish a permanent system of waterworks, subject to the approval of the state board of health, which was secured. *Re Long*, 34 N. Y. S. R. 778, 12 N. Y. Supp. 230.

But an ordinance for the construction of a box sewer 2 miles long, with no provision for intermediate openings between the beginning and terminating points, so as to drain the adjacent lands lying on each side, and falling to designate the territory to be drained, is void, both because deficient in description, and because unreasonable: being an attempt to assess the contiguous property without making provisions necessary to effect a drainage of their property.

law. While the element of public health is often made an important factor in the consideration of statutes of this kind, it is believed that any public benefit, such as the improvement of highways, or the reclamation of large tracts of otherwise waste lands, is sufficient to support and sustain them. Cases on this subject are *Coomes v. Burt*, 22 Pick. 422; *Wright v. Boston*, 9 Cush. 241; *Lowell v. Boston*, 111 Mass. 489, 15 Am. Rep. 39; *French v. Kirkland*, 1 Paige, 117; *People ex rel. Griffin v. Brooklyn*, 4 N. Y. 438, 55 Am. Dec. 286; *O'Reiley v. Kankakee Valley Draining Co.* 32 Ind. 169; *State ex rel. Holts v. Henry County*, 41 Ohio St. 423; *Re Drainage between Lower Chatham & Little Falls*, 35 N. J. L. 497; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Head v. Amoskeag Mfg. Co.* 113 U. S. 20, 28 L. ed. 889, 5 Sup. Ct. Rep. 441;

Hyde Park v. Carton, 132 Ill. 100, 23 N. E. 500.

In adopting a plan for a ditch under Minn. Laws 1883, chap. 103, both the owners and the board exercise quasi judicial functions; and the county will not be liable for damages caused by a defect or want of efficiency in the plan of a drain adopted. *Thompson v. Polk County*, 38 Minn. 130, 36 N. W. 287.

2. Choice of route.

Of course, a practicable route must be chosen, but considerable latitude of choice rests with the authorities.

The practicability of a drain, within a statutory requirement thereof, means, not the best route, but the construction of a ditch having a sufficient fall, a proper course and direction, and a sufficient outlet to drain the lands proposed, which can be constructed without serious difficulty, and which, when constructed, will perform the office of a ditch throughout the route. *Thomas v. County Comrs.* 5 Ohio N. P. 449.

The question as to whether or not a proposed drain is located upon the best and cheapest and most available route, and as to whether or not it is practicable to construct it without affecting the lands of others, being left by the drainage law to the judgment of the commissioners, their decision, in the absence of fraud, is final, and cannot be reviewed upon a remonstrance filed by affected land owners. *Anderson v. Baker*, 98 Ind. 587.

Whether it is practicable or expedient to construct a ditch upon the route proposed is a matter to be determined by the officers to whom the statutory authority to locate ditches is intrusted, and their determination is not reviewable by the court. *Zigler v. Menges*, 121 Ind. 99, 22 N. E. 782.

It is necessary, in a proceeding to establish a drainage ditch, under Neb. Comp. Stat. chap. 89, art. 1, requiring that the board of commissioners find that the route of the improvement proposed is the best route, that such finding be entered on its journal, since the finding is jurisdictional. *State ex rel. Union P. R. Co. v. Colfax County*, 51 Neb. 28, 70 N. W. 500.

When the freeholders, pursuant to the statute (Rev. Stat. 731), lay out a ditch or drain, they are the sole judges, not alone of the necessity and reasonableness of it, but of its location, and their return is conclusive for at least a year, and cannot be set aside, save for manifest bias or corruption, upon testimony of those who differ in judgment; but it is essential to 60 L. R. A.

10 Am. & Eng. Enc. Law, p. 226; 1 Lewis, Em. Dom. 188. The same doctrine is applied to the interpretation of statutes providing for the condemnation of private property for the construction of ditches through which to conduct water for the purpose of irrigating arid lands, and thus adapt them to agricultural purposes. Long, Irrigation, 35-62, and cases cited; 10 Am. & Eng. Enc. Law, p. 1084.

We are required to take judicial notice of the topography of all sections of the state, and, by doing so, find that the so-called Red River Valley, comprising, for the most part, Clay, Norman, Polk, Red Lake, Marshall, and Kittson counties, is flat, level prairie, and, for the want of natural drainage, is wet and swampy during the greater portion of each year; and, in the absence of artificial drainage, large tracts of land therein are

the jurisdiction of the freeholders that the person through whose land the drain is made should have refused to join in the work, or to permit it to be done. *Stout v. Hopewell*, 25 N. J. L. 202.

Evidence to show the practicability of another route than that fixed by the viewers is inadmissible in a proceeding to establish a ditch under a statute intrusting to viewers the selection of the route of the ditch, as their action, in the absence of fraud or a gross abuse of discretion, will not be reviewed by the courts. *Wilson v. Talley*, 144 Ind. 74, 42 N. E. 362, 1009.

The condemnation of land for city sewer purposes cannot be defeated on the ground that the location of the sewer is not the most compatible with the greatest public good and least private injury, in the absence of clear and convincing proof to that effect by those who alleged the same, since it is to be presumed that the state, or its agent, which the person making the condemnation is by statute declared to be, has made the best possible choice in the selection of such location. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

Trustees are not restricted to the course of the natural flow of the surface water in the location of ditches. *Miller v. Weber*, 1 Ohio C. D. 77, 1 Ohio C. C. 130.

The mere fact that the route of a drainage ditch intersects one or more natural water basins or small lakes does not invalidate the proceeding. *Goodrich v. Stangland*, 155 Ind. 279, 58 N. E. 148.

The fact that a proposed ditch is over the line of a ditch previously established and constructed is not a bar to the proceedings establishing the new ditch. *Rogers v. Venis*, 137 Ind. 221, 36 N. E. 841.

An injunction will not be granted to restrain the board of county commissioners from constructing a ditch for the reason that a part of the line is over and along the line of an established township ditch. *Miller v. Logan County*, 3 Ohio C. C. 617.

There is no constitutional or statutory inhibition against locating and constructing a new public drain along and upon an old one. Landowners assessed for the construction of the former ditch did not thereby acquire vested rights that will prevent the location and construction of another ditch upon the same line. *Meranda v. Spurlin*, 100 Ind. 380.

A public sewer may, with the owner's consent, be constructed across the course of a tidal creek, which, under grant from the state, had become private property, the mouth of

wholly unfit and unsuited for agricultural or other purposes, but, when properly drained, are most valuable and productive. There are undoubtedly other portions of the state where similar conditions exist in a lesser degree, but we refer to the Red River Valley section as the most conspicuous and prominent. Clearly, the reclamation of these lands by a system of drainage will inure to the public good, not only by rendering them suitable for agricultural purposes, but will also very naturally benefit the public health. There can be no doubt as to the constitutionality of statutes enacted for that purpose. Counsel do not contend to the contrary. Their contention is that the act under consideration was not designed or intended for the public health, convenience, or welfare, but to enable private parties to further private interests at the expense of

their neighbors. This contention is based upon what we believe to be a too strict construction of the statute. It is true that there is no express declaration therein that it was enacted in the interests of the public welfare, but this omission is not necessarily fatal to its validity. The statute must be construed in the light of all its provisions, and in harmony with pre-existing legislation on the subject. Black, Interpretation of Laws, 62. Statutes are seldom drawn with minute particularity, and unintentional omissions and apparent oversights are supplied by implication and intentment by the courts. In cases of imperfectly drawn statutes, the courts, rather than pronounce them unconstitutional and void, will draw inferences from the evident intent of the legislature, as gathered from the law taken as a whole, supplying technical inaccuracies

which has been closed so as to destroy its utility, so that the taxpayers cannot defeat the assessment to pay for the sewer. *Herbert v. Bayonne*, 63 N. J. L. 532, 42 Atl. 833, Affirmed in 64 N. J. L. 548, 46 Atl. 608.

A special tax bill for the construction of a sewer is not invalidated by reason of the fact that it was built on private property, where it was so constructed with the consent of the owner of the property, as he would be estopped from afterwards disturbing it. *St. Joseph use of Saxton Nat. Bank v. Landis*, 54 Mo. App. 315.

A court of equity will not enjoin the payment of tax bills issued to the contractor, until a proper proportion of such bills are paid or tendered, where such contractor at great expense has constructed a sewer in full compliance with plans, specifications, and plats furnished, and under immediate direction and supervision of the authorized engineer, and the work has been accepted by the city, but which sewer, by mistake of the city authorities, wrongfully crosses private property, although the sewer may be useless until it is lawfully connected with a proper outlet, which can be done at an inconsiderable expense. The proper portion of such tax would be the contract price for all the work less the cost of that part extending through the private property. *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.

It cannot be presumed that married women possessed of property in legal right consented to the use of such property in constructing a public sewer, under the rule that every presumption, fairly raised, will be indulged, and all reasonable equities applied, in favor of a tax levied for the construction of a sewer already built. *Ibid.*

Although a statute prohibits the running of a sewer diagonally through property when it is practicable to construct it parallel to one of the exterior lines of the property, and the building of it through private property if it is practicable to construct it along a street, a strong case should be presented to justify the courts in interfering with the judgment of the municipal authorities upon that question. *Joplin Consol. Mfn. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

The question as to whether or not a proposed drain, sought to be established under the law, may be constructed in a better and cheaper manner upon the lands of the petitioner and without affecting the lands of others, does not determine the public or private character of the work, and is not jurisdictional. *Anderson v. Baker*, 93 Ind. 587.

An ordinance of a municipal corporation for 60 L. R. A.

the construction of a sewer is not invalid because it does not provide for obtaining the right to open the same in a branch or ravine which is on private property, and an assessment levied thereunder is valid. It is immaterial whether such right is obtained before or after the passage of the ordinance and making of the assessment. *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105.

The fact that an ordinance of a municipal corporation for a sewer provides for an outlet by a ditch running over private property is no reason, in a proceeding to confirm a special assessment for the cost of constructing such sewer, for declaring the ordinance void; although it might be a reason for enjoining proceedings thereunder until the right to use the ground over which the ditch passes is obtained by condemnation or otherwise. *Burhans v. Norwood Park*, 138 Ill. 147, 27 N. E. 1088.

But an ordinance of a municipal corporation for the construction of a sewer is insufficient as a basis for a special assessment, where it provides for the location of the sewer in a designated street which does not exist, but is private property. *Dempster v. Chicago*, 175 Ill. 278, 51 N. E. 710.

Commissioners have no jurisdiction to lay out a drainage ditch over a ditch already cut by an adjoining proprietor, and assess damages for the right of way, as the Oregon statute providing therefor contemplates such action only for the construction of a new ditch where there is none; but in such case the owner is to be compensated under another provision of such statute giving compensation by way of contribution for the tapping of his ditch, in proportion to the mutual benefits derived from its use in draining their lands. *Seely v. Sebastian*, 4 Or. 25.

A county commissioner has no right to locate a ditch on private land for the improvement of a highway, unless suitable drainage cannot be made in the roadway at the same expense, in which event demand must first be made of the owner and an opportunity be given him to point out a location therefor, which must be accepted if accessible and suitable, and he himself, can make the location only when the owner fails to do so or makes an unsuitable one, under a statute giving him authority, whenever necessary to construct, repair, or preserve a highway, to enter private land and take material therefrom or locate a ditch, etc., thereon without first assessing and tendering the damages, in view of the further provisions of the statute that entries shall not be made when drainage can be made on the roadway at no

in expression, and obviously unintentional mistakes and omissions by implication, from the necessity of making them operative and effectual as to specific things which are included in the broad and comprehensive terms and purposes of the law; and these inferences and implications are as much a part of the law as what is distinctly expressed therein. *People v. Budd*, 117 N. Y. 13, 5 L. R. A. 559, 22 N. E. 670, 682; *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577; *Sutherland*, Stat. Constr. 334-337. In *Winters v. Duluth*, 82 Minn. 127, 84 N. W. 788, the court said: Statutes must be construed so as to give effect to the evident legislative intent, even if the result seems contrary to rules of construction and the strict letter of the statute. In *Talbot v. Hudson*, 16 Gray, 417, the court had under consideration a statute similar to that here

involved, in which there was the same omission to declare the public purpose of the act; but the court construed it to be in the interests of the public welfare, from a consideration of the provisions of the entire act. The whole act was taken together, and held to have been enacted for the public good. The opinion in that case is a very instructive one, and worthy of a careful reading. Authorities in this line might be multiplied, but it is unnecessary. From a very careful and painstaking examination of this act, we are satisfied that but one construction should, within these rules, be given it, and that to the effect that the legislature intended to provide exclusively for the public welfare. It provides that the county commissioners may construct a ditch or drain when they find the necessity therefor, and that the other provisions of the act have

greater cost, or material can be obtained thereon, and that in all cases demand shall first be made before entering upon an owner's land, and, if he refuses to assent, the commissioner shall notify him of his intention to enter and point out the land to be occupied or the material to be taken; but, if he assents, "he may point out the material and the location from which it is to be taken, and if accessible and fit for the purpose intended, it shall be there taken;" the last clause, taken in connection with the other provisions of the statute, not limiting the owner's right of location merely to material taken, but applying to the taking of the land for the construction of ditches as well. *Cauble v. Hultz*, 118 Ind. 13, 20 N. E. 515.

A landowner may enjoin the construction by a county supervisor of a ditch in a certain location on his land for the drainage of a highway if irreparable injury will result thereby, where it is his duty, under the statute, to construct such ditch upon a roadway if proper drainage can thereby be acquired at no greater cost, but, if not, to accept that location for the ditch pointed out by the landowner if the same is acceptable and suitable, and the only questions to be determined are, whether proper drainage can be had in the highway, and whether the location pointed out by the owner is acceptable and suitable. A determination of these questions is for the court, and not for the supervisor, although no provision is made in the statute for a determination of such questions upon appeal. *Ibid.*

The fact that, for the purpose of draining a highway, drains are constructed on adjacent private property will not prevent the inclusion of their cost in the highway assessment, if it does not appear that the owners of the property objected thereto, where the construction was open and notorious, and has existed for a number of years, and the municipality could have obtained title to the land in case the owners objected. *Moore v. Albany*, 98 N. Y. 396.

Where a statute prohibits the construction of water courses along the side of a highway so as to incommode abutting property owners, and gives a remedy therefor by complaint to the selectmen, an action will not lie on behalf of a landowner against the surveyor who caused the injury: since, in the absence of the statute, the surveyor would have had the right to make such improvement in the highway as the public convenience required without liability to the abutting property owner. *Elder v. Bemis*, 2 Met. 599.

The legislature has the power to enact a law providing for the deepening, widening, and 60 L. R. A.

straightening of a natural stream for drainage purposes. *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160.

No jurisdiction is conferred, in a proceeding to establish a ditch, to alter and change the channel of a water course, unless it is a method of drainage and merely incident thereto, under a provision of the drainage act authorizing the court to determine that the method of drainage may be by removing obstructions from a water course, by deepening, widening, straightening, or changing its channel, etc.,—especially where a later statute confers upon another body the exclusive jurisdiction to straighten or change water courses to protect the banks of the stream where such change is the primary object to be accomplished. *Scruggs v. Reese*, 128 Ind. 399, 27 N. E. 748.

That a proposed drain is to be constructed for 19 miles along the line of an existing water course, which is to be straightened, widened, and deepened, does not render the work an internal improvement forbidden by the Constitution. *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233.

Equity will not restrain the erection of a sewer over a private water course polluted with sewage, when the work is urgently demanded for the protection of the public health, and the intention of the municipal corporation to appropriate the private property is evident, as the municipal power of taxation is sufficient security for payment of damages. *Bromley v. Philadelphia*, 8 Pa. Co. Ct. 600.

Under a petition to lay out a drain along the general course of a creek, the commissioner may include portions of it, and deepen, widen, or straighten the same, where the statute provides that, in cases where a natural water course shall need cleaning out, deepening, or widening, where no proceedings have been had previously to establish such water course, it shall be immaterial whether the first proceedings shall be to clean or lay out, deepen or widen; but the commissioner shall take such steps as may be necessary to obtain a right of way, and go on with his proceedings in the manner provided by law. *Hausser v. Burbank*, 117 Mich. 463, 76 N. W. 100.

No additional easement is imposed by the arching over of a natural water course by a municipal corporation which had previously used it as a channel for carrying off surface water. Calling the drain a sewer after it is arched over does not change the nature of the easement. *Jeannette v. Eschallier*, 7 Pa. Dist. R. 268.

The fact that drainage commissioners have availed themselves of the benefits derived from

been complied with. It provides that the petition shall state the necessity for the ditch, and this must necessarily refer to and mean the public necessity, for only public ditches are authorized to be laid out by the act. No assessments upon lands benefited can be made, except toward the payment of a public ditch; and the theory that a private ditch may be ordered constructed under its provisions is impliedly negated by almost every section of the statute. Section 31 was undoubtedly embodied therein for the very purpose of indicating that the legislature intended it to apply exclusively to cases where the public health, convenience, or welfare will be advanced. This section provides: "This act shall be liberally construed, so as to promote the public health and the drainage and reclamation of wet and overflowed lands." It was not in the

power of the legislature to provide for a drainage system in the interests of individuals for private advantage and gain, and we are bound to assume that the legislature had that legal proposition in mind in enacting this statute. It is not important that proceedings under the statute are commenced on petition by one or more private citizens; nor is it controlling, by any means, that private interests are advanced and promoted; nor need any considerable portion of the community be directly benefited by the proposed improvement. *Lien v. Norman County*, 80 Minn. 58, 82 N. W. 1004; *Talbot v. Hudson*, 16 Gray, 417; 10 Am. & Eng. Enc. Law, p. 1063; *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75. The proceedings are conducted by public officials of the county, who are under oath to perform their duties impartially. The ditch,

the removal of a dam in a creek will not estop them from denying the validity of the contract entered into between them and the owner of such dam for its removal, which is void as exceeding the power and authority of the commissioners, where the owners of the land within the district are not estopped from denying the right of such owner to a judgment against the drainage district based upon such contract. *Badger v. Inlet Drainage Dist.* 141 Ill. 540, 81 N. E. 170, Affirming 42 Ill. App. 79.

3. Lack of outlet.

It is within the jurisdiction of a drain commissioner to determine what the outlet of a drain shall be. *Gillison v. Cressman*, 100 Mich. 591, 59 N. W. 321.

The fact that an outlet for a sewer as provided in the ordinance will prove insufficient is not sufficient to invalidate the ordinance or defeat the right to levy assessments for the construction of the sewer. *Bickerdike v. Chicago*, 185 Ill. 280, 56 N. E. 1096.

Whether or not a "proper" outlet has been provided for a proposed sewer is a matter left to the discretion of the village authorities, with which the court will not interfere by injunction restraining the construction of the sewer, unless such discretion has been grossly abused. *Johnson v. Avondale*, 1 Ohio C. C. 229.

A municipal board has the power to contract for the construction of a sewer, although it has no outlet except through a plan or system of which it is a part but which cannot be completed; since it is open to the board to adopt plans to dispose of the sewage in some other mode, and it may gather it for that purpose. *Harney v. Benson*, 113 Cal. 814, 45 Pac. 687.

A district sewer connected with a private one is improperly constructed, and a special tax bill issued for the work done thereon is invalid, under a charter provision declaring that district sewers must connect with a public sewer or some natural course of drainage. *Heman v. Payne*, 27 Mo. App. 481; *Kansas City use of Enright v. Ratekin*, 30 Mo. App. 416.

A drainage district may not appropriate a natural water course within the limits of a city which had been previously appropriated and improved by the city for a drainage outlet. *Bishop v. People*, 200 Ill. 33, 65 N. E. 421.

Under a drainage act authorizing the county court to empower the owners of land to drain them across the lands of adjoining proprietors, the court has no authority to authorize the drainage in such a manner that it will be de-

posited and remain on the lands of such adjoining owners. *French v. White*, 24 Conn. 170.

Under a municipal charter declaring that district sewers shall connect with a public sewer or other district sewer, or with the natural course of drainage, an ordinance was invalid where it provided for the construction of a sewer to empty into the bed of a creek which had become filled up and obstructed so that it was a mere pond without an outlet; and special tax bills for work done under the ordinance could not be enforced. *Kansas use of Frear Stone & Pipe Mfg. Co. v. Swope*, 79 Mo. 446.

Under a charter provision requiring that district sewers must connect with a public sewer or another district sewer, or with the natural course of drainage, the municipality cannot construct a district sewer to connect with any natural course of drainage it may select, but it must connect with the natural course of drainage constituting the base or basis of some part of its sewer system; and a connection at a point about two blocks removed from a public sewer, with a stream or ravine which flows in the same general direction as the public sewer and empties into the same stream several hundred feet away, is improper, as the public sewer is the proper base for that part of the sewer system. *Bayha v. Taylor*, 36 Mo. App. 427.

A charter provision that a district sewer shall connect with another district sewer, public sewer, or natural course of drainage, is a substantial matter, and must be followed in an ordinance establishing a sewer, or the cost of such sewer cannot be enforced by local assessment. *Johnson v. Duer*, 115 Mo. 366, 21 S. W. 800.

Where an ordinance under which a district sewer was constructed was void by reason of its providing for the connection of the sewer with a stream not constituting a natural course of drainage, the special tax bills issued thereon are not rendered valid by the subsequent connection of the district sewer with a public one. *Bayha v. Taylor*, 36 Mo. App. 427.

It need not appear on the face of an ordinance providing for the construction of a sewer that it will connect with another sewer or natural course of drainage as prescribed by statute, if the provisions of the ordinance do in fact so connect it. *St. Joseph v. Wilshire*, 47 Mo. App. 125.

An assessment for the construction of a sewer is not invalid because such sewer originally terminated in a certain street and did not afford

when constructed, is not turned over to, or placed under the control of, individuals, but remains in the charge of the public authorities. The township supervisors are expressly required by the terms of the act to keep them in repair and free from obstructions, and it is made a misdemeanor for any person or persons in any way to obstruct or damage the same. This shows with reasonable certainty that the legislature had in mind the public welfare, rather than private interests. It is possible that the literal language of the statute may permit, reading it strictly, of a construction such as contended for by relators; but the rule applied in *Stewart v. Great Northern R. Co.* 85 Minn. 515, *sub nom. Re Stewart*, 33 L. R. A. 427, 68 N. W. 208, should be applied. The court there construed the general statutes authorizing elevator companies to condemn

an elevator site upon the right of way of any railway company, and it was strenuously contended that the statute under which proceedings there were instituted permitted the condemnation of such a site for a purely private use and purpose. The court, in disposing of the contention, said (and the remark is pertinent to the case at bar), "Where one construction of a statute will make it void for conflict with the Constitution, and another would render it valid, the latter, if not a forced and unreasonable one, will be adopted, although the former, at first view, is otherwise the more natural interpretation of the language used." To hold that the legislature intended by the enactment of the statute under consideration to further public interests is not a forced or unreasonable construction of the law, though, at first view, a contrary intent might seem

a proper outlet, where at the time such improvement was determined upon, the ultimate extension thereof to a river was contemplated, and such extension was made within a year so as to afford a proper outlet. *Wilson v. Cincinnati*, 5 Ohio N. P. 68.

It is no defense to a levy of a special assessment upon contiguous lands for the construction of a sewer within a municipal corporation that the system adopted requires such drainage to be discharged into a lake, and is against public policy. The question as to whether the lands and lots of the city shall be drained, and how and when it shall be done, are within the legislative discretion of the city authorities. *Rich v. Chicago*, 152 Ill. 18, 38 N. E. 255.

The fact that a sewer built by a municipality discharges into a private stream, however it may affect the rights of the proprietors of that stream, does not relieve a person assessed for the construction of the sewer from liability on the assessment. *Cone v. Hartford*, 28 Conn. 303.

The owner of a private property in a drainage district has no such vested property right in the sewers of the district as to entitle him to claim protection of a court of chancery, by injunction, to prevent one outside of the district from connecting drains from his premises with the district sewers under a license from the corporate authorities of the district, merely because he has paid special assessments for the cost of such sewers, in the absence of any showing that his private property, or the sewers for which he has been assessed as a special benefit, will certainly be materially diminished in value by reason of the connection. *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761, *Affirming* 37 Ill. App. 326.

Under a municipal charter providing that district sewers shall connect with a public sewer or other natural source of drainage, an ordinance authorizing the construction of a district sewer is not invalid by reason of its authorizing a connection with a district sewer, where such sewer connects directly with a public sewer, and is of ample capacity for such purpose. *Eyerman v. Blaksley*, 78 Mo. 145.

In the absence of statutory liability, one drainage district is not under legal obligation to contribute towards or pay the cost of enlarging the ditches of a lower district so as to afford an outlet for the increased flow therein caused by the connection of the ditches of the other therewith, where the ditches of both districts are located in the same natural depression, or regular channel, known as a slough, and the lands in the first-named district are the 60 L. R. A.

upper or dominant lands, and the lands of the other the lower or servient lands; the effect of such connection by the upper district being, not to change the natural flow of the surface water, but to increase its flow in the regular channel in which it was accustomed to flow before. *Kankakee Drainage Dist. v. Lake Fork Special Drainage Comrs.* 130 Ill. 261, 22 N. E. 607, *Reversing* 29 Ill. App. 86.

Under a statute authorizing inclosure commissioners to drain lands in their district, they are not authorized to alter the drains so as to overload an ancient drain flowing through lands outside their district. *Dawson v. Paver*, 5 Hare, 415, 16 L. J. Ch. N. S. 274, 11 Jur. 766.

County commissioners have no authority to construct a ditch beyond the boundaries of their own county, in the absence of a clear and unmistakable grant of such right by the legislature; and jurisdiction for that purpose cannot be conferred by the mere waiver or voluntary entry of appearance by landowners in another county. *Schamp v. Kennedy*, 16 Ohio C. C. 604.

A township may not extend its drainage into an adjoining township without a petition for that purpose, signed by a majority of the owners of the property to be benefited thereby in the adjoining township. *Chatham Twp. v. Dover Twp.* 12 Can. S. C. 321.

The Ontario drainage law providing that when a drain constructed in one municipality is used as an outlet, or will provide an outlet, for drainage from lands in another municipality, lands benefited may be assessed for their proportion of the cost, applies to drains properly so-called, and does not include original water courses that have been deepened or enlarged. *Broughton v. Grey Twp.* 27 Can. S. C. 495, *Reversing* 23 Ont. App. Rep. 801.

A section of the farm drainage act of Illinois, providing that another drainage district may connect with ditches of a drainage district upon payment of the cost of enlarging such ditches to accommodate the increased flow caused by the connection, does not apply to and impose such burden upon a connecting drainage district formed under another and wholly independent drainage act, but is confined to drainage districts formed under that act, by virtue of a clause therein providing that such act shall not affect other independent drainage laws, but shall apply only to such districts as are provided for in that act. *Kankakee Drainage Dist. v. Lake Fork Special Drainage Comrs.* 130 Ill. 261, 22 N. E. 607.

A landowner within a drainage district organized under the farm drainage law of Illinois

its more natural interpretation. As said, in substance, in *Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450, as a sequence it logically follows that every statute duly passed by the legislature is presumably valid, and this presumption is conclusive unless it affirmatively appears to be in conflict with some provision of the Constitution; and, in order to justify a court in pronouncing it invalid, its repugnancy with the Constitution "must be so clear, plain, and palpable as to leave no reasonable doubt or hesitation upon the judicial mind."

It is further claimed in support of the contention that the law is unconstitutional that no provision is made therein for the determination by the board of county commissioners, or otherwise, of the question whether a proposed improvement thereunder will result beneficially to the public. As we

have already noted, the question as to the propriety, wisdom, and public necessity of statutes of this kind is one exclusively for the legislature to determine; but the question whether a particular improvement under such a statute will promote the public health, convenience, or welfare is one of law, which is beyond the power of the legislature to determine to the exclusion of the courts. And if it be essential to the validity of any such statute that provision be made for the determination of that question, we have to determine whether this act makes such provision, and casts that duty upon the board of county commissioners. We are of opinion that, fairly construed, and invoking the rule as to implications and intensions in the construction of statutes, the board of commissioners is required to pass upon that question before final action is taken. The

may, by mandamus, compel drainage commissioners so to alter the system as to provide an outlet of sufficient capacity to drain all the lands of the district, where he is taxed for the improvement, but receives no benefits therefrom by reason of the insufficient depth of the outlet provided. Under the statute the duty of the commissioners to provide outlets of ample capacity for the waters of the district is mandatory. *Peotone & M. Union Drainage Dist. No. 1 v. Adams*, 163 Ill. 428, 45 N. E. 266, affirming 61 Ill. App. 435.

A contention, in an action to have declared void an assessment for a branch sewer, that it is not connected with any sewer established by ordinance as a main public sewer, is of no avail when the sewer is in fact a main public sewer, and so accepted and paid for by the city council, although not established by ordinance. *Akers v. Kolkmeier* (Mo. App.) 71 S. W. 536.

4. Responsiveness.

If the drainage of property will cost more than the property will be worth after the improvement is completed, that fact should prevent further proceedings, and, in most instances, will do so. When, however, the making of the improvement lies in the discretion of a body not directly interested in the property, and the rule is applied that liability for the cost does not depend on the benefit (see note to *Heffner v. Cass & Morgan Counties* [Ill.] 58 L. R. A. 353), it may happen that the expense of the improvement is excessive. But in most instances all persons concerned endeavor to prevent such a result. If, however, the levying of the assessment is regarded as an exercise of the taxing power, there is no constitutional protection against it.

Evidence that, collectively, the lands affected by the construction of a public ditch were of no more value with than without the proposed drainage is inadmissible to sustain a remonstrance that the cost of the ditch exceeds the aggregate benefits, where the aggregate benefits to lands, the owners of which are making no objections to the assessment, exceed the cost of the drain. *Earhart v. Farmers' Creamery*, 148 Ind. 79, 47 N. E. 226.

A proceeding for condemnation of a right of way for a drain cannot be defeated on the ground that the statute authorizing it is unconstitutional because the tax for the improvement is void so far as it exceeds the benefit received, where the statute expressly provides that the benefit and cost shall be ascertained before any proceedings are taken, and that, if 60 L. R. A.

the cost exceeds the benefit, the commissioners can proceed no further with the enterprise. *Redmon v. Chacey*, 7 N. D. 281, 78 N. W. 1081.

A bill by a landowner to enjoin drainage commissioners from making appropriations from the general fund to construct certain subordinate ditches not necessary for the general drainage of the whole district cannot be maintained in the absence of positive allegations that such ditches are not within the original purpose for which the corporate funds may be used, so that all lands within the district shall receive their proper and equal benefits, as contemplated when the lands were classified. *McFadden v. White*, 81 Ill. App. 109.

An assessment for a sewer is not invalid, although the city officers have no means of ascertaining what the improvement will cost, where it does not appear that the assessment is too large, or that the authorities have acted dishonestly in the matter. *Loomis v. Little Falls*, 66 App. Div. 299, 72 N. Y. Supp. 774.

Pumping works and alley sewers, being adjuncts to the main sewer and necessary aids to its successful operation, are properly included as part of the cost of constructing the main sewer. *McChesney v. Hyde Park*, 151 Ill. 634, 37 N. E. 858.

Attorneys' fees cannot be assessed, taxed up, and collected as a part of the expenses of the location or construction of a ditch from the landowners affected, in the absence of a statutory provision therefor in the law authorizing the ditch. *Kersey v. Turner*, 99 Ind. 257.

b. Necessity of designating.

1. In general.

The proceedings for the establishment of a drain are usually required to designate the plans, route, specifications, estimates, and all other matters necessary to distinguish the particular improvement contemplated, and to give persons whose property will be taken, or who will be taxed for it, all information which they may require in forming an intelligent judgment as to what attitude to assume towards the improvement.

To entitle Jersey City to build a sewer, a plan of it must first be made and adopted by resolution of the board of aldermen, approved by the mayor, and the notice to landowners to appear and be heard in objection, while not required to take any particular form, must be sufficiently definite to inform them of the nature and extent of the proposed work. *State, Coar, Prosecutor, v. Jersey City*, 35 N. J. L. 404.

statute provides for filing with the county auditor a petition for the location of a proposed ditch, upon the filing of which that official is required to give notice, by publishing and posting the same, to all interested parties, of a time and place "of hearing to be had thereon." At the hearing the board must determine whether to entertain the petition. If entertained, they are required to appoint a civil engineer, whose duty it is to make a survey of the proposed ditch, reporting the same to the board. Whereupon viewers are to be appointed, who, in turn, examine the route of the proposed ditch, estimate the damages and benefits to accrue from its construction, and report the same to the board. After all these preliminary steps are taken, a second notice of hearing is provided for, giving therein a time and place of hearing upon the petition, at which,

the statute provides, the board shall "proceed to hear and consider the same, and all persons interested may appear and be heard by and before them." It will be observed that two hearings are required to be had,—one at the time of filing the petition, and one following the report of the viewers; and the question presented is whether it is the duty of the board to determine at either that the proposed ditch, if constructed, will promote the public interests. All parties interested are thus afforded an opportunity to appear and be heard; and manifestly the hearing must be had on all questions pertinent to the pending proceedings, and particularly the controlling question whether the relief prayed for may, under the Constitution and laws of the state, be granted. If this were not so, and the legislature did not contemplate such a hearing, then the provi-

An order establishing a sewer must be reasonably definite when made, as important rights of the parties are then fixed. *Sheehan v. Fitchburg*, 131 Mass. 523.

An indefinite order for the laying out of a sewer cannot be aided by subsequent plans made at the time of construction. *Ibid*.

But a sewer assessment is not invalidated by mere failure of municipal authorities to comply with provisions of the ordinance as to making and recording plans of the improvement which had no relation to the assessment. *Kelso v. Boston*, 120 Mass. 297.

Substantial compliance of the ordinance with a statute requiring the specification of the nature, character, locality, and description of a sewer improvement to render the assessment valid is sufficient. *Pearce v. Hyde Park*, 126 Ill. 287, 18 N. E. 824.

An ordinance of a municipal corporation for the construction of a sewer is not rendered uncertain by reason of the caption failing to state that its purpose in part was to provide for house connections with the sewer. The sewer catch-basins, manholes, and house connections are all parts of one improvement. *Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327.

The order of the probate court establishing a drain should describe the lands belonging to the several owners respectively, so that the special commissioners may value the premises. *Bennett v. Olney*, 56 Mich. 634, 23 N. W. 449.

The statutory requirements as to the acts to be done by commissioners in constructing sewers, such as the filing of plans and specifications of the work, must be complied with before an assessment can be made upon abutting property for the cost of it. *Kneeland v. Milwaukee*, 18 Wis. 412.

An assessment for the construction of sewers and other work, including cribbing, manholes, and flush tank, is void, when the description in the resolution of intention is insufficient as to the dimensions, nature, and character of the work and the materials to be used. *McDonnell v. Gillon*, 134 Cal. 329, 66 Pac. 314.

A statute of Illinois vesting corporate authorities of cities with power to construct drains contemplates that such drains will be constructed for the purpose of draining lands within their corporate limits, and an ordinance providing for the construction of a sewer by special assessment cannot correctly specify its nature and character, as required by statute, without designating in some way the territory to be drained, and making such reasonable provisions as are necessary to effect such drain-
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age. Hyde Park v. Carton, 132 Ill. 100, 23 N. E. 590.

Mere clerical errors in the plans under which sewers are constructed will not defeat the assessments therefor, if the work is done in substantial conformity to the ordinance and to the intention of the parties. *Eyermaun v. Provenchere*, 15 Mo. App. 256.

The word "fall," in a clause of an ordinance specifying the location and construction of a sewer, will be construed to mean "rise," where the effect of a literal interpretation would be the construction of a sewer with the outlet higher than the starting point, and it is evident from other sections of the ordinance and from the plans and specifications that the latter word was intended. *Steele v. River Forest*, 141 Ill. 302, 30 N. E. 1034.

2. Estimates of cost.

Failure to observe a charter provision requiring a detailed estimate of the cost of a sewer to be obtained before proceeding with the work renders the proceedings void, and the assessment levied for the sewer illegal. *Mills v. Detroit*, 95 Mich. 422, 54 N. W. 897.

A contract for a sewer, executed by a municipal corporation before an estimate has been made of the probable expense of the work, is invalid, so that no charge can be created against abutting property thereunder. *People ex rel. Moore, v. New York*, 5 Barb. 43.

A provision in a ditching law authorizing persons desiring to make application under an act for the construction of a ditch to employ an engineer to enter upon such lands, over which the proposed ditch is to run, as may be necessary to make a survey and schedule and an estimate of the cost of construction, does not require the making of such survey and estimate before the making of the application, unless the same is necessary to state the facts required to be contained therein. *Slusser v. Ransom*, 39 Ind. 506.

A provision of a city charter limiting the cost of an improvement to the amount of the appropriation made therefor which was based upon the estimate made at the time of the adoption of the ordinance authorizing the work applies only to improvements paid for out of the city treasury, and not to those paid by a special tax against the property benefited. *Hill v. Swingle*, 159 Mo. 45, 80 S. W. 114.

A judgment confirming a special assessment levied upon land in a drainage district cannot be attacked in a proceeding to foreclose the lien for the unpaid assessment, upon the ground that the whole assessment exceeds the estimated

sion for the notice of time and place thereof becomes practically inoperative and meaningless. Clearly the lawmakers could not have been so careful in respect to requiring these notices merely for the purpose of enabling interested parties to appear and raise objections going merely to the regularity of the proceedings, for the regularity of the steps taken is of no very great importance. The notice to interested parties, affording them an opportunity to be heard on the merits of the proceedings, is the important step. The legislature had no authority to authorize the construction of a ditch, except for public purposes; the commissioners have no power to order one constructed for a private purpose; and the question whether a proposed ditch may be constructed at all depends primarily upon whether it will result in a public benefit. To authorize pro-

ceedings under the statute, therefore, that question must be determined either at the preliminary hearing upon the petition, or at the second or final hearing. While the statute does not, in express terms, require the board to determine it, the existence of the fact being essential to their authority to proceed in any case, and essential to the validity of the statute, too, the power to determine it must be implied. It is stated as a general rule in Black, Interpretation of Laws, 62, that every statute is understood to contain, by implication, if not by its express terms, all such provisions as may be necessary to effectuate its object and purpose, or to make effective the rights, powers, privileges, or jurisdiction which it grants, and also all such collateral and subsidiary consequences as may be fairly and logically inferred from its terms. An application of

cost of the work and the expense of the assessment. *Hammond v. People*, 169 Ill. 545, 48 N. E. 573.

When the cost of a sewer draining a district lying partly in three towns is apportioned among the three, and the amount apportioned to each is assessed upon lands within that town embraced in the drainage area, if the lots are not assessed more than the value of their actual benefits, and if, also, the assessment is not improperly distributed, the fact that the estimated cost according to the drainage area proves greatly disproportionate to the actual cost according to the benefits conferred which is the method adopted and required by statute in assigning to each town the amount it is to pay, is a ground of complaint, neither of the town itself in its corporate capacity, nor of the landowners assessed. *State, King, Prosecutor, v. Reed*, 43 N. J. L. 186, Affirmed in 48 N. J. L. 370, 5 Atl. 178.

Under the statutes of Illinois, a municipal corporation may pass an ordinance providing for the construction of a sewer in one of its streets, the cost thereof to be paid, one half by general tax, and one half by special taxation to be levied on the property contiguous to the improvement in proportion to the benefits accruing to the respective parcels of land along the line of the improvement by the making thereof; and it is not necessary to its validity that, before its passage, an examination shall have been made of such property and the probable benefits thereto by the construction of the sewer have been determined to be one half the cost thereof, since special taxation does not imply special benefit or any benefit, and no attention need be paid thereto, after that mode of taxation is adopted, further than may be paid by the city council in determining which particular one of the several modes of special taxation of contiguous property open to them shall be resorted to. This being a proceeding by special taxation, and not by special assessment, the steps required to be taken in the latter case need not be regarded. *Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686.

A tax for a sewer is not illegal, although neither the resolution ordering the sewer, nor the one that assesses the tax, in terms fixes the dimensions of the sewer, or names the gross amount to be paid therefor, or the amount of tax to be assessed upon each tract of land, and the owner thereof, when the resolution assessing the tax named the street through which the sewer was to be constructed and the terminal points and ordered that the tax be assessed and levied on each lot, part of lot, or tract of

ground in the sum and to the amount shown by the plat of the city engineer, which plat showed the amount to be assessed to each square foot, the number of square feet in each tract of ground, and the total assessment for each tract of ground subject to be assessed for the sewer. *Ditoe v. Davenport*, 74 Iowa, 66, 36 N. W. 895.

3. Route.

The description of a proposed drain in the application therefor is sufficient where it approximately indicates the route and termini. *Hausser v. Burbank*, 117 Mich. 463, 76 N. W. 109; *STATE ex rel. UTICK v. POLK COUNTY*.

A petition to establish a drain sufficiently describes it where it contains a description of the line of the drain, together with a table showing the numbers of the stations and the depth and width, so that, if the line indicated be taken to mean the center line of the strip to be taken, the description is definite and certain. *Anketell v. Hayward*, 119 Mich. 525, 78 N. W. 557.

The description of a proposed drain to commence at a specified point upon a designated water course which is to be deepened, widened, and straightened through given sections terminating at a point indicated, sufficiently complies with a statutory provision requiring a general description of the beginning, the route, and the terminus of the drain. *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233.

An omission of the name of a street throughout from the legislative proceedings for the construction of a sewer is a defect which is fatal to an assessment on the property located thereon for the construction thereof, where the descriptions of property affected by the improvement are by streets. *Cincinnati v. Honnigfort*, 32 Ohio L. J. 82.

A petition to lay out a township drain is sufficient where it gives the terminal points and the direction which it is to run, with the distances. *Clark v. Teller*, 50 Mich. 618, 16 N. W. 167.

A petition to lay out a drain is insufficient to confer jurisdiction upon the drain commissioner where the course of the proposed drain is left to the determination of the commissioner. *Null v. Zierle*, 52 Mich. 540, 18 N. W. 348.

A description of a proposed township drain in an application therefor is too indefinite to authorize official action, where it allows the commissioner to determine the distance and direction of the drain. *Frost v. Leatherman*, 55 Mich. 33, 20 N. W. 705.

this rule is illustrated by the case of *Woodruff v. Glendale*, 26 Minn. 78, 1 N. W. 581, where the court construed Laws 1873, chap. 5, providing for the laying out of public highways. That statute authorized the town board of supervisors to open and lay out highways, upon certain provisions of the statute being complied with, and provided for the assessment of damages, but nowhere provided for the payment of the same. In speaking of this omission, the court said: "The only point made is that the act is unconstitutional because it does not provide for payment of the damages assessed. If no such provision were found in the act, of course, it would be unconstitutional. There is no express provision to that effect. But rather than hold the law to be void, the court will find such provision by implication, if the act will admit of

such a construction." In the case of *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750, the court had under consideration the validity of certain ordinances of the city of Portland authorizing the construction of drains and sewers, and the assessment of private property to defray the expense thereof. The ordinances failed to provide for notice to interested parties, and it was insisted that they were unconstitutional and void, as a taking of private property without due process of law. The court held that if notice was in fact given to all interested parties, though the ordinance did not require it in express terms, there was no violation of the Constitution, and the proceedings in laying out the sewers were sustained. In the case at bar the petition for the proposed ditch distinctly alleged that its construction would benefit

An application for the establishment of a drain which gives its dimensions and describes a line between the termini, is insufficient where it fails to state which side of the line the land should be taken, or to give any data from which it can be ascertained. *Bennett v. Olney*, 56 Mich. 634, 23 N. W. 449.

A view taken by the jury to determine the necessity for a public ditch is defective where it does not point out the line of the ditch, or specify its dimensions, but refers to it merely by name. *Chapman v. Clark*, 49 Mich. 305, 13 N. W. 601.

A proceeding to lay out a public ditch will be quashed where the venire to summon the jury failed to give the dimensions of the ditch, or to indicate the line of it with any precision. *Ibid.*

4. Dimensions.

Proceedings to condemn land for drainage purposes, under a statute requiring commissioners to determine the route, with length and average depth, of the proposed ditch, are void where the ditch is described only as a line, without description of width or average depth, and it does not appear what specific land has been condemned, what kind of a ditch has been approved of, or on what basis the commissioners acted. *Milton v. Wacker*, 40 Mich. 229.

An ordinance of a municipal corporation for the construction of a sewer is void for uncertainty where the only description as to the depth and grade is that "said sewer shall be laid at a proper depth and grade to give proper fall and drainage." *Alton v. Middleton*, 168 Ill. 442, 41 N. E. 926.

Under a charter authorizing the city council to construct sewers of such dimensions as may be prescribed by ordinance, the council cannot delegate the power thus given to determine the dimensions of a sewer; and an ordinance authorizing the construction of a sewer of such dimensions as the city engineer may deem requisite is void. *St. Louis use of Murphy v. Clemens*, 43 Mo. 395, Expressly Overruling *St. Louis v. Oeters*, 36 Mo. 456, so far as it asserts a contrary principle.

But Judge Baker held that the failure of the city council to state, either in its notice of the passage of a resolution for the construction of a sewer, or in the resolution itself, the size of the proposed sewer, as required by statute, does not deprive it of jurisdiction to order the improvement, and is not a ground for enjoining the collection of the assessment therefor. *Rickards v. Hammond*, 67 Fed. 380.
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Under a charter authorizing the construction of public and district sewers, the former to be paid for by the city and the latter by special tax upon the property located in the district, the district sewers to be constructed upon recommendation of the board of public improvement, and to be of such dimensions as it may prescribe, the character of a sewer constructed as a district sewer and of the prescribed dimensions is not open to attack in collateral proceedings to enforce the special tax, on the ground that its main stem, being 8 feet wide, constitutes a public sewer. *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, Affirmed in 181 U. S. 402 b, 45 L. ed. 922, 21 Sup. Ct. Rep. 645.

5. Material and openings.

An ordinance directing the construction of several sewers sufficiently conforms to a provision of the municipal charter requiring it to designate the material of which the sewers are to be constructed where it provides that the first three be made of "vitrified clay pipe," and that one of the others be a "sewer made of pipe," and that each of the remaining ones be a "pipe sewer," as it will be presumed that the council intended that they should all be of vitrified clay,—the same material as that of the first three. *St. Joseph use of Saxton Nat. Bank v. Landis*, 54 Mo. App. 315.

An ordinance of a municipal corporation merely providing for the construction of a sewer, without providing for its being covered so as to protect the same, and furnishing no data for an estimate of the cost of such covering, is void, and a special assessment cannot be levied under it. *Title Guarantee & Trust Co. v. Chicago*, 162 Ill. 505, 44 N. E. 832.

An ordinance providing for the construction of a branch sewer in accordance with the provisions for a main sewer is sufficient as to description or dimensions and materials. *Akers v. Kolkmeier* (Mo. App.) 71 S. W. 536.

A municipality, in providing for the construction of a sewer, cannot delegate to the city engineer the power to determine the material out of which the sewer or its catch-basins, which form a substantial part of it, shall be constructed, as such power is a legislative one which cannot be delegated. *St. Joseph v. Wilshire*, 47 Mo. App. 125.

But, although an ordinance providing for the construction of a sewer improperly delegated to the city engineer power to prescribe the material out of which the manhole and catch-basins were to be made, it did not thereby deprive the contractor of the right to recover on the special

the public health, convenience, and welfare; and the commissioners found the same fact in their final order, thus showing the construction the officials placed upon the statute. They understood that they could proceed only where a proposed ditch would be of public utility, and they found the fact in the final order accordingly. Of course, their construction of the statute is not final or of any particular force, but that they determined the essential question conferring upon them the right to construct the ditch brings the case within the Oregon case just cited.

It is further urged that no appeal is allowed from an order directing the construction of a ditch. This is not essential to the validity of the statute. In cases where no appeal is provided, the matter being discretionary with the legislature, certiorari or other proper remedy is open to injured

parties to review the proceedings. The question of public use being a judicial one, interested parties may bring it before the court at any time, upon its appearing that the commissioners contemplate the construction of a ditch in the furtherance of private interests. Just what the precise remedy would be in such a case, we are not called upon to determine at this time. In all probability, an action would lie to restrain further proceedings on the part of the board, if the result thereof would be a taking of private property for a private use; and the question whether the ditch proposed to be constructed would promote the public health, convenience, and welfare could thus be directly presented to the courts for determination, and would not be open to the objection that the judgment or determination of the commissioners was being attacked in a col-

tax bills the amount due for the construction of the sewer less the amount charged for the manhole and catch-basins, where such amount could be determined from the contract. *Ibid.*

An ordinance for the construction of a system of sewerage which fails to specify the nature, character, locality, and description of the manholes and catch-basins, fails to comply with the statutory requirements in that respect, and is invalid, and cannot be made the basis of special assessments. *Ogden v. Lake View*, 121 Ill. 422, 13 N. E. 159.

An ordinance providing for the construction of a sewer is not invalid for want of certainty in the description of the improvement, in violation of the statute authorizing such improvements to be made by special assessment, which specifies that ordinances for that purpose shall "specify therein the nature, character, locality, and description of such improvement," because it does not designate the exact spot upon the sewer where the manholes are to be constructed, and simply provides that the sewer should be constructed "with necessary manholes and inlets for surface drainage." *Springfield v. Mathus*, 124 Ill. 88, 16 N. E. 92; *Springfield v. Sale*, 127 Ill. 359, 20 N. E. 86.

The omission from an ordinance of a municipal corporation authorizing the construction of a sewer of any provision for manholes and catch-basins, will not affect its validity, as violating a statutory provision requiring such ordinance to state fully the character and nature of the improvement, where a sewer has already been constructed in the street sufficient for the purposes of conveying surface water, etc. *Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901.

Where a municipality is required by its charter to designate by ordinance the size of sewers to be constructed by it, but the charter is silent as to inlets, manholes, etc., and as to the material of which they are to be constructed, it may regard these appendages to the sewer as matters of detail not necessary to be inserted in the ordinance. *St. Joseph use of Gibson v. Owen*, 110 Mo. 445, 19 S. W. 713.

An ordinance of a municipal corporation authorizing the construction of a sewer is not void for uncertainty in the location of catch-basins provided for, where they are to be located on the curb lines of the street at such points as the engineer in charge shall direct. *Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327.

The word "necessary" in an ordinance providing for the construction of a sewer "with necessary manholes and inlets for surface drainage" should be taken as a restrictive term as respects the location of the manholes, going to 60 L. R. A.

show where they should be constructed; that is, they are to be where it is necessary and proper that they should be, and is sufficient to enable a civil engineer to determine where they should be located. *Springfield v. Mathus*, 124 Ill. 88, 16 N. E. 92.

c. *Departure from.*

1. *Route.*

The supervisors, in laying out a ditch under the drainage law, have the right to make any variation from the line thereof, in their discretion, provided they do not so far depart from the line proposed in the petition as to make materially another and a different line. *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637, 17 N. W. 389.

Under the provision of N. Y. Laws 1889, chap. 375, as amended by Laws 1891, chap. 816, that, upon petition by the requisite property owners for the construction of a sewer, the board shall give notice of a hearing for and against the construction of such system, the board has power to construct a sewer only in the street named in the petition, and cannot extend it to another street. *Re Drake*, 69 Hun, 95, 23 N. Y. Supp. 264.

A municipal lien for the construction of a sewer cannot stand where the property abuts on the sewer as constructed, but not on the route as designated in the authorizing ordinance. *Scranton City v. Kingsbury*, 4 Pa. Dist. R. 555.

In an action for damages and an order of sale against land for a special assessment for the construction of a sewer conceded to have been located on a different line than that designated in the ordinance providing for its construction, the burden of proof is upon the municipal corporation to show that the location of the completed sewer is substantially the location established by the ordinance, and that the deviation has not operated to the injury of the owners of property against which the judgment is sought, and that the sewer as constructed is not less beneficial to such property than it would have been if located in literal compliance with the terms of the ordinance. *Church v. People ex rel. Kochersperger*, 174 Ill. 366, 51 N. E. 747.

Drainage commissioners, in cutting a ditch in a drainage district, must not, after having assessed the damages a landowner will sustain thereby, make a substantial variation from the line as indicated on the plat filed in the condemnation proceedings; and if they do so equity will enjoin them, although the ditch as con-

lateral proceeding. *Soudder v. Jones*, 134 Ind. 547, 32 N. E. 221; 7 Enc. Pl. & Pr. 222. Such an action was sustained in *Northwestern Teleph. Exch. Co. v. Minneapolis*, 81 Minn. 140, 53 L. R. A. 175, 83 N. W. 527, 86 N. W. 69, where the relief sought was to restrain the municipal authorities from the exercise of the police power,—far broader and more comprehensive than an exercise of the power of eminent domain,—on the ground that its threatened exercise was arbitrary and unnecessary. Upon both these propositions, in view of the importance of the case, the fact that the law has been in operation for some time, and, no doubt, many ditches and drains have been ordered constructed thereunder, and large expenses incurred in furtherance of such improvements, and the further fact that the objections to the validity of the statute go to its form, rather than to its substance, we are constrained to hold it valid, and in no way

in violation of any provision of the Constitution. The result of holding otherwise, and pronouncing the statute unconstitutional, would be to nullify all proceedings had under it, invalidate debts contracted, and wipe the law from the statute books for defects and omissions not going to its substance, or to the general authority of the legislature to enact it, which defects and omissions could be remedied and cured by proper legislation, and when thus cured and remedied the statute would be a valid legislative enactment. The rights of property owners are fully protected under the law; notice and opportunity to be heard are afforded them at every step; and it being within the general power and authority of the legislature to enact such legislation, we deem it the part of wisdom to supply by application of the liberal rules of statutory construction all formal defects and technical omissions in the expression of the legislative will.

structed may not be more injurious to the land than it would have been if constructed as planned. *Rutledge v. Drainage Dist. No. 6*, 16 Ill. App. 655.

It is no objection to a proceeding to establish a drain that it extends beyond the line of the lands described in the original application, where the plaintiff's lands are not injured thereby, nor his taxes increased by the extension, which is paid for by the owners whose lands it crosses. *Davison v. Otis*, 24 Mich. 28.

One who knows of the proceedings to relocate a ditch, and takes a contract to dig it, and does dig part of it, is estopped from thereafter attacking the proceedings of the drain commissioner. *People ex rel. Roediger v. Wayne County Drain Commissioner*, 40 Mich. 745.

A tax levied to cover the expenses of building a drainage ditch is not invalid because a change was made in the survey originally fixed upon so that the ditch as built did not follow the original survey, if the two surveys corresponded in length and were on substantially the same line. *Hutts v. Manona County*, 100 Iowa, 74, 69 N. W. 284.

When the county board is required to locate a public drain ditch, the line is located with sufficient certainty when the board approves and adopts the route as defined in the petition, and some small variation of the engineer from that route cannot be said to be another route. *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292.

Property owners cannot refuse to pay assessments for the construction of a sewer because it was not laid in the exact line directed by the ordinance, where no injury has resulted from the change, and the benefits are the same. *People ex rel. Raymond v. Church*, 192 Ill. 302, 61 N. W. 496.

The owner of a city lot cannot defeat a special assessment levied on the same by the city for the construction of a sewer in the street upon which such lot fronts, on the ground that there was a deviation in the location thereof from that provided in the ordinance authorizing such improvement, where such change does not render the sewer less beneficial to his property. *Rossiter v. Lake Forest*, 151 Ill. 489, 38 N. E. 359.

A deviation from the approved plans for the reclamation of swamp lands is within the discretion of the trustees of a reclamation district, where such deviation is slight, or no injury

results therefrom, but, instead, such deviation is beneficial. *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676.

A landowner is not entitled to equitable relief from a change in the line of a ditch affecting his lands, and for the construction of which a share is allotted thereto, where the change is not on his own lands, and in no way affects the drainage thereof. *Cooper v. Shaw*, 148 Ind. 313, 47 N. E. 679.

2. Plans.

A municipal corporation has the power to make such minor changes in the construction of a sewer as are within the general scope of the original plan and necessary to render it at all effective, although not provided for in the ordinance under which the improvement is constructed. An iron door opening outward to permit the escape of sewage into the river, but closing in case of a flood so as to prevent backwater from getting into the sewer, is included within this category. *People ex rel. McCormack v. McWethy*, 177 Ill. 334, 52 N. E. 479.

It is no ground for resisting payment of a ditch assessment that the ditch was not constructed according to the plans and specifications thereof, under a statute giving landowners a remedy for a variation from such plans by direct application to the court having the work in charge. *Shrack v. Covault*, 144 Ind. 260, 43 N. E. 229.

A drainage commissioner is liable on his bond, given for a faithful discharge of his duties in constructing a public ditch, for damages resulting from an unauthorized deviation by him from the plans and specifications according to which the work was ordered by the court to be constructed, the measure of which is the amount necessary to complete the ditch in the manner ordered. *Smith v. State ex rel. Ingberman*, 117 Ind. 167, 19 N. E. 744.

The question whether the commissioners of a drainage district, organized under the farm drainage act of Illinois, may lay tile deeper than proposed by the engineer's plans without entering a resolution to that effect of record, cannot be raised on appeal by a landowner from an order of court confirming a special assessment upon his land. The only question that can be raised in such case is expressly declared by such act to be whether or not such tax is in excess of the benefits to accrue. *Slason v. Drainage Dist. No. 1*, 163 Ill. 295, 45 N. E. 215.

It is further contended that the description of the proposed ditch, as set forth in the petition, is so indefinite and uncertain as to confer no jurisdiction upon the county commissioners. We do not concur with relators in this contention. The description of the proposed ditch, as contained in the petition, is as follows: "Commencing at a point in the southwest quarter of the southwest quarter (S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$) of section eight (8), on the northerly shore of a certain lake, lying and being in said section eight (8) and section seventeen, town of Queen, Polk county, Minn.; thence running," etc. The precise objection made to the description is that it is indefinite and uncertain as to the starting point of the proposed ditch. A petition in proper form is, no doubt, a prerequisite to the authority of the commissioners to act, but it is not necessary that the same contain an accurate description of the proposed ditch,—either of its starting point or terminus. It is sufficient if the de-

scription contained therein be approximately correct. *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. 672. The precise location of the ditch is determined by the civil engineer, and is to be found in his report; and that this report definitely located that point and the entire course of the ditch, there is no question. *Gribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707. The petition mentions as the starting point of the ditch a point on the shore of a certain lake in section 8, town of Queen, Polk county. It is a fact of which the court takes notice that congressional townships, when organized, are given a name by the organizing power, and a reference to the town by such name is as definite and certain as though the number of township and range were given. We find nothing in this particular contention, nor in the other points urged by relators, on which to base an order vacating or setting aside the proceedings of the commissioners.

Writ discharged.

The commissioners of a drainage district, under the drainage laws of Illinois, may change the plan for the drainage of such district as originally adopted, and upon which the lands in the district were classified, and may make a second levy of assessments, if necessary to carry out the plans as changed, without giving notice to the owners of such lands either of the change of the plans or of the second levy, where such change is necessary to effectually drain all the lands of the district as contemplated when such classification was made; and in such case they need not complete the work under the original plan before making the change. *Reynolds v. Milk Grove Special Drainage Dist.* 134 Ill. 268, 25 N. E. 516, Affirming 34 Ill. App. 302. There is nothing in the law forbidding the change, and the drainage of the lands would be greatly embarrassed if there were no power to correct mistakes.

When legislative authority is given to a municipality to build a main sewer through certain named streets, with such laterals as the officers entrusted with the work deem necessary properly to drain the territory, all to be done according to a certain plan, there is no right to abandon such plan and follow another providing for two main sewers instead. *State, Hoboken, Prosecutor, v. Chamberlain*, 37 N. J. L. 51.

The statute having authorized the water commissioners in Jersey City, in executing a plan reported by them and adopted by the common council, to make such changes or alterations as may be found convenient or necessary in the progress of the work, their power in the premises is discretionary; and, where the general plan contemplates the use of an old sewer, and they decide to build a new one instead, they are the sole judges of its necessity or convenience, and the courts cannot review their decision. *State, Plard, Prosecutor, v. Jersey City*, 30 N. J. L. 148.

Sewer assessments in Jersey City, levied for a system reported by the water commissioners and adopted by the common council, providing for main sewers laid on an incline due to the difference between high and low water, connected with a canal into which water is admitted by automatic tide gates for flushing them at intervals, and discharging into the river, the plans for which comprise many details relating to laterals, and prescribing form, materials, size, estimated cost, etc., will not be avoided because the main sewer was built be-

fore the canal (the common council being entitled to designate the time of building), or because alterations were made in the grade, form, dimensions, and materials, and allowances were made to contractors for extra work beyond the specifications; or because the sewer assessed for connects with a sewer upon property already assessed and paid for, or because laterals were added not included in plan; or because of faulty, mistaken, or fraudulent construction by the contractor; or because the sewer was built through private property; or because it will not answer its expected purpose; or because of errors or omissions in the assessment roll; for the reason, that the statute empowers the commissioners to construct the canal, locks, sewers, and drains as planned, and to make all necessary or convenient changes during the progress of the work; and they also have the power to correct errors and omissions from the assessment roll, and to make an entirely new one if necessary. *State, Vanderbeck, Prosecutor, v. Jersey City*, 29 N. J. L. 441; *State, Plard, Prosecutor, v. Jersey City*, 30 N. J. L. 148.

The cost of extending the point of discharge of a sewer out to the middle of a river by means of an iron pipe is not properly chargeable to the assessment fund for the construction of the sewer under an ordinance which does not provide for such extension. *People ex rel. McCornack, v. McWethy*, 177 Ill. 334, 52 N. E. 479.

A municipal corporation has no power to construct extra sewers and additional catch-basins not provided for in the ordinance under which a sewer is constructed, although such changes make the sewer more beneficial than the one provided for; nor is the assessment fund collected for such improvement chargeable for their cost. *Ibid.*

A municipal corporation has no right, after it has passed an ordinance for the construction of a sewer within defined limits and describing the real estate that will be benefited thereby, to change the character of the sewer and extend it over other territory, without making a change in the real estate to be assessed for its cost. *Columbus v. Storey*, 35 Ind. 97.

After a general plan for sewers has been filed for New York city under the act of 1865, additions may be made to the sewers there proposed without the filing of additional maps, and the assessments therefor will be valid. *Roosevelt Hospital v. New York*, 84 N. Y. 108, Affirming 18 Hun, 582.

MISSOURI SUPREME COURT.

MOUND CITY LAND & STOCK COMPANY
et al., Repts.,
v.

Dina MILLER *et al., Appts.*

(.....Mo.....)

1. A constitutional prohibition of the taking of private property for private purposes is not applicable to a statute providing for the drainage of large tracts of land.
2. A corporation organized for the drainage of a large tract of land is not private, but a political subdivision of the state.
3. Requiring citizens to become members of drainage districts, and share

It is no defense to the enforcement of an assessment on the roadway of a turnpike company for the construction of a drain that the same is not being built as ordered by the court establishing it, but that a portion has been abandoned, thus making the outlet insufficient, to the injury of the roadway by backwater, where the statute under which the proceedings were had gives the court establishing the ditch control over its construction, and authorizes a direct application to be made to it to require the performance of the work as ordered. *Indianapolis & C. Gravel Road Co. v. State ex rel. Flack*, 105 Ind. 37, 4 N. E. 316.

An order to lay a sewer of 15 and 12 inch pipe, located as shown on a plan on file, is sufficiently complied with to uphold an assessment if the plan shows that a part of the pipe is to be 24-inch, which size is used where called for by the plan. *Bowditch v. Superintendent of Streets*, 168 Mass. 239, 46 N. E. 1026.

It is no ground for the issuing of a writ of injunction restraining the collection of an assessment on an owner's land for the construction of a drain that the drain was not constructed as laid out and established where the duty of determining that question is by law expressly devolved upon the board of commissioners, whose decision cannot be collaterally attacked solely upon that ground. *Muncey v. Joest*, 74 Ind. 409.

In an action to enforce the statutory lien of an assessment on land for the construction of a ditch, damages sustained by the owner of such land by reason of the failure to construct and complete the ditch fully as petitioned for are not proper subjects either of counterclaim or set-off. *Laverty v. State ex rel. Hill*, 109 Ind. 217, 9 N. E. 774.

The drainage commissioners of a district organized under the drainage laws of Illinois have no power to contract with an individual for the removal of his dam across a creek to afford better drainage facilities for the district, or to assess the lands of the district to pay the consideration agreed by them to be paid such individual, where such improvement was not described in the report and accompanying plans and profiles filed by them when the district was organized, and they did not, prior to the making of such contract, file a report recommending such improvement, so as to afford the owners of lands in the district an opportunity to be heard thereon. *Badger v. Inlet Drainage Dist.* 141 Ill. 540, 31 N. E. 170, Affirming 42 Ill. App. 79.

An assessment for the construction of a sewer system will not be rendered void by the fact that the sewer is not laid under two streets 60 L. R. A.

the expense of drainage, against their wills, does not make the law unconstitutional.

4. The right of trial by jury does not extend to proceedings for the organization of drainage districts.
5. An owner of property who, before it can be included in a drainage district, is given a day in court, is not deprived of his property without due process of law.
6. Basing the voting power in a drainage district on acreage, rather than on membership, is not unlawful.

(November 26, 1902.)

A PPEAL by defendants from a judgment of the Circuit Court for Holt County in favor of plaintiffs in a proceeding for the

comprised in the system because they are not graded so as to be ready for a sewer, where the sewers to be laid in them are only laterals, draining these streets alone, so that the whole benefit of the system would accrue to the owners of the property assessed, whether the sewers were constructed in such streets or not. *Wewell v. Cincinnati*, 45 Ohio St. 407, 15 N. E. 196.

3. Default of contractor.

It is no defense to an action to enforce the collection of an assessment for the construction of a public ditch that the work was not completed, or that it had not been or would not be done according to contract, where the law under which the ditch was established authorizes the drainage commissioner to exercise a reasonable discretion in levying assessments to secure in advance money to pay for work in progress, and gives landowners adequate remedy to compel a performance of the work in accordance with the specifications. *Racer v. State use of Rhine*, 131 Ind. 893, 31 N. E. 81.

It is no defense to the collection of a drainage assessment that the ditch was being constructed contrary to the plans and specifications, and that the same would not be completed in accordance therewith, where the landowner has a remedy for such divergence by direct proceedings against the commissioners in the circuit court. *Stafford v. State use of Rhine*, 12 Ind. App. 540, 40 N. E. 701.

Where a contract for the construction of a sewer was forfeited by failure of the contractor to complete the work within the time stipulated therein, the tax bills issued in payment of the work were void, and were not validated by an ordinance extending the time to do the work, made after the forfeiture. *Neill v. Gates*, 152 Mo. 585, 34 S. W. 460.

Payment of taxes lawfully levied by a meadow company cannot be escaped because of the negligent or improper manner in which the managers of the company have constructed or maintained sluices. *Farrell v. Kingessing & T. Meadow Co.* 2 Walk. (Pa.) 502.

The misconduct of a commissioner appointed by the court to construct a public ditch in failing to have the work performed in accordance with the plans and specifications does not affect the order of the court establishing the ditch and requiring its construction, so as to defeat the lien of an assessment on lands therefor, since the power of that court still remains to cause the work to be completed in accordance with the spirit and intention of the order made in the first instance. *Hackett v. State use of Martindale*, 113 Ind. 532, 15 N. E. 799.

incorporation of a drainage district. Affirmed.

Statement by Marshall, J.:

This is proceeding under Rev. Stat. 1899, §§ 6517 et seq. (being now Rev. Stat. 1899, §§ 8251 et seq.), to have incorporated Squaw Creek drainage district No. 1, in Holt county. The proceeding was instituted in the circuit court of Holt county on July 2, 1899, by the filing of articles of association and a petition for incorporation by a majority of the resident owners of a contiguous body of swamp and overflowed lands, embracing an area in excess of 640 acres, to wit, of about 23,000 acres. The petition conforms to the requirement of the statute in respect to what shall be stated, and is signed by the majority of the resident owners. Proper notice was given, and on the 22d of

The failure to construct a sewer within the time specified in the contract is not excused, so as to entitle the contractor to collect the special tax bills, by the fact that the delay was caused by an injunction, where it was sued out by a third person, and was not based on the illegality of the work. *Whittemore v. Sills*, 76 Mo. App. 248.

But a contractor is not prevented from collecting the special tax bills for the construction of a sewer by the fact that, by reason of an injunction issued against the work, he failed to complete it within the time specified in the ordinance, where the ordinance referred to the plans and specifications as a part thereof, in which it was provided that the contractor should be entitled to additional time equal to the delay caused by a suspension of the work from any cause. *Ibid.*

d. *Departure from statute.*

An ordinance of a municipal corporation establishing a system of drainage and sewers for the entire village is not invalid as providing for a double improvement, although such system involves the construction of sewers in different streets. *Walker v. People ex rel. Kochersperger*, 170 Ill. 410, 48 N. E. 1010.

An ordinance of a municipal corporation for the construction of a main sewer with branches is not invalid as providing for more than one improvement. *Payne v. South Springfield*, 161 Ill. 285, 44 N. E. 105.

The mere fact that the city council of a municipal corporation ordered a line of pipe sewers to be laid so that the outlet should be at an intermediate point instead of at either end does not convert the line into separate lines so as to render the ordinance providing for the improvement void because creating a double improvement. *Church v. People ex rel. Kochersperger*, 179 Ill. 205, 58 N. E. 554.

An ordinance of a municipal corporation for the construction of a sewer is not void as providing for a double improvement because it provides for the construction of more than one sewer, one having house connection and the others not, and not coming into actual connection with each other, where they are to be made of the same material and in the same way. *Hinsdale v. Shannon*, 182 Ill. 312, 55 N. E. 327.

A city ordinance providing for the construction of a sewer in a street in connection with the grading and paving thereof, and for a levy of one assessment for the entire improvement, is not void as embracing more than one separate subject.

February, 1900, the defendants filed an answer specifying sixteen principal objections and five subobjections to the incorporation of the drainage district. But of these, nine raised questions of fact, which were found against the defendants by the trial court, and are not open to review here, for the reason that no evidence is preserved by this record, and the bill of exceptions only states that there was evidence pro and con; and also because this court will not review the findings of fact by the trial court where the evidence is conflicting. The other seven objections raise questions of law, and are as follows: "(1) The proposed incorporation or organization is not warranted by the statute, and is in violation of the Constitution of the state of Missouri. (2) That it is an attempt to delegate the police power that should be enforced by the proper officers and

rate and distinct improvement, but is only one of several elements which, when united, constitute a single, whole improvement. *Murphy v. Peoria*, 119 Ill. 509, 9 N. E. 895.

In an action for the obstruction of a ditch, mistakes in the proceedings laying it out, and fatal to the legality thereof, if raised by proper parties, cannot be urged as a defense. *Freeman v. Weeks*, 48 Mich. 255, 12 N. W. 215.

In an action for damages for obstructing a ditch by which the land of one owner is drained over that of an adjoining owner, the proceeding, under a statute by which the ditch was established, being a final proceeding in a competent court having jurisdiction over the subject-matter and the parties to the record, cannot be collaterally attacked for irregularity by one who was a party to that proceeding. *Chambers v. Kyle*, 67 Ind. 208.

V. Necessity must be shown.

a. To make establishment legal.

To authorize the establishment of a drain, it must be necessary to the public welfare. There is no authority, either to take private property for a right of way, or to assess taxes, unless the public good requires it.

See, upon the general subject of necessity, the cases mentioned in subd. I.

Unless proposed drainage is determined to be for the benefit of public health, the proceedings will be void under the New York laws. *Burk v. Ayers*, 19 Hun, 17.

A finding by trustees that a ditch is necessary is essential to the validity of proceedings for the establishment thereof under the Ohio statutes, and, in the absence of any such finding, the proceedings are void. *Rice v. Wellman*, 5 Ohio C. C. 834.

Highway commissioners cannot condemn a right of way for a ditch across an owner's premises, under the statute giving that right, unless a necessity exists for such ditch or drain in order to carry off the water from the highway or to drain a pond or slough on the highway; which necessity must, by the terms of the statute, be determined by such highway commissioners. Chaplin v. Wheatland Highway Comrs. 129 Ill. 851, 22 N. E. 484.

To sustain the establishment of a ditch, it must not only be found that it will be conducive to the public health, convenience, and general welfare, but also that it is necessary, under the Ohio statutes in terms calling for both findings, since necessity does not follow the first finding. *Caldwell v. Harrison Twp.* 2 Ohio C. C. 10.

tribunals of the state to private individuals.

(3) That the statute under which the petitioners propose to incorporate makes a discrimination between resident owners and nonresident owners of swamp or overflowed lands situate in the state of Missouri, and thereby violates the Constitution of the United States. (4) That the court had no jurisdiction of the subject-matter. (5) That by this class of so-called corporations there is not only an attempt to take objector's property against his will, but a violation of personal right in attempting to make him a member of the corporation against his will." "(10) That the power of assessment and taxation that the so-called corporation or organization sought to be given the organizers or corporations would, if exercised, create an unreasonable burden upon objectors' lands." "(16) Your object-

ors further say said drainage district should not be organized as asked, and made a corporation for the following reasons: (a) There is no public necessity therefor. (b) The corporation would entail burden on your objectors and others like situated without corresponding benefit. (c) The said drainage district is in fact a private corporation when organized under this plan, and your objectors should not be made members thereof against their wills. (d) The drainage district proposed would be neither a public corporation nor of public utility. These articles, as proposed, are defective in not stating a place or location of its business office. (e) The proposed incorporation or organization attempts to subject the property and lands of your objectors to burden and taxation without providing a right of a jury trial."

A finding by the commissioners as to the necessity of a ditch, and that it is demanded by, or will be conducive to, the public health, convenience, or welfare, as required by statute before establishing a ditch, is essential to the validity of the establishment. *Miller v. Graham*, 17 Ohio St. 1.

The draining of marshes and ponds for the promotion of the public health has been held as a public object justifying the taking of private property and the assessment of taxes therefor; but the draining of an owner's farm to render it more valuable to him would not be so regarded. *Anderson v. Kerns Draining Co.* 14 Ind. 199, 77 Am. Dec. 63.

Failure of the court in a drainage proceeding to find affirmatively, either that the proposed drain will improve the public health, or benefit a public highway or street, or be of public utility, as required by the statute under which the proceedings are had, will defeat the right to have the ditch established. *Bass v. Elliott*, 105 Ind. 517, 5 N. E. 663.

The determination of an inferior tribunal that a town ditch is demanded by, or will conduce to, the public health or welfare, being essential to its jurisdiction, under the Wisconsin statutes, must appear on the face of the proceedings in laying out and establishing a ditch, or such proceedings will be void. *State ex rel. Witte v. Curtis*, 86 Wis. 140, 56 N. W. 475.

Ditching proceedings, under a statute not requiring the proposed drain to be of public utility, not alleging or proving that fact, are nevertheless invalid and illegal, where, by a later statute in effect at the date of such proceedings and declared to be in addition to other draining laws, power is given to establish drains "when the same shall be conducive to the public health, convenience, or welfare, or where the same will be of public benefit or utility." *Delsner v. Simpson*, 72 Ind. 435.

A statement in a petition for the establishment of a ditch that its construction would be "conductive to the public health, convenience, and welfare," and would be "of public benefit and utility," is a sufficient "setting forth of the necessity" of the ditch to comply with the statute making that a requirement. *Corey v. Swagger*, 74 Ind. 211.

Before township trustees can establish a public ditch upon private property under a statute providing for the draining of swamps or marshes which are the sources of disease, they must find that the place to be drained by the ditch is a source of disease, and that the draining of it would promote the public health. *Hull v. Baird*, 73 Iowa, 528, 35 N. W. 613.

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Evidence tending to show that a drain sought to be established would, among other things, carry off water from the vicinity of a public schoolhouse is sufficient to support a finding and judgment of the court that the ditch would improve the public health and be of public utility. *Collins v. Rupe*, 109 Ind. 340, 10 N. E. 91.

The fact that an owner's land is not noxious to the public health, or that the same will not be promoted by draining his land, does not make a statute authorizing the organization of a company to construct a drain for the public benefit through his land, and to assess the benefits and injuries thereto, void, where the drain must of necessity pass through his land. *O'Reilly v. Kankakee Valley Drainage Co.* 32 Ind. 169.

Neither the Constitution providing drainage for agricultural and sanitary purposes, nor the drainage laws of Illinois, require that the benefits the lands in a drainage district may receive by reason of such drainage shall be for agricultural or sanitary purposes in the sense that such benefits shall consist alone in improving the capacity to produce agricultural crops or the efficiency of the property for sanitary uses. They require that the districts shall be organized for those purposes; but the only limitation in respect to benefits is that the drains, etc., shall be constructed and maintained by "special assessments upon the property benefited thereby." *Coffax Highway Comrs. v. East Lake Fork Special Drainage Dist.* 127 Ill. 581, 21 N. E. 208.

A ditch cannot be shown not to be conducive to public health so as to entitle owners of land affected to an injunction restraining the letting of a contract for the construction thereof, unless there is manifest error, not merely technical, in the proceedings of the trustees. *Hulse v. Coffland*, 7 Ohio Dec. Reprint, 611.

It is not the length of a proposed ditch, but the extent of the drainage to be affected by it, which determines the power to establish it. *Zimmerman v. Canfield*, 42 Ohio St. 463.

As, under a municipal charter authorizing the construction of a sewer wherever the board of public improvements recommends it as necessary for sanitary or other purposes, a sewer may be constructed for purposes other than sanitary, it is not necessary that the recommendation should state the purpose of the sewer. *Eyeraman v. Blakely*, 78 Mo. 145.

The turnpike road of a corporation is a public highway within the meaning of a provision in the drainage act authorizing the establishment of drains if the same will be of benefit

The case was tried by the circuit court of Holt county, and the following finding and judgment entered by that court:

"And the court now here being further and fully advised in the premises finds that said petition and articles of association were duly signed and filed in the office of the clerk of this court on the 29th day of June, A. D. 1899, and that a summons was duly issued thereon to each and every and all of the resident defendant landowners who did not waive service of such summons, and that service was duly had on each, every, and all of said defendants not so waiving same, as is fully shown by the return of service by the sheriff of this county herein filed, more than thirty days before the first day of the January term, A. D. 1900, of this court; and that such other resident defendants and landowners interested duly waived

the issue and service of such summons, and entered their appearance herein, as will fully appear in their said several written waivers, duly signed, and filed herein; and that all nonresident defendants and landowners not served with summons or waiving the same have been duly and legally notified of the pendency of this proceeding by publication as provided by law. And the court also now being further informed and advised in the premises finds from the evidence adduced that the said petition and articles of association so filed herein were and are duly signed by a majority in interest of the resident owners of the contiguous body of swamp and overflowed lands described in said petition and articles of association, situate, lying, and being wholly in Holt county, Missouri, and that said lands constitute an area exceeding 640 acres in extent, to wit,

to one or more public highways. *Neff v. Reed*, 98 Ind. 841.

The opinion of witnesses as to the public utility of a ditch sought to be established by law is not admissible. *Yost v. Conroy*, 92 Ind. 464, 47 Am. Rep. 156.

A witness who has stated in detail the number of acres in the vicinity of a ditch, and who has given its size and location, may testify, in an action to establish the ditch, as to how many acres of land would be benefited by its construction; and he may also give his opinion as to what effect the drainage of the wet land would have upon the public health of the community, although he is not an expert. *Bennett v. Meehan*, 83 Ind. 566, 48 Am. Rep. 78.

b. To uphold assessment.

A constitutional provision that private property cannot be taken for drains and ditches unless the use is public as judicially determined is intended to regulate the right of eminent domain, and has no reference to special assessments for local improvements. *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163.

Under an act providing that any drains established under that act shall be necessary and conducive to public health, convenience, or welfare, or of public benefit or utility, an assessment on land for the construction of a drain cannot be enforced in the absence of anything in the records of the proceedings to construct the ditch, or any averments in the case, or any evidence, tending to prove that the drain complies with the statutory conditions. *Tillman v. Kircher*, 64 Ind. 104.

In an action to enforce an assessment against land for the construction of a drain under a statute requiring the same to be necessary and conducive to public health, convenience, or welfare, or of public benefit or utility, as a condition of its establishment, it is necessary to establish that the evidence proved, and the board of commissioners found, that such proposed drain would fulfil those requirements. *Bate v. Sheets*, 64 Ind. 209.

A recovery cannot be had in an action to enforce the lien of an assessment upon lands for the construction of a drain, where the evidence fails to establish that the drain was necessary and conducive to public health, convenience, or welfare, or of public benefit or utility, as required by the statute in force at the time the action was brought, although the proceedings to construct the ditch were begun under a prior act, which did not require the public utility of the drain to be shown before it could be established. *Ibid.*

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An assessment for the cost of constructing a sewer cannot be defeated on the ground that there was no necessity for its construction, a previously constructed sewer extending over substantially the same territory, where such sewer is an extension of a general plan of sewerage existing in the city, and it appears that the original sewer was intended to be only a temporary one, and was not constructed along the lines of the streets, but followed natural drains, and was so situated as to render it difficult to be tapped, and its construction, so far as the city was concerned, seems to have been permissive only. *Allen v. Woods*, 20 Ky. L. Rep. 59, 45 S. W. 106.

An assessment on lands for the construction of a ditch is void where the same was made pending an appeal from an order of the county commissioners finding the proposed ditch of public utility and establishing the same, and the fact that subsequently the appellate court, upon a trial *de novo*, rendered a judgment similar to that appealed from, does not reinstate the former judgment so as to render the proceedings had thereunder valid. *Meehan v. Wiles*, 93 Ind. 52.

A sewer which receives the drainage of sewers from intersecting streets is a trunk sewer, and not a local sewer, within the Ohio statutes declaring a local sewer to be one intended for and used exclusively for the drainage and accommodation of lots abutting thereon, assessments for which are valid without a resolution of the council declaring the necessity of the improvements, under a statute giving the board of public affairs exclusive jurisdiction in case of trunk sewers, and dispensing with any action or concurrence of the council in any of the proceedings. *Cincinnati use of Deters v. Standard Wagon Co.* 1 Ohio N. P. 387.

Abutting owners cannot object to the construction of a sewer forming part of a general system, on the ground that all the owners on the street have already made sufficient private arrangements for carrying off sewage from their premises, since § 2385 of the Ohio statutes justifies such contention only where the person has already, by steps taken by the municipal corporation, and to the construction of which his land has contributed, been entirely or in part supplied with drainage. *Johnson v. Avondale*, 1 Ohio C. C. 229.

c. Who to determine necessity.

The question whether a ditch is or is not of public utility being by law expressly committed to the decision of county commissioners, their decision cannot be collaterally attacked by in-

about 23,000 acres in all, which is and was sought to be incorporated and formed into such drainage district for the purpose of having such said lands reclaimed and protected from the effects of water by such drainage or otherwise. And the court further finds that, for the purpose of organizing and incorporating such drainage district, the said petitioners, a majority of the resident landowners of such body of swamp and overflowed lands in said county, have signed articles of association in which the name of said district is stated to be 'Squaw Creek Drainage District No. 1,' and that the number of years that the same is to continue is fifty years, and that the limits of the same, and the names and places of residence of the owners of lands in said district owned by those proposing to organize the same and join the said organization of said district,

and the names of all owners of lands in said district, and the description of lands owned by each, who are or will be benefited by such organization, but who refuse to join in such organization and incorporation. And the court further finds that by the terms of said articles of association the said owners of real estate so forming the said drainage district for said drainage purpose are willing to and have obligated themselves to pay the tax or taxes that may be assessed to pay the expenses of said organization, and to make the improvements that may be necessary to effect the drainage of said lands so here proposed to be formed into said drainage district, and which said articles of association are as follows:" [Setting them out in full.] "Wherefore, the premises considered, the court doth now here order, adjudge, and decree: That the said drainage district be,

junction to restrain the collection of an assessment on lands for the construction of the ditch. *Marshall v. Gill*, 77 Ind. 402.

A drain which will be conducive to the public health, convenience, and welfare, and will be of public benefit and utility, is "necessary." *Blissard v. Riley*, 83 Ind. 300.

When a municipality authorized by statute to construct such sewers as "are required for the benefit or convenience of the citizens, or the promotion of the public health," decides that a sewer ought to be constructed, and directs it to be built, it presumably determines that it is required for the benefit or convenience and promotion of the health of the public, and need not say so in express terms. *State, Van Vorst, Prosecutor, v. Jersey City*, 27 N. J. L. 493.

An ordinance directing the construction of a sewer is conclusive as to its necessity, under a municipal charter directing the construction of sewers whenever the city council may deem it necessary for sanitary or other purposes. *Miller v. Anheuser*, 2 Mo. App. 168.

County commissioners, in determining the preliminary question as to whether a ditch or drain is necessary or will be conducive to the public health, convenience, or welfare, and whether the line described is the best route, are called to the exercise of political, and not judicial, powers, it being a question of public policy, and not of private right. *Zimmerman v. Canfield*, 42 Ohio St. 463.

A general drainage act which gives to a board of commissioners full discretion and power to determine the necessity for the drainage of any particular section of the state, the creation and organization of drainage districts, and to provide ways and means for the accomplishment of the purpose, is void as an unconstitutional delegation to executive officers of solely legislative powers. *People v. Parks*, 58 Cal. 624; *Doane v. Weil*, 58 Cal. 334.

In *Fuller v. Haff*, 4 Ohio C. D. 184, it is said that, whether a ditch will be conducive to public health, etc., is to be submitted (under the Ohio statutes) to the commissioners or trustees; and, while the courts of error will supervise if the records disclose affirmatively that an erroneous construction of the statute has been followed, courts of equity will not, ordinarily at least, set aside their conclusion of fact upon such questions, nor grant the right to tile a ditch where such permission has been refused by township trustees, merely because the court might think that, from the facts disclosed, the privilege or right to tile ought to have been granted.

The statement in a special finding in a ditch proceeding that the ditch would benefit the pub-

lic health is a statement of ultimate fact, and not a mere conclusion of law, since there is no standard by which it can be determined, as a pure matter of law, that a ditch will promote the public health; and such a finding is sufficient to sustain a judgment establishing the ditch and the assessment of land specially benefited by its construction for the cost thereof. *Perkins v. Hayward*, 124 Ind. 445, 24 N. E. 1033.

A statute giving an appeal from the decision of drainage commissioners as to all material questions except the necessity of the drainage to promote public health and welfare is not void as depriving one of his property without due process of law. *State ex rel. Baltzell v. Stewart*, 74 Wis. 620, 8 L. R. A. 394, 43 N. W. 947.

Where a statute gives sewer commissioners, in case they find it necessary to construct a sewer or drain through a part of a street not yet opened, power to apply for the appointment of commissioners to open the street, their decision of the question of the necessity to open the street is conclusive, and cannot be reviewed by the courts. *Re Fowler*, 53 N. Y. 60.

In *Bow v. Smith*, 9 Mod. 94, the lord chancellor refused to set aside an assessment for the construction of a new sluice on the ground that the old one was sufficient, holding that that was a matter to be determined by the commissioners, and not by the court.

When the legislature has reposed in the county board power to establish a public drain when necessary for purposes intended and conducive to the public health, convenience, and welfare, its findings on those points are conclusive. *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292.

A recommendation by the board of public improvements of the passage by the municipal council of an ordinance authorizing the construction of a sewer is equivalent to a declaration that it is necessary, under a charter authorizing the construction of a sewer whenever such board shall recommend it as necessary. *Sheehan v. Martin*, 10 Mo. App. 285.

A township trustee having, under a drainage act, general jurisdiction, upon petition, to establish a drainage ditch in his township when in his opinion the same will be conducive to the public health, convenience, and welfare, his findings in these respects are conclusive as against collateral attacks, as well as his determination as to whether the route selected is practical or the most practicable for the drainage of the lands in question, in the absence of gross abuse of discretion. *Griffith v. Pence*, 9 Kan. App. 253, 59 Pac. 677.

and the same is hereby, formed, created, organized, and incorporated in accordance with said articles of incorporation so signed by the said petitioners and filed herein, as drainage district with the boundaries as hereinbefore set out and described; said district to include all the lands in said boundaries described, except such as have been by said petitioners excepted, and the finding of the court herein, on objections duly filed, not to be benefited by such proposed ditch, drains, dikes, or other improvements sought to be effected, as hereinbefore set out and described, and referred to in the court's findings. That the lands so excepted and excluded shall in no form or manner be assessed with any taxes or benefits for the drainage or improvements to be made hereafter by said organization of the lands included in such drainage district, nor shall

the lands so excepted and excluded, or the owners thereof, be entitled to any right or interest in and to the ditches, dikes, drains, or other improvements of, or made by, the petitioners or incorporators of the said drainage district. That the said drainage district shall be created and incorporated in and by the name of 'Squaw Creek Drainage District Number One (1),' under which name it shall and may sue or be sued, plead and be impleaded, in all courts of law or otherwise of this state. That such drainage district and incorporation shall be and continue as such under said name for the period of twenty years, and shall possess and exercise all the rights and powers and authority given and conferred by and under the laws as provided under §§ 6517 to 6530, and both inclusive, of article three (3), in chapter ninety-seven (97), of the Revised Statutes

Whether the public welfare makes a sewer necessary or expedient, where the law has confided that question to the judgment of a city council, is a question with which the courts have nothing to do. *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

The courts have no power to enjoin the completion of a drain on the theory that it is injurious to the public health, such power being placed exclusively in those tribunals established by law for the sole purpose of determining the question of necessity and of eminent domain. *Swan Creek Twp. v. Brown* (Mich.) 90 N. W. 38.

A finding by a board of supervisors in an order establishing a drainage ditch that "all the requirements of the law have been fully complied with," and that the ditch be declared established, necessarily involves a determination of the necessity for the establishment of the ditch, under Code, § 1041, providing that such a ditch shall be established if determined by the board to be conducive to the public health. *Oliver v. Monona County* (Iowa) 90 N. W. 510.

The legislature has the power to provide for the trial of drainage cases by the court without a jury. *Lipes v. Hand*, 104 Ind. 503, 1 N. E. 871, 4 N. E. 160.

The provision in the Indiana drainage act requiring questions of fact to be tried by the court without a jury does not conflict with the constitutional requirements that "in all civil cases the right to trial by jury shall remain inviolate." *Ross v. Davis*, 97 Ind. 79; *Indianapolis & C. Gravel Road Co. v. Christian*, 93 Ind. 360.

A provision in a ditching law authorizing questions of fact, in proceedings for the establishment of ditches, to be tried by the court without a jury, is not unconstitutional as violating the constitutional provision that in all civil cases the right to trial by jury shall remain inviolate. It is a special statutory proceeding, and not a "civil action" within the meaning of the Constitution, which is limited to civil actions recognized by the common law. *Anderson v. Caldwell*, 91 Ind. 451, 46 Am. Rep. 613.

A proceeding to establish a ditch is a special one, purely of statutory origin, in which the right of a trial by jury may lawfully be withheld by the legislature, as the constitutional provision of the right of trial by jury is applicable only to that clause of common-law actions wherein the right of trial by jury existed when the Constitution was adopted. *Baltimore & O. & C. R. Co. v. Ketting*, 122 Ind. 5, 23 N. E. 527.

Rev. Stat. 1899, § 8251, providing for the or-

ganization of a drainage district by a majority in interest of the resident owners of swamp or overflowed land after notice to all and the granting of a decree fixing its boundaries, after a hearing as to the propriety and necessity of such a district, is constitutional under the principles permitting irrigation, levee, and sewer laws, and is not rendered unconstitutional by the failure to provide any right of trial by jury, as to the formation of such district, no such right in an instance of this kind having ever been given at common law or by the state Constitution. *MOUND CITY LAND & STOCK CO. v. MILLER*.

The construction of drains is the exercise of the police power of the state, to the determination as to the conduciveness of which to public health the legislature may provide that an agreement of only eight of the jurors is necessary. *Thomas v. County Comrs.* 5 Ohio N. P. 453.

A decision of the state court that a special statutory proceeding to establish a drain is not a civil suit or action is not binding on the Federal court in determining whether the proceeding is a civil suit in law or equity within the meaning of the act relating to the removal of causes. *Re Jarnecke Ditch*, 69 Fed. 161.

In a proceeding under a petition for a public drain, it is no violation of the constitutional provision against taking property without due process of law to deny a trial by jury. *Re Bradley*, 108 Iowa, 476, 79 N. W. 280.

A statute providing that the agreement of only eight of the jurors shall be necessary upon the question whether a drainage ditch will be practicable and conducive to public health, convenience, and welfare is not a violation of the constitutional provision that the right of trial by jury shall be inviolate, and private property shall be held inviolate but subservient to public welfare, as the power of eminent domain is not conferred by the Constitution, but is inherent in the state, and, the determination of the question of the necessity for its exercise resting with the legislature, it is not required to be submitted to a jury at all unless so declared by the legislature. *Emig v. County Comrs.* 5 Ohio N. P. 471.

VI. Acquisition of right of way.

a. Right to acquire.

Drainage being for the public good, and within the prerogative powers of government, the necessary rights of way may be procured by right of eminent domain. See note to *Re Tut-*

of Missouri of 1889, and amendments thereto by the general assembly of Missouri of 1895, and as now embodied in the Revised Statutes of Missouri of 1899. It is further ordered, adjudged, and decreed by the court that the said drainage district as now formed, created, and incorporated shall consist of, comprise, and embrace therein only such of the lands scheduled in said articles of association and petition for incorporation as may be contained in the following list and schedule, to wit: "[Here follows the list and schedule of lands contained in the drainage district, among which is the following: '80, 10, 60, 30—W. $\frac{1}{2}$ of N. E. $\frac{1}{4}$. James P. Davis, Napier, Missouri.]" The defendant James P. Davis, after proper steps, appealed to this court.

Messrs. S. F. O'Fallon and C. A. Anthony for appellants.

Hill (N. Y.) 49 L. R. A. 781. The public highways are always available for the purpose. See note on *Liability of municipal corporations for drainage*, post. — Even property which has been devoted to other public uses may be utilized for the purpose of drainage if the necessity therefor exists.

A release of the right of way for a drain need not be obtained from the abutting owners along an established drain by the proposed use of which they will be benefited, where its dimensions are not changed. *Sturm v. Kelly*, 120 Mich. 685, 79 N. W. 930.

A city, having determined that a sewer is desirable, is only bound to prove that the taking of the property sought to be condemned is necessary for the construction of the sewer, where by statute sewerage has been declared a public use for which private property may be taken. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

The right of highway commissioners to enter upon the land of another for the purpose of constructing a permanent ditch or drain over the same, and to maintain the same permanently for the purpose of draining a highway, involves a freehold. *Dierks v. Addison Twp. Highway Comrs.* 142 Ill. 197, 31 N. E. 496.

Since the expression of the legislative will authorizing the taking of property for public purposes is of itself due process; and since the ditch act itself provides for notice to interested parties, and gives such parties a right to appeal in case they are aggrieved,—such act does not authorize the taking of property without due process of law. *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707.

Highway commissioners have no authority to exercise the power of eminent domain for the purpose of carrying over an adjoining farm the sewage which a municipal corporation may deposit upon the highway by drains or other appliances, under a statute authorizing them to enter upon any adjacent lands for the purpose of opening drains, etc., necessary to drain a highway, especially where the sewage is conducted in an unnatural direction. *Dierks v. Addison Twp. Highway Comrs.* 142 Ill. 197, 31 N. E. 496.

A right of way of a railroad company is subject to appropriation and use for the construction thereon, parallel to its used roadway, of a county ditch which will not be incompatible or interfere with the exercise by the company of any of its franchises, under a statute giving commissioners power to construct ditches, in general terms without restraint or qualification on account of the nature of the use or owner-
60 L. R. A.

Messrs. John Kennish and Henry T. Alkire, for respondents:

The power of the legislature to enact this statute cannot be questioned, unless the statute is in violation of some provision of the Missouri Constitution or the Federal Constitution.

Ex parte Roberts, 166 Mo. 207, 65 S. W. 726; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *State v. Biazan*, 162 Mo. 1, 62 S. W. 828; *Chicago, D. & V. R. Co. v. Smith*, 62 Ill. 273, 14 Am. Rep. 99; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015.

The drainage district is a public, not a private, corporation.

Morrison v. Morey, 146 Mo. 543, 48 S. W. 629; *Harvard v. St. Clair & M. Levee & Drainage Co.* 51 Ill. 130.

No provision of either the Constitution of Missouri or the Constitution of the United States is violated by the statute.

ship of the lands on which they may be located. *Northern Ohio R. Co. v. Hancock County*, 63 Ohio St. 32, 57 N. E. 1023.

But lands in Ohio appropriated and in use for railroad purposes cannot thereafter be condemned for public ditches or drains, where such use would prevent the construction of a side track or double track, or would interfere with the full enjoyment of the land for railroad purposes. *Lake Erie & W. R. Co. v. Seneca County*, 57 Fed. 945.

The location of a public ditch in part on the right of way of a railroad company is not unauthorized on the ground that property taken for one public use cannot again be appropriated to another public use, where it does not appear that the location of the ditch in any way interferes with the uses of the railroad company,—especially as the latter is not complaining. *Steele v. Empson*, 142 Ind. 397, 41 N. E. 822.

A public drain may be established and placed on the right of way of a railroad company if it does not impair or destroy the use of such right of way by the railroad company. *Baltimore & O. S. W. R. Co. v. Jackson County*, 156 Ind. 280, 58 N. E. 837, 59 N. E. 856.

But in an earlier case it was held that the court has no jurisdiction or power to establish and order the construction of a public ditch longitudinally upon the right of way of a railroad company, especially where its use for that purpose would interfere with its public use for railroad purposes for which it was acquired by condemnation, in the absence, in the drainage law under which the ditch is established, of clear and express terms or necessary implication indicating a legislative intent to subject lands devoted to a public use already in exercise to drainage purposes. *Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144.

Express power is necessary to enable a municipal corporation to condemn property for sewer purposes. *Butler v. Thomasville*, 74 Ga. 570.

The trustees of a village have no power to acquire a lot on which to locate buildings for pumping works for drainage purposes by special assessment under the Illinois drainage laws, but must acquire title thereto by regular condemnation proceedings. *Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846.

A statute containing a provision requiring of cities of a particular class, as a condition precedent to the right to exercise the power of eminent domain for sewer and other municipal purposes, an unavailing effort to agree with the owners of the property sought to be acquired,

Kansas City v. Ward, 134 Mo. 172, 35 S. W. 600; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Rutherford v. Maynes*, 97 Pa. 78; *Turlock Irrig. Dist. v. Williams*, 76 Cal. 360, 18 Pac. 379; *Garrett v. St. Louis*, 25 Mo. 505, 69 Am. Dec. 475; *St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. ed. 763, 767, 8 Sup. Ct. Rep. 921; *Daily v. Scope*, 47 Miss. 367; *Emery v. San Francisco Gas Co.* 28 Cal. 346.

The constitutional provision as to maximum rate of taxation is not violated.

Morrison v. Morey, 146 Mo. 543, 48 S. W. 629; *Kansas City v. Bacon*, 147 Mo. 259, 48 S. W. 800.

The formation and powers of such corporations as the one in question have been uniformly sustained by this court.

Egyptian Levee Co. v. Hardin, 27 Mo. 495,

72 Am. Dec. 276; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629; *St. Joseph v. Anthony*, 30 Mo. 537; *St. Joseph v. O'Donoghue*, 31 Mo. 345; *St. Louis use of Creamer v. Eters*, 36 Mo. 456; *St. Louis use of Creamer v. Clemens*, 36 Mo. 467; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53; *Farrar v. St. Louis*, 90 Mo. 370; *Kansas use of Coates v. Ridenour*, 84 Mo. 253; *St. Louis v. Ranken*, 96 Mo. 497, 9 S. W. 910; *Independence v. Gates*, 110 Mo. 374, 19 S. W. 728; *St. Joseph use of Gibson v. Owen*, 110 Mo. 445, 19 S. W. 713; *Kansas City v. Ward*, 134 Mo. 172, 35 S. W. 600.

Marshall, J., delivered the opinion of the court:

The first question presented for adjudication in this case is the constitutionality of the drainage laws of this state. The first drainage law in this state was the act of

is a violation of a constitutional provision for uniformity of operation and the prohibition of special laws where a general law can be made applicable, where there is a general statutory provision that any "person," which includes a public corporation, may acquire private property for specified purposes. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

Drainage districts are authorized by the drainage laws of Illinois to obtain control of natural channels outside the districts, which serve as outlets for such districts, for the purpose of enlarging and deepening the same when necessary to render the drainage system available for the purpose for which the districts are organized, by condemnation under the eminent domain act, by which the same pass under the absolute control of the district authorities, and are as much subject to their control for the purpose for which they were condemned as any ditches within their districts. *Union Drainage Dist. v. O'Reilly*, 132 Ill. 631, 24 N. E. 426.

A statute providing for the construction, reparation, and perfection of drains, ditches, and levees, does not embrace more than one subject contrary to constitutional provisions. *Blake v. People use of Caldwell*, 109 Ill. 504.

Where it appears that a person objecting to the construction of a drain through his land obtained title thereto after proceedings for the construction of the drain had been instituted, and for the purpose of raising certain objections which the original owner had lost the right to make, the sale is not a bona fide one. *Hackett v. Brown* (Mich.) 8 Det. L. N. 559, 87 N. W. 102.

An irrevocable right of drainage across another's land cannot be established where the provisions of a statute specially applicable to the case were not observed, and where a parol license was shown revocable under the statute of frauds. *Lawrence v. Springer*, 49 N. J. Eq. 289, 24 Atl. 938, *Reversing* 47 N. J. Eq. 461, 21 Atl. 41.

b. How acquired.

1. By contract.

Of course the right of way may be acquired by contract, and an attempt to procure it in that way is generally a prerequisite to a resort to the machinery of the law of eminent domain.

A license to drainage commissioners to construct a drain through property does not vest any title, or give an irrevocable easement in the land. *Olmsted v. Dennis*, 77 N. Y. 878, 60 L. R. A.

A railroad company which gives a written consent or license for a drain to cross its tracks, and erects a culvert for that purpose, sufficiently releases the right of way, although it does not execute a formal release. *Sturm v. Kelly*, 120 Mich. 685, 79 N. W. 930.

But a release of the right of way for one drain cannot operate as a release for another. *Ibid.*

A written contract entered into between a landowner and a municipal corporation, by which the former, in consideration of the dismissal of condemnation proceedings instituted by the latter to acquire the right of way for a sewer across his land, agreed to allow the municipal corporation to enter upon such premises and construct a drain without making him any further compensation, is a sufficient license for the entry by such municipal corporation and the construction of such drain. *Bloomington v. Burke*, 12 Ill. App. 814.

The act conferring upon cities power to seize property under the right of eminent domain to construct sewers and drains does not deprive them of the power to acquire private property by contract for that purpose, where such power is not denied by any statute. *Leeds v. Richmond*, 102 Ind. 372, 1 N. E. 711.

A proceeding to lay out a drain will be quashed where the commissioner has not attempted to obtain, as required by statute, a release of the right of way and damages from the property owners through whose premises the drain is to pass. *Whisler v. Lenawee County Drain Commissioner*, 40 Mich. 591.

Upon a proceeding by highway commissioners to condemn land for the digging of a ditch across the lands of another in pursuance of statute, it must appear from the record of the official proceedings of such commissioners that the digging of the ditch was necessary in order to carry off the water from the highway, and that they had negotiated with such owner for leave to take a part of his premises for the ditch, and had failed to obtain such consent upon a just compensation having been offered him therefor; and parol evidence that the digging of the ditch was necessary in order to carry off the water from the highway is incompetent. *Chaplin v. Wheatland Twp. Highway Comrs.* 129 Ill. 651, 22 N. E. 484.

A landowner may enjoin the collection of a special assessment for the construction of a sewer across his land, where he was induced to withdraw valid objections to its confirmation by an agreement entered into by the municipal corporation constructing such sewer to condemn

April 21, 1877 (Acts 1877, p. 285). The plan of that act was that upon petition of the owners of a majority interest of the lands to be drained the county court appointed commissioners, who managed the work. The cost was apportioned between the public at large and the individuals whose land was specially benefited, and special assessments were levied accordingly. Then, in 1879, an act was passed (Acts 1879, p. 132), which is the origin and basis of the present law, but it was expressly provided that it should not be construed to alter, amend, or repeal the act of 1877, above referred to. This act contained twenty sections. The scheme of the act was to authorize the formation of drainage districts, to consist of not less than 640 acres each, by the people of the district, and to authorize the people of such districts to manage the

business. It permitted the organization of such a drainage district by the majority in interest of the resident owners of swamp and overflowed lands signing articles of association, submitting them to the circuit court, with a petition praying for a decree creating such district. It also provided for notice to all persons in the proposed district who did not join in the petition, and for a trial by the circuit court of the propriety and necessity of such a district, and for fixing the boundaries of the district, and for excluding all the land in the district that would not be benefited by such drainage. It provided for the election, by the people, of a board of supervisors to manage the business; the procurement, by condemnation, if necessary, of a right of way for ditches, drains, and dikes, for levying an assessment, not exceeding 50 cents per acre per year, for

the right of way over his land for a street, which it did, but, after the confirmation of the special assessment, vacated the condemnation judgment and dismissed the proceedings, by repealing the ordinance for laying out the street along such right of way. This conduct would warrant the inference that, having acquired possession, the city had no intention of laying out a street, but had a fraudulent design to disregard the agreement, by which such landowner lost a substantial right. *Dempster v. Chicago*, 175 Ill. 278, 51 N. E. 710.

A contract by which drainage commissioners are permitted to use the banks of a river, and to deepen and widen the stream, and to cut a ditch through the owner's land, paying him the compensation, is one for an interest in land within the statute of frauds. *Phillips v. Thompson*, 1 Johns. Ch. 131.

The owner of land which is so situated as conveniently to receive surface water and sewage collected by a city and discharged from the sewer does not dedicate the land to such purpose by the payment of an assessment for the construction of the sewer,—especially where he has repeatedly protested against the discharge of the sewage upon his premises. *Van Rensselaer v. Albany*, 15 Abb. N. C. 487.

One whose land is not crossed by a drain, but whose premises are in the assessment district, cannot attack the proceedings on the ground that the releases of all the right of way have not been given, where the commissioner procured releases from the supposed owners, and the rights of the parties in interest had been determined in a suit for an injunction, from which no appeal has been taken. *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233.

An oral promise by a property owner to sign a written consent to the construction of a ditch across his land provided the signature of an adjacent owner is obtained does not amount to a license, where, after the latter's signature is obtained, the party giving the promise refused to consent to the construction of the ditch. *Hitchens v. Shaller*, 32 Mich. 496.

A petitioner for the construction of a ditch, who released the right of way and all claim for damages, and entered into a contract to dig the ditch across his own lands, and agreed that the contract might be relet upon his failure to perform, waives all right to recover damages from parties who thereafter, in good faith, attempt to construct the ditch, if, at the time of the execution of the release, he knew, or by reasonable diligence could have known, of existing defects in the proceedings; but, if he only learned of them in the exercise of reasonable

diligence after contracting to construct the ditch, he may recover damages. *Hopkins v. Briggs*, 41 Mich. 175, 2 N. W. 199.

A common council authorized to construct sewers, purchase land therefor, establish the assessment district, and to fix finally the amount and apportionment of the assessment, may agree with a property owner who deeds the right of way, to exempt his land from assessment for the construction of the sewer, although the original assessment is, under the charter, let by a board of commissioners. In such case the city, having enjoyed the fruits of the contract, is estopped from questioning the power of the council to make it. *Colt v. Grand Rapids*, 115 Mich. 493, 73 N. W. 811.

A municipal corporation is not liable to a landowner for the amount allotted him as the value of property proposed to be taken for the opening of a street because it constructs a sewer through such premises, where the condemnation proceedings for the opening of the street are subsequently dismissed upon motion of the landowner because of a failure on the part of the municipal corporation to pay the award; and such owner is not entitled to a sum equal to the difference between the award and an assessment of the benefits levied against his land, deposited by the municipal corporation in court. *Pearce v. Chicago*, 176 Ill. 152, 52 N. E. 27.

An action to compel a village to purchase at a price to be fixed by the court land which it has unlawfully entered upon and appropriated to sewer purposes is of an unprecedented character, and cannot be maintained either at law or in equity. *Mitchell v. White Plains*, 91 Hun, 189, 36 N. Y. Supp. 204.

The registry laws apply to the permission given by the owner of land to a municipality to construct a drain through his land, whether the agreement conveys the land, creates an easement, or is a mere license which has become irrevocable; so that, if there has been no by-law authorizing the land to be taken, the interest of the municipality therein would be invalid as against a registered deed executed by an assignee of the owner, who was a purchaser for value without notice. *Toronto v. Jarvis*, 25 Can. S. C. 237.

2. By eminent domain.

In taking land for a sewer, the limit of the public right is the public necessity, and the residue of the use of the land so used remains unaffected in the owner. *Wilson v. Scranton*, 141 Pa. 621, 21 Atl. 779.

But a title in fee, and not merely an ease-

benefits, to pay the expenses of surveys, building drains, ditches, dikes, etc., and the appointment by the county court of a drain commissioner, whose duty it was to survey, locate, mark out, estimate the cost of, and contract for the construction of, all such drains, ditches, dikes, etc. This act passed into the revision of 1889, and became section 6517 *et seq.* In 1895 the legislature amended three sections of the law, and added a new section, and the law as thus amended passed into the revision of 1899, and became § 8251 *et seq.*, Rev. Stat. 1899, and this proceeding is governed by the law as it was thus enacted and perfected.

Boiled down, the objections to this law may be said to be that it is unconstitutional, because it authorizes the formation of a private corporation for the purpose of improving private property, and forces private

individuals to become members of such corporation against their will, and assesses a tax against their property for the improvement of all the property in the district that is benefited by such drainage; that it discriminates between resident and nonresident owners; that it creates an unreasonable burden upon the objectors' lands without any corresponding benefit; and that it subjects the land to burden and taxation without providing a right of trial by jury. Section 20 of article 2 of the Constitution is also said to be violated by this law. That section is as follows: "That no private property can be taken for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be pre-

ment, will be acquired by a town in land taken under a statute giving the right to remove obstructions from a brook and alter its current for sewer purposes, to effect which it may "take or purchase land," and providing that the "title to land so taken shall vest in the municipality." Page v. O'Toole, 144 Mass. 303, 10 N. E. 851.

Where a right of way across private land for the purpose of constructing a sewer was condemned under a statute which had been previously repealed by the adoption of a general statute covering the same subject, the proceedings had thereunder were void, and persons entering on the premises for the purpose of constructing the sewer were trespassers. State v. Tenny, 58 S. C. 215, 36 S. E. 558.

A proceeding to condemn land for a drain under a statute providing for the condemnation of land by a village for a drain is not complete until such resolution or order is recorded, such recording being a condition precedent to the right to enter upon the land and construct the drain. Svensen v. West Salem, 114 Wis. 650, 91 N. W. 121.

c. Compensation must be made.

1. In general.

Permanent appropriation of land for a sewer or gutter cannot be made, even for the public good, without compensating the owner; and, as no general powers to condemn appertain to the duties of corporation officers, an incorporated town which has no authority conferred upon it to condemn land for these purposes may not make an appropriation of private property therefor. Aldrich v. Paine, 106 Iowa, 461, 76 N. W. 312.

Land dry and free from nuisance cannot be permanently appropriated for drains for the benefit of other lands, or even for the general welfare, without compensation. Re Church of Holy Sepulchre, 61 How. Pr. 315.

Land can be taken for a public drainage ditch without the owner's consent only by making just compensation. People *ex rel.* Williams v. Haines, 49 N. Y. 587.

Authority to drainage commissioners, to enter upon and occupy such lands of private owners as may be needed for the purpose of draining wet and swamp lands, is a taking or appropriation of the lands for public purposes, for which compensation must be made. People *ex rel.* Cook v. Nearing, 27 N. Y. 306.

The owner of land and a sewer thereon is entitled to compensation if such sewer is appropriated, according to the nature of the ap-

propriation, whether it be so appropriated as to deprive him of all dominion or control over it, or merely by the taking of an easement therein for a special purpose, not depriving him of his rights further than that he shall not use the same for purposes inconsistent with such special purposes. McDonald v. Cincinnati, 4 Ohio N. P. 253.

A landowner is entitled to have his damages for land taken for the construction of a drainage ditch paid within a reasonable time, to be fixed by the court, after the condemnation proceedings, a failure to do which will forfeit the right to appropriate. Skagit County v. McLean, 20 Wash. 92, 54 Pac. 781.

Building a sewer across private property requires compensation under a constitutional provision that private property shall not be taken for public use without compensation, although the market value of the property is not diminished. Smith v. Atlanta, 92 Ga. 119, 17 S. E. 981.

The taking of an easement for a drainage ditch is a taking of private property within the spirit and meaning of a constitutional prohibition. Reeves v. Wood County, 8 Ohio St. 333.

The location and construction of a public ditch across or upon the right of way of a railroad company, though the ditch be constructed by tilling under the surface, is an appropriation of the company's property which entitles it to compensation for the value of the interest so taken. Lake Erie & W. R. Co. v. Hancock County, 63 Ohio St. 23, 57 N. E. 1009.

That section of the highway laws of Illinois providing that, when highway commissioners desire to cut a ditch across the land of another for the purpose of draining a highway, the landowner shall be summoned before a justice of the peace "for the purpose of having the damage assessed which such owner may sustain," etc., is broad enough to cover compensation for the land taken, as well as damages to that not taken, and is, therefore, not in conflict with that clause of the Bill of Rights providing that private property shall not be taken or damaged for public use without just compensation. The sense in which the word "damage" is used in the statute is the total loss the owner would suffer by having the ditch on his land. Chaplin v. Wheatland Twp. Highway Comrs. 129 Ill. 651, 22 N. E. 484.

The clause in the highway laws of Illinois authorizing highway commissioners to apply to a justice of the peace to have the damages assessed which an owner will sustain by the cutting of a ditch to drain a highway across his premises, "unless the owner of such land, or

scribed by law; and that, whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public." It is only necessary to say of this last contention that this section does not apply to such a case as this. *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163. The levee laws of this state were opposed upon many of the grounds relied upon herein against the drainage laws, but the constitutionality of the former was sustained by this court in *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276; *Columbia Bottom Levee Co. v. Mcier*, 39 Mo. 53; *Morrison v. Morey*, 146 Mo. 543, 48 S. W. 629; and *State ex rel. Stotts v. Wall*, 153 Mo., loc. cit. 220, 54 S.

W. 465. Irrigation laws have been attacked upon much the same grounds, but their constitutionality has been upheld. *Turlock Irrig. Dist. v. Williams*, 76 Cal. 360, 18 Pac. 379. Levees keep out the water. Irrigation canals bring in the water. Drains take out the water. The public has an interest in each kind of such laws. By keeping out the water, the health of the inhabitants is conserved, and the value of the lands increased, and the revenues of the state enhanced. Thus, the state is directly interested both for sanitary and financial reasons. The irrigation laws bring in the water, and make valuable the arid lands, and thereby enhance their value, and hence bring in more revenue to the state. Thus the state has a direct pecuniary interest, although not a sanitary interest. The principles underlying the cases upholding the

his agent, shall first consent to the cutting of such ditch," means, unless the owner shall first consent after the commissioners have offered him an amount deemed by them to be a just compensation for the damages to be sustained by him. No owner can be compelled to permit a ditch to be cut across his land, unless an offer is made to compensate him therefor. *Ibid*.

Under a drainage law making provision for compensation to an owner for land taken for ditches and damages to land not taken, which are required to be paid before entry thereon, it would seem that where, by an enlargement of the drainage district, an additional burden of water is precipitated upon his land to its injury, the damages consequent thereto should be assessed and paid by the district prior to the discharge of such additional waters upon his land. *Elmore v. Drainage Comrs.* 135 Ill. 269, 25 N. E. 1010.

Corporations existing for drainage purposes are public corporations, and land taken for the purpose of a ditch is for a public purpose, and compensation must be made to the owner before his land can be taken for such public use. *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588.

A town which owns the fee in its streets is entitled to recover compensation as an individual, for injury thereto by the construction of a county drain through them, under Iowa Code 1873, § 1210, which prescribes a procedure for persons claiming compensation for lands taken in the construction of a drain, ditch, or water course. *Aldrich v. Palne*, 106 Iowa, 461, 78 N. W. 812.

No objection can be made to the laying out of a sewer on the ground that compensation has not been made as required by the Constitution by one who assented to its laying out, and connected his private drain with it. *Haskell v. New Bedford*, 108 Mass. 208.

Where, at the time of the establishment of the location of a drainage ditch, a property owner made a claim for damages, which was allowed, and in a subsequent action by him to enjoin the completion of the ditch it did not appear that the damage which he would suffer by its completion would be substantially different from that for which he has already been given compensation, such relief will not be granted. *Oliver v. Monona County (Iowa)* 90 N. W. 510.

The failure of a board of supervisors to have damages to the property through which a drainage ditch was to pass appraised and paid or secured before locating the ditch is not a jurisdictional question, and cannot, therefore, be objected to in a collateral attack. *Ibid*.

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A drainage law which provides for the taking of private property for the right of way of ditches to drain swamps without condemnation proceedings, although providing for the ascertaining and payment of the owner's damages if he comes into court and files his claim, is contrary to the constitutional provision prohibiting the taking of private property without first having made compensation therefor; neither can the law be sustained as a proper exercise of the police power for the abatement of a nuisance, where the act does not require the nuisance to be of such imminent danger to the public welfare as to justify the taking of private property of others than those maintaining the nuisance, without compensation. *Askam v. King County*, 9 Wash. 1, 36 Pac. 1097.

A ditch law is invalid which does not provide that the compensation for damages for land appropriated for any given ditch shall first be paid in money or secured by deposit, as required by § 19, art. 1, of the Ohio Constitution, but at most only requires its computation in connection with the costs and expenses of constructing the work, to be provided for by assessment, although there is a further provision that the commissioners shall, upon actual view of the premises, fix and allow compensation, and assess such damage as will accrue, but with nothing to show from what source the compensation is to be derived. *Smith v. McKee*, 3 Ohio Dec. Reprint, 578; *Beck v. Medina County*, 9 Ohio Dec. Reprint, 108.

A statute authorizing township trustees to locate ditches and drains upon lands adjoining or lying near a public road whenever in their judgment such ditches or drains are necessary for the benefit of the road, but making no provision for compensation to the owner in money to be assessed by a jury for the land appropriated, is invalid under a constitutional provision requiring that, when private property is taken for the purpose of making or repairing roads, a compensation shall be made to the owner in money, and such compensation shall be assessed by a jury. *Watson v. Pleasant Twp.* 21 Ohio St. 667.

When a ditch proceeding is allowed to continue regardless of whether the owner's compensation should first be "paid in money, or first secured by a deposit of money," and without affording him opportunity to claim or prove compensation and damages, such ditch proceeding is void, and the court will enjoin further proceedings until the ditch is legally established. *Zimmerman v. Canfield*, 42 Ohio St. 463.

A law is not unreasonable and void which

validity and constitutionality of levee and irrigation laws apply with even greater force to drainage laws; for, from a sanitary point of view, the dangers to health arising from overflows occasioned by floods are intermittent, while the dangers to health arising from marshes and stagnant pools of water are continuous, and ever present. There is certainly as much, if not greater, reason and necessity for drainage laws, as there is for levee and irrigation laws. Drainage laws are closely akin to sewer laws. In fact, the only difference between the two is that they are called sewers in cities and closely populated communities, while they are called drains in rural and agricultural communities, and the further difference that sewers are generally covered over to prevent the escape and dissemination of foul odors and noxious gases, and conceal the passage of

their contents through the streets, while drains are open. There is, however, no difference in the legal principles applicable to the two. If one is constitutional, so is the other. If private property that is benefited by a sewer can be charged for the benefits it receives against the wishes of the owner, so, also, can the agricultural lands be charged for the benefits conferred upon them. The constitutionality and validity of sewer laws have been uniformly upheld. *St. Louis use of Oremer v. Olters*, 36 Mo. 456; *Kansas City v. Kidenour*, 84 Mo. 253; *St. Joseph use of Gibson v. Owen*, 110 Mo. 445, 19 S. W. 713; *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559; *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163. So, likewise, the validity and constitutionality of reclamation or drainage laws has been upheld by the courts. *Hagar v. Reclamation Dist. No. 108*, 111 U.

falls to provide for the payment of damages from the construction of a drainage canal suffered when no benefits have accrued, when the general law affords a remedy therefor against the corporation. *Brown v. Keener*, 74 N. C. 714.

A constitutional provision in relation to drainage, which authorizes the passage of laws permitting the owners of land to construct drains across the lands of others, does not authorize the taking of private property for the purpose of drainage without making just compensation, merely because the constitutional provision is silent on the subject of compensation to the owners of the lands over which such drains are to be constructed. *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588.

The failure of a statute authorizing the construction of a sewer to provide for the payment of compensation for the land taken does not render the statute unconstitutional, where it prescribes that, if the sewer commissioners cannot agree with the owners, they may proceed under the condemnation law of the state, which does not permit lands to be taken except upon payment of compensation. *Swikehard v. Michaels*, 81 Hun, 825, 29 N. Y. Supp. 777, 80 N. Y. Supp. 1185.

But it has been held that, where the statutes limit the right to apply for damages for the construction of a sewer to six months from the decision to take the land, no application can be made after that time, although the owner of the land injured had no notice of the taking until after the expiration of the six months. *Cambridge v. Middlesex County*, 6 Allen, 134.

A statute requiring compensation to be made for injuries sustained by the taking of land for sewer purposes does not apply to the temporary draining of a pond while constructing the sewer along a highway. *Chelsea Dye House & Laundry Co. v. Com.* 164 Mass. 350, 41 N. E. 649.

The owner of land over which it is sought to cut a ditch or drain for public use is entitled, under the Constitution to be paid the value of the ground used for the ditch, and also any damage resulting to the rest of this land by reason of the construction and maintenance thereof. *Chaplin v. Wheatland Highway Comrs.* 129 Ill. 651, 22 N. E. 484.

The mere fact that the construction of a sewer near private property will be a nuisance at common law does not constitute it a taking for which compensation must be made to the owner, unless required to be made by statute. *Lincoln v. Com.* 164 Mass. 368, 41 N. E. 489. 60 L. R. A.

2. When and how made.

Where the statute providing that the allowance by the proper officers of damages to be paid for land taken for a drainage ditch makes the amount payable out of the general fund of the county, there is a sufficient payment or deposit of the money to authorize the continuance of the proceedings under a constitutional provision making that a condition precedent to the taking, where there is nothing to show that the county is insolvent. *Zimmerman v. Canfield*, 42 Ohio St. 463.

A statute authorizing the condemnation of lands for sewer purposes, which provides that commissioners to make the award shall issue improvement certificates in their own names payable any time they designate within two years, pledging the credit of the cities containing the sewers, is unconstitutional, as failing to secure payment for the private land taken at the time it is appropriated, and as not securing the payment in money. *State, Butler, Prosecutor, v. Ravine Road Sewer Comrs.* 39 N. J. L. 665.

Wis. Rev. Stat. § 1237, providing a method whereby the owner or occupant of lands entered upon and taken for a drain in the improvement of a highway may, upon application, have his damages appraised and paid by the town, satisfies the provision of Wis. Const. art. 1, § 13, requiring just compensation when land is taken for public use, as the taxable property of such town constitutes a pledge or fund to which such owner may with certainty resort for payment in the prescribed manner. *Smeaton v. Martin*, 57 Wis. 364, 15 N. W. 403.

Provision for compensation for a right of way for a drainage ditch is sufficient under a constitutional provision that the property cannot be taken until compensation is made, where, in case no funds are on hand arising from the levy of the drainage tax, warrants may be issued by the court which may be negotiated and the proceeds used in paying for a right of way. *Redmon v. Chacey*, 7 N. D. 231, 73 N. W. 1081.

But a provision for payment of compensation for a right of way for a drainage ditch to be made in county warrants is not sufficient where there is a possibility that there may be no funds out of which to pay the warrants, under a Constitution providing that private property shall not be taken for public use without just compensation having been first made to, or paid into court for, the owner. *Martin v. Tyler*, 4 N. D. 278, 25 L. R. A. 838, 60 N. W. 392.

In drainage assessments, benefits to land in a drainage district cannot be set off against damages for land taken for a ditch. No different

S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441; *Rutherford v. Mynes*, 97 Pa. 78; *Colfax Highway Comrs. v. East Lake Fork Special Drainage Dist.* 127 Ill. 581, 21 N. E. 206; *Riebling v. People use of Columbia Levee & Drainage Dist.* 145 Ill. 120, 33 N. E. 1090; *Kinyon v. Du-chene*, 21 Mich. 498; *Sessions v. Crunkilton*, 20 Ohio St. 349; *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634. California, Pennsylvania, Illinois, Michigan, Ohio, and New Jersey have reclamation laws, based upon the same principles as our statute. The details of the laws may be different, the agencies employed by the state to carry the laws into effect may differ, but this in no wise affects the constitutionality of the laws. The fact that under some laws the county courts are charged with the duty

of carrying the law into effect, while in others commissioners are provided for that purpose, and in others the people themselves are empowered to organize into corporations called "drainage districts," makes no difference. It is competent for the state to raise up a governmental agency for the enforcement of its police powers, and for the purpose of enhancing its revenues and carrying its revenue laws into effect. The agency thus created is an arm of the state, a political subdivision of the state, and exercises prescribed functions of government, and is not a private corporation in any sense. *Morrison v. Morey*, 146 Mo., loc. cit. 561, 48 S. W. 629 (where the people were authorized to form a corporation); *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634 (where commissioners were to be appointed by a justice of the supreme court); *Sessions*

rule exists with reference to drainage districts than with reference to condemnation proceedings in which private property is to be taken for public purposes. *Rayson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588.

But in an action to assess the damages to a landowner in a drainage district for the right of way for a ditch, the jury may, by express statutory provisions, offset the benefits against the damages. Taking land in a drainage district for drainage purposes is not a taking of private property for public use within the meaning of a clause in the Constitution requiring just compensation to be made therefor. *Winkelmann v. Drainage Dist.* 24 Ill. App. 242.

A provision that land required for a drain must be paid for before the work is commenced is for the benefit of the owner, and he may waive it. *Olmstead v. Dennis*, 77 N. Y. 378.

A land owner who fails to avail himself of his statutory right to have his compensation for damages fixed, and makes no opposition to the completion of the canal, thereby forfeits his right to previous compensation, and is not entitled to restrain the use of the canal by an injunction. *Jefferson & L. P. R. Co. v. New Orleans*, 31 La. Ann. 478.

If the owner of land in a drainage district consents that the amount allowed him for land taken shall be applied to the reduction of his benefits assessed, and pays the excess of benefits over the amount allowed him for compensation, he cannot complain that he was not paid in whole for the land. *Elgin, J. & E. R. Co. v. Hohenshell*, 193 Ill. 159, 61 N. E. 1102.

When the statute provides that a municipal corporation shall make due compensation for damages necessarily resulting from the exercise of power to construct a drain on private lands, the compensation need not be made, or proceedings instituted therefor, until after it has been so taken. *Stonehouse v. Enniskillen Twp.* 32 U. C. Q. B. 562.

Under the New York drainage acts of 1869 and 1881, it is not necessary that the damages awarded to the owner of land over which the ditch is constructed should have been actually paid to him prior to the levying of the assessment. *Re Swan*, 35 Hun, 625.

Compensation for land taken for draining a swamp cannot be made by assessing the amount upon the owners of the land drained according to the number of acres owned by each respectively. *Hartwell v. Armstrong*, 19 Barb. 166.

An award of the damages sustained by the owner of land for the cutting of a ditch across the same by a municipal corporation, having 60 L. R. A.

been made by arbitrators mutually chosen in pursuance by a resolution of the city council authorizing the submission of the controversy to arbitration, can be enforced against such municipality by an action in assumpsit, in the absence of positive law disabling it from submitting unsettled claims to arbitration. *Shawneetown v. Baker*, 85 Ill. 568.

d. Procedure.

A statute authorizing the establishing of drains over the lands of others and the assessment thereon of benefits and damages is to be strictly construed in favor of the landowners. *Bogart v. Castor*, 87 Ind. 244.

Proceedings for taking private property for the construction of a drainage ditch must be in strict compliance with the legislative enactments authorizing them. *Nishnabotna Drainage Dist. v. Campbell*, 154 Mo. 151, 55 S. W. 276.

In a proceeding to acquire land under right of eminent domain for drainage purposes, the facts necessary to give the court jurisdiction must appear in the petition. *Re Marsh*, 71 N. Y. 315, Reversing 10 Hun, 49.

Proceedings to condemn land for a sewer are not void for failure to file a petition setting forth the inability of the parties to agree as to the compensation to be paid, where the statute leaves the regulation of the proceedings to the municipal ordinance, and the evidence shows their inability to agree, which is all the ordinance requires. *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

In proceedings to condemn a sewer route over a tract of land including platted lots which are a part thereof, it is not necessary to mention them if the description given as to the tract necessarily includes them. *Ibid.*

In an action by a sanitary district, created under an act of legislature with ample power to condemn such a quantity of land as may reasonably be necessary to carry out the object of the district, to condemn a strip of land over a quarter of a mile wide for the purpose of its main channel, the owner thereof has the right to have the court determine whether or not the taking of so much land is an abuse of the power conferred by seeking to condemn more land than is reasonably necessary for the purpose for which it was created, and for this the court has the power to prevent such abuse. *Tedens v. Chicago Sanitary Dist.* 149 Ill. 87, 36 N. E. 1033.

In a condemnation proceeding by a sanitary district against the owner of land for the right of way for its main channel, the owner of such

v. *Oranblinton*, 20 Ohio St. 349 (where county commissioners and township trustees were charged with the carrying into effect the act); *Kinyon v. Duchene*, 21 Mich. 498 (where drain commissioners, to be appointed by the board of supervisors, were provided for); *Colfax Highway Comrs. v. East Lake Fork Special Drainage Dist.* 127 Ill. 581, 21 N. E. 206 (where drainage commissioners were provided for); *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663 (where the people of the district were authorized to organize as a district, and to elect a board of trustees to manage the matter); *Turlock Irrig. Dist. v. Williams*, 76 Cal. 360, 18 Pac. 379 (where the people of the district were authorized to organize as a district, and to elect a board of directors to manage the matter). The legal principles upon which reclamation

laws rest are so admirably stated in *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663, that a short extract from the opinion of Mr. Justice Field in that case is warranted. He said: "It is not open to doubt that it is in the power of the state to require local improvements to be made which are essential to the health and prosperity of any community within its borders. To this end it may provide for the construction of canals for draining marshy and malarious districts, and of levees to prevent inundations, as well as for the opening of streets in cities and of roads in the country. The system adopted in California to reclaim swamp and overflowed lands by forming districts, where the lands are susceptible of reclamation in one mode, is not essentially different from that of other states where lands of that descrip-

tion is entitled to have plans and specifications of such channel introduced in evidence so as to furnish the court with the necessary data to enable it to determine whether such district is seeking to condemn more of such owner's land than is reasonably necessary to carry out the object of the district. *Ibid.*

A description of land to be taken for a public drain should be as definite as is necessary in a deed. *Mathias v. Carson*, 49 Mich. 465, 13 N. W. 818.

Whether or not a description of land taken for a sewer by words and reference to a map is "as certain as is required in a common conveyance of land" as required by statute is a question of fact. *Kohlhepp v. West Roxbury*, 120 Mass. 596.

In proceedings for the condemnation of land for sewer purposes, if, after definitely locating the culvert, a notice published by the board of public works under the provisions of Special Laws 1887, p. 835, § 8, proceeded, "also a strip 30 feet in width extending from the south end of said culvert to the north end of said culvert, the center line of which strip shall be the center line of said culvert," the property is sufficiently identified, although the assessment sheet and the notice of confirmation, referring, however, to the notice quoted above, omitted the words, "the center line of such strip shall be the center line of the culvert;" the sufficiency and definiteness of an assessment and award are to be ascertained from an examination of the condemnation proceedings taken as a whole, and the notice, being referred to in the assessment sheet or award, is thereby made a part of the latter instrument as though incorporated in it. *Lumbermen's Ins. Co. v. St. Paul*, 85 Minn. 234, 88 N. W. 749.

A proceeding to take land for a public drain is void where the application therefor gives a line merely, without indicating the width. *Mathias v. Carson*, 49 Mich. 465, 13 N. W. 818.

In a proceeding to condemn land for the construction of a ditch, the court should not undertake to divest the title of the owner, but only to subject the land to the use required. *Palmer v. Harris County (Tex. Civ. App.)* 69 S. W. 220.

The action of a commissioner's court in determining that it is necessary to use land for the purpose of draining a public road concludes the question as to the necessity for the taking as far as its submission to a jury is concerned, in a proceeding by a county to condemn the land. *Ibid.*

A township owning no land, as a municipality to be injuriously affected by the construction of

a public drain, may not maintain a bill to enjoin its completion, in behalf of landowners in the township who do not claim to be injuriously affected. *Swan Creek Twp. v. Brown (Mich.)* 9 Det. L. N. 52, 90 N. W. 38.

The owner of land whose right to appeal and whose constitutional right to have his compensation for his lands sought to be appropriated assessed by the jury is, on the face of the records, cut off by the act of the county commissioners in making an award and entering it of record as of a date prior to the actual time of making, so that at the latter date the time for appeal appears on the record already to have expired, is entitled to an injunction against the orders and proceedings of the board on and after the date of such entry, but not against the proceedings had prior to that date. *Miller v. Logan County*, 3 Ohio C. C. 617.

A bill for injunction cannot be maintained against the construction of a sewer outlet so far as the case involves merely the loss of land taken and injury to the remaining land by the construction of the sewer, where, under the statute, damages for such injuries can be assessed in proceedings to obtain the right of way. *Dierks v. Addison Twp. Highway Comrs.* 142 Ill. 197, 31 N. E. 496.

Condemnation proceedings for a sewer way are *in rem*; the money award takes the place of the easement taken, and the real owners of the property are entitled to receive it. *Lumbermen's Ins. Co. v. St. Paul*, 82 Minn. 497, 85 N. W. 525.

In ditch proceedings it is not upon the question of the appropriation of lands, but upon that of compensation for lands so appropriated, that the owner is entitled, of right, to a hearing in court and the verdict of a jury. *Zimmerman v. Canfield*, 42 Ohio St. 463.

A provision for a jury on appeal to the probate court, which is allowed from the action of county commissioners in allowing compensation and damages for lands appropriated in the establishment of a ditch, is a sufficient compliance with a statutory requirement as to the assessment by a jury of compensation on the appropriation of private property. *Chesbrough v. Putnam & P. Counties*, 37 Ohio St. 508.

The power conferred upon a corporation created by an act of the legislature for the drainage of wet lands in a designated district, to decide upon the amount of the damages to be awarded and benefits to be assessed to lands over which the work is projected, cannot be justified as a proper exercise of the right of eminent domain, since such company, being a mere private corporation whose existence has not re-

tion are found. The fact that the lands may be situated in more than one county cannot affect the power of the state to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the legislature may designate. In some states the reclamation is made by building levees on the banks of streams which are subject to overflow; in other states by ditches to carry off the surplus water. Levees or embankments are necessary to protect lands on the lower Mississippi against annual inundations. The expense of such works may be charged against parties specially benefited, and be made a lien upon their property. All that is required in such cases is that the charges shall be apportioned in some just and rea-

sonable mode, according to the benefit received. Absolute equality in imposing them may not be reached; only an approximation to it may be attainable. If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to the mode pursued that, to some extent, inequalities may arise. It may possibly be that in some portions of the country there are overflowed lands of so large an extent that the expense of their reclamation should properly be borne by the state. But this is a matter purely of legislative discretion. Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised,—whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure. *Mobile County v.*

ceived the assent of a majority of the voters in that district, and which is interested in the replenishment of its own treasury, is not an impartial agency, such as is required to determine the just compensation required under the Constitution to be made in the exercise of that right. *Hessler v. Drainage Comrs.* 53 Ill. 105.

The construction of a sewer across a lot held by a husband and wife as tenants by the entirety will be enjoined at the suit of the wife, although the city has taken proceedings to condemn the right of way as against the husband, since the construction of the sewer would prejudice her rights in case she should survive him. *Grosser v. Rochester*, 60 Hun, 379, 15 N. Y. Supp. 62.

It is a good defense to an action against an adjoining landowner for wrongfully digging a ditch opening into an existing ditch on an owner's land and thereby overflowing his land, that the new ditch was duly established in pursuance of law in a proceeding to which such owner was a party and he had notice of and was assessed for its construction, from which he took no appeal, but stood by and allowed the work to be done on his land without objections; although an action would lie under the statute for failure to enlarge the capacity of the old ditch so as to accommodate the increased flow caused by connecting the new ditch therewith. *Powell v. Clelland*, 82 Ind. 24.

But one who will be injured by the construction of a proposed ditch is not estopped from complaining of it because the contract for its construction was awarded to him at a public bidding, where he bid for it to keep the work in abeyance until he could have time to file his bill for an injunction. *Conrad v. Smith*, 32 Mich. 429.

e. Measure of damages.

For the lands appropriated for a drainage ditch the landowner is entitled to full compensation, and is also entitled to the damages to his other lands from which the appropriation is made, but he is not entitled to have awarded him, as part of his compensation, the value of a strip of land not actually appropriated, on each side of the ditch; nor is he entitled to have the cost of constructing such portion of the ditch as the trustees apportion to him to construct, assessed as part of his damages. *Miller v. Weber*, 1 Ohio C. C. 130.

The measure of damages for land across which a sewer is constructed is the value of the land appropriated, in estimating which the fact that the owner may still apply the premises to 60 L. R. A.

any use not inconsistent with the existence of the sewer may be considered. *Atlanta v. Hunicutt*, 95 Ga. 138, 22 S. E. 130.

In condemnation for sewer purposes, only the value of land actually taken can be awarded, not damage to the rest of the premises from prior noxious discharge of sewage. *Stewart v. Rutland*, 58 Vt. 12, 4 Atl. 420.

But so far as by taking a part of one's land for purposes of a sewer a source of harm is brought nearer to the part which is left, the damages caused by the increased proximity may be recovered for, whether apart from the statute the source of harm would have amounted to a nuisance or not. *Taft v. Com.* 158 Mass. 526, 33 N. E. 1046.

So, the owner of land taken for sewerage works is entitled to compensation for injury to other lands owned by him, not only by the construction of the works, but by their use, even though no nuisance be caused by such use of the works. *Essex v. Acton Local Board*, L. R. 14 App. Cas. 153, 58 L. J. Q. B. N. S. 594, 61 L. T. N. S. 1, 38 Week. Rep. 209, 56 J. P. 750.

The damages for land condemned for a sewer outlet may include an allowance for what the owner of the remaining land will be inconvenienced in its use. *Bennett v. Marion*, 106 Iowa, 628, 76 N. Y. 844.

Under a statute requiring compensation to be made for all damages sustained by reason of the taking of land for a public sewer, anticipated future injury to the remaining property by reason of the use of the property taken may be considered. *Lincoln v. Com.* 164 Mass. 368, 41 N. E. 489.

In assessing the compensation to be awarded a landowner through whose property a right of way is taken for a sewer which will empty into a stream on his land, no compensation is to be made for the possibility of the deposits from the sewer being made in such a manner as to become a public nuisance, since it must be assumed that the sewer will be used in such a way as to secure a proper and safe disposal of its contents. *Clark v. Washington*, 1 Pa. Dist. R. 651.

In determining the damages to adjoining landowners by the construction of a ditch, there is to be considered whatever of actual injury, not remote, purely speculative, is caused to their lands by reason of the construction thereof. *Thomas v. County Comrs.* 5 Ohio N. P. 449.

The owner of land taken for the construction of a drainage ditch is entitled to the full, fair market value thereof, irrespective of benefits thereto by its construction, and by such market value is meant such an amount as could be ob-

Kimball, 102 U. S. 691, 704, 26 L. ed. 238, 242. The rule of equality and uniformity prescribed in cases of taxation for state and county purposes does not require that all property, or all persons in a county or district, shall be taxed for local purposes. Such an application of the rule would often produce the very inequality it was designed to prevent. As we said in *Louisiana v. Pilebury*, 103 U. S. 278, 295, 26 L. ed. 1090, 1096, there would often be manifest injustice in subjecting the whole property of a city—and the same may be said of the whole property of any district—to taxation for an improvement of a local character. The rule that he who reaps the benefit should bear the burden must in such cases be applied."

The opinion of Foote, C., in *Turlock Irrig. Dist. v. Williams*, 76 Cal., loc. cit. 367, 18 Pac. 379, is so opposite to this case that it

tained on an offer of the property for sale, after reasonable time and notice, and not at a forced sale on short notice. *Ibid.*

Under the provisions of the farm drainage law of Illinois, the jury must, in assessing the damages to a landowner in a drainage district, find the value of the ground used for the ditch, also the damages, if any, to the remaining land not taken, and cannot set off the benefits there-to by the drainage, that being the duty of the commissioners. *Union Drainage Dist. v. Volke*, 163 Ill. 243, 45 N. E. 415, Affirming 59 Ill. App. 283.

In an action to condemn a right of way for a drainage ditch already constructed over land, additional damages by reason of the construction of another ditch above under a separate and independent proceeding, which pours its waters into such lower ditch, cannot be considered, where the condemnation of the right of way for the other ditch is not sought in that action. *Skagit County v. McLean*, 20 Wash. 92, 54 Pac. 781.

The compensation for land taken for a sewer route should include the injury which will be done to the tract by the emptying of the sewer into a stream flowing across it, although the ordinance authorizing the sewer does not in terms undertake to acquire that right, and the petition describes only that portion of the owner's property over which the sewer will pass. *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

Where a strip of land is taken for the construction of a sewer, its owner is entitled to compensation for the temporary destruction of a water supply on his remaining land during the process of construction, where the statute requires compensation to be made for all damages that shall be sustained by reason of the taking. *Penney v. Com.* 178 Mass. 507, 53 N. E. 865.

The damages to be awarded by viewers upon the construction of a public sewer must be the unavoidable result of the act of eminent domain, either temporary or permanent, and as of the date of the completion of the sewer. *Re Chatham Street*, 16 Pa. Super. Ct. 103.

In a proceeding to condemn land for the construction of a ditch to drain a public road, the market value of the entire tract sought to be condemned must be considered in assessing the damages, although the entire tract so taken may not be necessary for the construction of the ditch. *Palmer v. Harris County* (Tex. Civ. App.) 69 S. W. 229.

The reasonable cost of any necessary adaptation of remaining land to the new state of 60 L. R. A.

requires partial reproduction here. He said: "One of the distinguished counsel for the defendant contends that the districts contemplated by the act are private corporations formed for a private purpose; to use his own language, 'Such an organization has none of the elements of a public municipal body.' While another able attorney on the same side contends that 'all the constituents of a public corporation are present, and to that class of corporations a district of the statute must be assigned,' and claims that the money sought to be raised under the act is a general tax, and that the system of organization of the corporations prescribed in the act is in conflict with the general plan of constitutional political organizations, and that the mode of taxation provided is different from that made necessary by the Constitution for general governmental purposes,

things produced by a sewer for which a portion of the land is taken may be considered by the jury in assessing the damages for such taking and injury to the remaining land. *Butcher's Slaughtering & Melting Assn. v. Com.* 163 Mass. 386, 40 N. E. 176.

Damages to abutting property from the temporary escape of sewer gas during the time reasonably necessary for making repairs to a sewer or removing obstructions should be considered in determining the compensation to be made in proceedings to condemn land for sewer purposes. *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604.

Proceedings for the establishment of a public ditch are not invalid because no allowance of damages was made for running the ditch along the line of an old ditch, as the fact that a new ditch is located on the line of an old one only goes to the question of the costs and benefits of the proposed work, in the absence of any statute making such location unlawful. *Denton v. Thompson*, 186 Ind. 446, 35 N. E. 264.

When, in the construction of a public ditch across or upon the right of way of a railroad company, it will become necessary to make an excavation under the tracks of a railroad, and for the company to incur expense in supporting the tracks or otherwise while the ditch is being constructed so as not to interfere with the use of its roads at that place, such expense shall be taken into account in assessing the damages of the company. *Lake Erie & W. R. Co. v. Hancock County*, 63 Ohio St. 23, 57 N. E. 1009, Followed in *Northern Ohio R. Co. v. Hancock County*, 63 Ohio St. 32, 57 N. E. 1023.

A provision in a drainage law which authorizes the allowance to the owner of land of "such actual damages, only, as will be sustained" by the entry upon his land by another for the purpose of constructing a drain over the same, embraces all damages that will be sustained by, or in consequence of, the entry upon the land and the construction of the drain, the proper construction of the words "actual damages" being all damages, both direct and consequential, which necessarily result from such taking and appropriation, the measure of which will be the diminution in value of the land by reason thereof. *Chronie v. Pugh*, 136 Ill. 539, 27 N. E. 415.

In assessing the damages to be allotted a lot owner in a drainage district, no damages suffered or sustained in consequence of the original construction of a levee should be allotted, but the same must be confined to such damages as will result from the completion of the proposed work under the present assessment.

and therefore the act is void. We are inclined to agree with the last-mentioned advocate of the defendant's cause, but to the extent only that the districts, when organized as provided in the act under discussion, have all the elements of corporations formed to accomplish a public use and purpose, according to the rules of law laid down in *Hagar v. Yolo County*, 47 Cal. 223; *Dean v. Davis*, 51 Cal. 406; *People v. Williams*, 56 Cal. 647; *People v. La Rue*, 67 Cal. 526, 8 Pac. 84; *Reclamation Dist. No. 108 v. Hagar*, 86 Cal. 54, 4 Pac. 945. The results to be derived from a drainage law, and one which has for its purpose the irrigation of immense bodies of arid lands, must necessarily be the same as respects the public good. The one is intended to bring into cultivation and make productive a large acreage of land which would otherwise remain

uncultivated, and unproductive of any advantage to the state, being useless, incapable of yielding any revenue of importance toward the support of the general purposes of state government, by reason of too much water flowing over or standing upon or percolating through them. The other has for its main object the utilizing and improvement of vast tracts of arid and unfruitful soil, desertlike in character, much of it, which, if water in sufficient quantity can be conducted upon and applied to it, may be made to produce the same results as flow from the drainage of large bodies of swamp and overflowed lands. Such a general scheme, by which immigration may be stimulated, the taxable property of the state increased, the relative burdens of taxation upon the whole people decreased, and the comfort and advantage of many thriving communities sub-

Lovell v. Sny Island Levee Drainage Dist. 159 Ill. 188, 42 N. E. 600.

After the recovery of damages for injury to the market value of land upon which a public sewer has been constructed, without the legal formalities necessary and proper in such cases of the exercise of eminent domain, no further damages can be recovered when the mere use of the sewer does not constitute a nuisance. *District of Columbia v. Hutchinson*, 1 App. D. C. 403.

A claim for damages for the overflow of an owner's land resulting from the construction of a dam the erection of which clearly appeared necessary to a feasible and economical prosecution of the work of the drainage district, will be presumed to have been passed upon by the jury in the assessment of such owner's damages in the drainage proceedings, and, if not, the matter becomes *res judicata* because he might have had such damages determined at that time. *McGillis v. Willis*, 39 Ill. App. 311.

A right to damages for land taken for a drainage ditch under a contract permitting the occupation for it until the damages are ascertained and the taxes raised to pay therefor, during which time no assessments for benefits shall be collected from the landowner, will pass with a sale of the land. *Murray v. Jayne*, 8 Barb. 612.

The value of a stone wall by the running foot along the front of the property is a proper element to be considered in an assessment of damages for land taken by eminent domain for sewer purposes. *Stone v. Com.* 181 Mass. 438, 63 N. E. 1074.

In a condemnation proceeding to ascertain the just compensation to be paid for lands which are subject to overflow, it is not proper to take into consideration the value thereof as affected by their capability of improvement by the erection of dikes, where such dikes, if constructed, would have the effect of wrongfully overflowing the lands of adjoining riparian owners. *Burke v. Sanitary Dist.* 152 Ill. 125, 38 N. E. 670.

As to compensation for injuries caused by the drain, see *infra*, VII. j.

VII. Completion of improvement.

a. Statutory provision must be followed.

Substantial compliance with the provisions of the statute in the form of ordinances for the construction or repair of sewers is necessary to support an assessment for the cost. *Kan-60 L. R. A.*

lakee v. Potter, 119 Ill. 324, 10 N. E. 212; *Combs v. Etter*, 49 Ind. 535.

An assessment on lands for the construction of a sewer by a municipal corporation having the power to construct sewers, and to make assessments upon real estate within the corporate limits to pay therefor, will be presumed, in a collateral attack to set the same aside, to be made in accordance with the requirements of the statute, and to be valid and enforceable, unless the complaint discloses a state of facts which clearly shows the assessment to be void. *Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342.

The county board has no jurisdiction to impose a tax on lands to defray the expense of constructing a ditch unless the statute is complied with in the proceedings relative to the ditch. *Curran v. Sibley County*, 47 Minn. 313, 50 N. W. 237.

A sewer constructed by a city is unauthorized, and an assessment levied for the cost thereof is void, where the action of the city was based upon neither a petition of a majority of the property holders, nor a recommendation of the board of health, which are the only conditions under which the city is granted the power to construct such sewers. *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825.

The computation of the cost of constructing a district sewer and the apportionment of the cost between the several lots in the district is void where it is performed by the employees of the engineering department under a municipal charter directing such acts to be performed by the board of public works. *Dollar Sav. Bank v. Ridge*, 62 Mo. App. 324.

Under statutory authority to open, enlarge, and straighten a drain, commissioners have no power to construct, in addition thereto, a lateral ditch, and the assessment levied by the commissioners is absolutely void where it included the cost of such ditch. *Mitchell v. Lane*, 62 Hun, 253, 16 N. Y. Supp. 707.

A proceeding to establish a ditch will be quashed where the jurors failed to take an oath to determine the necessity for using the property and the just compensation to be made therefor as required by Mich. Const. art. 18, § 2. *Bowler v. Perrin*, 47 Mich. 154, 10 N. W. 180.

An injunction will lie to restrain an illegal attempt to collect an assessment on lands for the construction of ditches to drain swamp and low lands which is void because the commissioners failed to go upon and examine all the taxable lands before making the levy, as re-

served, would seem to redound to the common advantage of all the people of the state to a greater or less extent. It is true that, incidentally, private persons and private property may be benefited, but the main plan of the legislature, viz., the general welfare of the whole people, inseparably bound up with the interests of those living in sections which are dry and unproductive without irrigation, is plain to be seen pervading the whole of the act in question. This is not a law passed to accomplish exclusive and selfish private gains. It is an extensive and far-reaching plan, by which the general public may be vastly benefited; and the legislature acted with good judgment in enacting it."

The case of *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53, is such a complete answer to so many of the contentions made in

this case that an extract from the opinion by Fagg, J., in that case is appropriate. He said: "The professed object of the act incorporating the Columbia Bottom Levee Company was to reclaim certain lands adjacent to the Missouri and Mississippi rivers, in the county of St. Louis, from liability to overflow. The designated limits embraced a large amount of land belonging to a number of different proprietors, and in the preamble to the act it is assumed to be passed upon their application. The first board of directors is designated in the act, and the manner of their organization pointed out. Whenever, therefore, it is shown that the said organization did take place as directed, there was a legally constituted company in existence, duly authorized by the act to proceed at once to carry out the purpose of its creation. There can be no question now as to

quired by the statute authorizing such drainage. *Curry v. Jones*, 4 Del. Ch. 559.

The statute to enable owners of marshes swept by the tides to improve them and assess the expense on the land must be strictly followed, or the proceedings will be set aside, as, for instance, two thirds of the owners being required to concur previously; not only must an actual agreement have been made preliminary to action, but it must have been in such indispensible form, and there must be some legal evidence of its existence. *State, Ward, Prosecutor, v. Frank & G. Creek Co.* 14 N. J. L. 301.

Under statutes providing different proceedings for the construction of trunk and local sewers, which provide that local sewers are such as are intended for use exclusively for the drainage and accommodation of lots abutting thereon, the mere fact that a sewer carries off surface drainage from the streets does not prevent its being local. *Cincinnati use of Deters v. Standard Wagon Co.* 1 Ohio N. P. 387.

The commissioners of a drainage district have no power to incur the expense of additional work provided for by the provisions of a special contract with the commissioners of another district, without first fulfilling the requirements of the statute as to giving notice to the owners of land in their district, and affording them an opportunity to be heard and to contest the propriety of the work and the expense contemplated. *Lima Lake Drainage Dist. v. Hunt Drainage Dist.* 101 Ill. App. 72.

Under the statute authorizing sewer commissioners to make and ordain statutes and ordinances after the laws and customs of Romney Marsh in the county of Kent or otherwise, after their own wisdom and discretion, the commissioners are not bound to follow such laws and customs, as the wisdom and discretion to be exercised by the commissioners must be according to law and justice. *Keighley's Case*, 10 Coke, 139.

b. Jurisdictional facts.

In a proceeding to establish a drain under Neb. Comp. Stat. chap. 89, §§ 7, 8, the jurisdictional facts are, a petition signed by one or more owners of land to be affected by the ditch, the bond provided by statute that the proposed ditch is necessary and will be conducive to the health, convenience, and welfare of the public, and the statutory notice. *Darst v. Grifin*, 31 Neb. 668, 48 N. W. 819.

The *ex parte* appointment of a special drain commissioner on the same day the application for his appointment was filed, and without notice to anyone, is invalid. *Corey v. Jackson County Probate Judge*, 56 Mich. 524, 23 N. W. 205.

In order to sustain special assessments for benefits from a public ditch, the record must affirmatively show a compliance with all the conditions essential to a valid exercise of the taxing power, and the enabling statute will be strictly construed. *Casey v. Burt County*, 59 Neb. 624, 81 N. W. 851.

Where a municipal charter, after declaring that district sewers shall be established within the limits of the districts to be prescribed by ordinance, expressly confers on the city council power to cause sewers to be constructed in any district whenever it may deem it necessary for sanitary purposes, the character, dimensions, and materials to be prescribed by ordinance or contract, it is not necessary after a sewer district has been established to pass a special ordinance to authorize the construction of each lateral sewer; and an ordinance defining the limits of the sewer district, and authorizing the city engineer to construct such sewers therein as may be necessary, is sufficient, as the contracts made by the city engineer will have to be approved by the council. *State ex rel. Cavender v. St. Louis*, 56 Mo. 277.

Drainage commissioners cannot, under the New York statutes, levy an assessment for the expenses of a drain until they have acquired a sufficient title to the land required therefor. *Olmsted v. Dennis*, 77 N. Y. 378.

But a sale of land for taxes for the construction of walls along the banks of a water course flowing through a city and used as a part of its drainage system will not be set aside, and the lien of the assessment discharged, upon a collateral attack in an action to quiet title, on the ground that the assessment was void for want of jurisdiction over the subject-matter because the municipality had not, by purchase or condemnation, acquired the right to construct the walls upon private property, in the absence of conclusive proof that the municipality had not acquired such right by dedication, prescription, or otherwise,—especially where the owner stood by and allowed the work to be completed without objecting, and has not paid or tendered the equitable amount of benefits resulting to his land by the improvement. *Jackson v. Smith*, 120 Ind. 520, 22 N. E. 431.

A municipal corporation has the power, under the statute, to construct a sewer and levy special assessments for the payment of the cost thereof in pursuance of an ordinance previously passed, which provided for its construction in part over private property, without making any

the power of the legislature to create such a company, and to invest it with all the necessary power and authority to construct whatever works may be necessary to accomplish the object intended, and to raise the funds to pay for the same by assessments on the lands to be benefited thereby. This question was fully discussed and determined in the case of *Egyptian Levee Co. v. Hardin*, 27 Mo. 495, 72 Am. Dec. 276. The appellant here (defendant below) insists that he was not a member of the company, and cannot be held liable to its assessments unless he had expressly given his assent to the exercise of such a power by an acceptance of the charter. The power of the legislature to delegate the authority to this company to levy a tax or assessment for the purposes indi-

cated being settled, it follows necessarily that his dissent or assent is a matter of no consequence. The act is evidently passed upon the idea that it is a work of sufficient public utility to require its execution, and to justify the incorporation of a company with the powers granted by it. The power to levy an assessment upon the lands in question is not to be understood as a power to tax in the ordinary meaning of that term. It is the power to compel the payment of a sum limited by the terms of the law as a compensation for a direct benefit conferred. Suppose that the state itself had undertaken to do this work. Will it be pretended that there is no power to compel the owners of the land to pay a tax sufficient to compensate for the actual amount of benefit re-

provision for acquiring, by condemnation or otherwise, the right to make the improvement on such property; nor is it essential to the validity of the ordinance that at the time of its passage the right should have been acquired to pass over such private lands. The matter of compensation can be fixed, and the right to use private property acquired, after the adoption of the ordinance providing for the improvement and the levying of the assessment therefor. *Hyde Park v. Borden*, 94 Ill. 26.

It is not a valid objection to the validity of drain proceedings that the names of two owners of land traversed by the drain were omitted from the application to the probate court, where such owners did not complain, and an adjoining owner has given a release of a sufficient quantity of land to accommodate the entire ditch and the deposits of earth therefrom. *Hauser v. Burbank*, 117 Mich. 642, 76 N. W. 111.

c. Effect of irregularities.

The legislature may provide that no assessment for a sewer shall be set aside for irregularity unless actual fraud is shown. *Re Mayer*, 50 N. Y. 504; *Re Ellsworth*, 53 N. Y. 647.

When a county board has jurisdiction to establish a drain irregularities in the proceedings will not render the assessment void. *Darat v. Griffin*, 31 Neb. 668, 48 N. W. 819.

Proceedings before drainage commissioners for the establishment of a drain, although in some respects informal, are valid as against a collateral attack. *Donalson v. Lawson*, 126 Ind. 169, 25 N. E. 903.

A proceeding to lay out a township drain will not be reversed except for very substantial faults. *Dunning v. Township Drain Commissioners*, 44 Mich. 518, 7 N. W. 239.

A mere irregularity will not invalidate proceedings for the establishment of a public drain, if it does not go to any of the jurisdictional steps. *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292.

Under a statute empowering the common council of a city to lay out, build, and construct sewers in the municipality, and to assess the expenses thereof, it is not necessary, in order to validate the assessments, that the laying out of the sewer be conducted with the technical formalities attached to the laying out of highways. *Cone v. Hartford*, 28 Conn. 363.

Owners of land which will be benefited by a drainage ditch cannot, after permitting the construction of the ditch without objection, take advantage of irregularities up to and including the letting of the contract for the construction of the ditch, so as to escape liability for pay-
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ment of the assessments upon their property. *Patterson v. Baumer*, 43 Iowa, 477.

When a board has acquired jurisdiction to act for the establishment of a public drain at the expense of benefited property, the presumption is in favor of the correctness and regularity of such proceedings, and should not be overturned except when it is affirmatively made to appear that there is error. *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292.

Under the provisions of the charter of the city of Duluth, the failure of the board of public works to establish a street grade or a sewer system before constructing a sewer, or to give the required notices of the meeting to make an assessment to defray the expenses of its construction and of application for its confirmation by the district court, does not affect the jurisdiction of the district court to render final judgment against the property for the amount of the assessment. *Duluth v. Dibblee*, 62 Minn. 18, 63 N. W. 1117.

That one of the jurors in a proceeding to lay out a township drain was not a freeholder is not available, where no objection was made at the time, and the party objecting was present at the hearing and declared himself satisfied with the panel. *Clark v. Teller*, 50 Mich. 618, 16 N. W. 167.

It is no defense to an action to enforce an assessment for the construction of a sewer, that the contractor failed to file a bond as provided in his contract with the city, which the latter had waived, and had accepted the work as having been performed in accordance with the contract. *Larned v. Maloney*, 19 Ind. App. 199, 49 N. E. 278.

An assessment for the construction of a ditch cannot be collaterally attacked for mere irregularities, where the petition for the establishment of the ditch was sufficient to give the county commissioners jurisdiction of the subject-matter, and remedy by appeal is provided by the statute for irregularity. *Foster v. Paxton*, 90 Ind. 122.

A statutory provision that, after the adoption of a plan for a sewer system, the council may direct the engineer to make an estimate of the cost, is not violated so as to make the assessment for the construction of the system void, by the fact that the estimate of the engineer as to cost accompanies his plans, and is not called for separately, if the council is thereby put in possession of the necessary information. *Wewell v. Cincinnati*, 45 Ohio St. 407, 15 N. E. 196.

Equity will not interfere with the collection of a drainage assessment merely for irregularity or defects not affecting the jurisdiction of the tribunal which imposed it. *Keigwin v.*

ceived by them? If the state can do it, certainly it can delegate the power to a company to do the same thing. Upon the idea, then, that there was a public necessity for this work,—and the legislature must be the judge of that matter,—and that it would result in direct benefit to the lands designated by the act, there can be no hardship upon individuals when the rate of assessment is equal, and the terms are fixed by which they can have a voice in controlling the affairs of the company."

These considerations impel the conclusion that the drainage laws of this state are constitutional and that the corporations organized thereunder to carry them into effect are public, governmental agencies, and in no sense private corporations; that the bene-

fits assessed are legal. The fact that the unwilling citizen is affected by the law, and drawn into the corporation against his will, does not affect the constitutionality of the law. The same is true of every law. Many persons object to many laws, and are drawn within the pale of the law against their will; but this does not affect the constitutionality or validity of the law. So, likewise, laws authorizing the formation of cities, towns, townships, and school districts draw unwilling persons into such association for governmental purposes, and entail taxes and special burdens and individual restraints that were not before imposed. But such results must follow from all laws and all governments. The welfare of the state, the health of the people of the state or of

Hamilton Twp. Drainage Comrs. 115 Ill. 347, 5 N. E. 575.

An injunction will not lie to restrain the collection of an assessment for a sewer on the ground of errors and irregularities occurring subsequent to the adoption of the ordinance and the making of the contract under which the sewer was constructed, where by statute an adequate remedy at law is provided for the determination of such questions by appeal from the assessment. *Rickcords v. Hammond*, 67 Fed. 350.

An assessment for sewer benefits, which has been duly confirmed, cannot be attacked for matters of procedure in any collateral proceeding. *Pollon v. Brunner*, 68 N. J. L. 116, 48 Atl. 541.

The advertisement of a plan of sewerage as required by the Ohio statutes is not a jurisdictional fact, and assessments on property on a street omitted from such advertisement are not invalidated thereby, where such street appeared in all subsequent resolutions, ordinances, and advertisements. *Cincinnati v. Honnigfort*, 32 Ohio L. J. 32.

That the report of viewers of a ditch, proposed to be established under the ditching law does not locate any flood gates, waterways, bridges, or farm crossings, and does not determine whether such gates, etc., are necessary, and that no outlet had been provided for the ditch, whereby adjacent lands would be overflowed and the drain be of no benefit, are defects in the proceedings which do not affect the jurisdiction of the commissioners; and their decision establishing the ditch cannot be collaterally attacked in an action to enjoin the collection of an assessment thereunder. *Argo v. Barthand*, 80 Ind. 63.

Such defects might have been ground for appeal, but not for injunction.

Questions merely affecting the regularity of the proceedings, and not the jurisdiction of the county commissioners in a proceeding to establish a ditch under a ditching law, cannot be collaterally attacked in a suit to enjoin the collection of an assessment on lands for the construction of the ditch. *Cauldwell v. Curry*, 93 Ind. 363.

Irregularity before a county board which had jurisdiction of a proceeding to establish a drain cannot be attacked collaterally as a defense to an action to collect the assessment founded thereon. *Smith v. Clifford*, 99 Ind. 113.

d. Notice; hearing.

1. General rules.

Whether or not notice must be given to per-
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sons interested in the construction of a sewer, and a hearing accorded them, depends on the character of the improvement, the statutory provisions on the subject, the light in which the court views the exercise of power by which the improvement is made, and the manner in which the person claiming notice will be affected by the improvement. If the statute makes notice a prerequisite to jurisdiction over the proceeding, it must be given. If the improvement is to be in a public street, where there is a right to place it, and the power to make it resides absolutely in a governmental body, while the cost is to be met by an exercise of the taxing power operating uniformly upon all property affected, there is no reason why any notice should be given except that the assessment roll is in the assessor's hands. If a right of way is to be acquired by right of eminent domain, the property owner must be given notice and an opportunity to be heard. If the assessment is to be according to benefits, or a different rate is to obtain in different parts of the district, the taxpayer is entitled to a hearing. The decisions have not very carefully or fully worked out any rule which may be regarded as uniform.

The attitude of the courts, as it depends on the light in which the proceeding is viewed, is well illustrated by a New York and a Pennsylvania decision. The former holds that the determination of a municipal corporation to construct a sewer is not invalid for lack of prior notice of intention so to do to the owners of property to be affected. *Re Zborowski*, 68 N. Y. 88.

Under that rule, the improvement may be made by the proper authorities, and the taxpayer can have no voice except indirectly through the ballot box.

The Pennsylvania court held that the legislature cannot authorize a municipal corporation to proceed to construct a sewer without notice to property holders of the proceedings by the viewers, or without a hearing before them or the council, and without appeal or opportunity of contesting the assessment. *McKeesport v. Dunshee*, 29 Pittsb. L. J. N. S. 88.

If the theory which is gradually extending among the courts is correct, that the making of necessary improvements is a governmental function to be exercised when the public good requires it, and that the individual, by becoming a member of the state, agrees to bear his share of the expenses, and cannot defeat projects which are for the public good, it would seem that the New York doctrine is more accurate, and that the consultation of the taxpayer upon the question is a matter of grace rather than of right.

a particular locality of the state, is a matter of governmental concern, and the fact that there are those who are unwilling to become a part of a governmental division of the state, and unwilling to bear the burdens of government, even where they result in personal benefit to them, does not affect the validity of the law.

It only remains to say that the right of trial by jury as guaranteed by the Constitution is in no manner impaired by the laws under consideration. No right of trial by jury existed in such cases at common law, or was ever accorded by any Constitution of this state. Nor is it true that the defendants are deprived of their property without due process of law. Before their property is brought within the benefit district or drainage district, all owners of property are given a day in court. The fact that this

case is here is conclusive evidence the defendants are enjoying all the benefits of due process of law, for they are contesting the power of the state to assess their property, even before any work of drainage has been done.

The fact that each owner is entitled to one vote for every acre of land owned by him creates no more infirmity in the law than the right of each stockholder of any corporation to cast as many votes as he owns shares of stock renders such laws invalid. In both instances the majority in interest, instead of the majority in number, controls; and who shall say such laws are not just?

These considerations result in the affirmation of the judgment of the Circuit Court.

All concur, except **Valliant, J.**, absent.

A drainage law is not unconstitutional for the reason that no provision is made for personal service of notice upon the owners of lots affected by the location and construction of a ditch. *Scott v. Brackett*, 89 Ind. 413.

But persons receiving no notice of a proceeding to establish a drainage ditch may attack the proceeding collaterally. *McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 725.

Drainage proceedings based on some notice are not void. *Montgomery v. Wassem*, 116 Ind. 343, 15 N. E. 795; *Johnson v. State use of Davidson*, 116 Ind. 374, 19 N. E. 298; *Otis v. DeBoer*, 116 Ind. 531, 19 N. E. 317.

The requirements of due process of law in drainage assessment proceedings are satisfied, where a hearing is had upon notice to the property owners before the assessment is made, although some of the preliminary proceedings, which imposed no burden on the property owners, were had without notice. *Erickson v. Cass County (N. D.)* 92 N. W. 841.

The court, in *Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450, while intimating its opinion to be that failure of a charter to provide for notice to landowners of the proposed construction of sewers comes within the prohibition against taking property without due process of law, nevertheless refuses to declare it void under the rule of *stare decisis*. But in his concurring opinion *Strahan, J.*, on rehearing, says that the charter expressly provides for notice in cases of street improvements, and that by a section thereof such provisions are made applicable in cases of sewers where the expense is ordered by the council to be made a charge on the property directly benefited; and further, that by ordinance a hearing was provided for, which he deems could be reasonably construed to imply that notice should be given. The court relies upon the case of *Strowbridge v. Portland*, 8 Or. 67, as deciding the question of the necessity of notice, but in that case notice of the proposed sewer improvement is alleged to have been published declaring the expenses assessed upon the property benefited and describing the property benefited, and the question upon which the contention of the case turned seems to have been more particularly with reference to whether the council should have first declared by ordinance that a sewer was necessary as preliminary to their proceeding to construct the sewer.

A special assessment on lands for the cost of draining a designated district in which such lands are situated is void, and cannot be enforced, where such assessment was made by a body corporate created by an act of legislation. *60 L. R. A.*

ture for the purpose of draining the district thereby created, with power to assess the cost thereof upon the lands benefited, three of its officers being appointed by it for that purpose, whose power to make the assessment is absolute, limited only by their discretion, and without giving the owners of land a hearing or an appeal therefrom; and such officers, not having been either directly elected by the people to be taxed, or appointed in some mode to which they had given their assent, are not corporate authorities, who are the only officers to whom the legislature has the power, under the Constitution, to delegate the right of corporate or local taxation. *Gage v. Graham*, 57 Ill. 144.

A drainage act is not unconstitutional which furnishes ample facilities for the landowner to present his claim for damages, to contest every question pertaining to his rights, and gives ample opportunities for appeals and questioning the regularity and legality of all proceedings in the establishment of the ditch or drain. *Griffith v. Pence*, 9 Kan. App. 253, 59 Pac. 677.

The appearance and remonstrance of certain persons whose lands will be affected by a drainage ditch will not affect the right of the court to dismiss the petition in favor of one who, after the proceedings have progressed for some time, enters a special appearance, and moves to dismiss for want of notice, so as to prevent the further progress of the case as against those to whom no notice was given. *Sites v. Miller*, 120 Ind. 19, 22 N. E. 82.

A motion to set aside judgments in drainage proceedings on the ground of want of notice, and therefore lack of jurisdiction, is a collateral attack, and must show what the record discloses as to notice, appearance, or acquisition of jurisdiction. *Long v. Ruch*, 148 Ind. 74, 47 N. E. 156.

Statutory requirement.

The will of the legislature is supreme, and, if it directs the giving of notice, notice must be given.

Failure to give the statutory notice to parties interested in a proceeding to establish a drain and open a water course renders all subsequent proceedings void as against parties not waiving notice or otherwise estopped. *Wright v. Rowley*, 44 Mich. 557, 7 N. W. 235.

A drainage by-law published without a notice of the holding of a court of revision for the purpose of hearing complaints against the assessment at some day, "not earlier than twenty, nor later than thirty, days from the day on which the by-law was first published," as required by

CONNECTICUT SUPREME COURT OF ERRORS.

City of WATERBURY *et al.*, *Appts.*,
v.
PLATT BROTHERS & COMPANY.

(75 Conn. 387.)

Power to condemn property injured by a sewer system for a temporary period necessary to perfect some other method of disposing of the sewage is not conferred by general authority to construct sewers and acquire by eminent domain the property necessary for that purpose.

(January 7, 1903.)

A PPEAL by petitioners from a judgment of the Superior Court for New Haven

County denying an application for the appointment of a committee to adjust the compensation to be paid for property temporarily needed for drainage purposes. *Affirmed.*

Statement by Hamersley, J.:

The substance of the application is as follows: "The respondent and its predecessors in title for many years prior to 1884 and to the present time has owned a tract of land and water privilege on the Naugatuck river, about 2 miles southerly from Waterbury. About 1884 the city, under authority from the legislature, constructed several sewers, by reason of which filthy and noxious substances, accumulated by the inhab-

statute is bad, and must be quashed. *Re Ferguson*, 44 U. C. Q. B. 41.

Notice to landowners affected, of proceedings to establish a ditch under the law, is, both under the Constitution and by the express requirements of the statute upon which the proceedings are founded, essential to the validity of the proceedings. *Jackson v. State use of Lindley*, 103 Ind. 250, 2 N. E. 742.

A tax deed issued on a sale for drain taxes will be set aside as a cloud on title, where it does not appear that any notice was given of the assessment, or any opportunity afforded to review the proceedings, or that the commissioner examined the lands, or obtained a release of the right of way, or called a jury in the proceeding; and it does not appear that any apportionment of the costs and expenses was made. *Pleotter v. Whaley*, 80 Mich. 257, 45 N. W. 81.

Under a charter provision requiring the assessors to give notice of the filing of their report and to fix a grievance day, a notice that the assessors had assessed the expense of extending a sewer, had made a report in writing, and had deposited the same with the clerk, and which states the time and place where the parties can be heard, sufficiently complies with the charter. *Bell v. Yonkers*, 78 Hun, 196, 28 N. Y. Supp. 947.

The right of a drainage district to levy a tax upon property situated therein exists by virtue of the statute alone; and where such statute requires due notice to be given an owner of the organization of the district, a tax levied upon his property is void in the absence of the giving of such notice. *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588.

Notice to the owners of land along the line of a proposed ditch, of the pendency and prayer of the petition therefor and of the time and place of hearing, required by a statute authorizing the proceedings, is a jurisdictional fact, without compliance with which township trustees have no authority to hear and determine the petition for its construction. *Sessions v. Crunkilton*, 20 Ohio St. 349.

An injunction will lie to restrain the collection of an assessment on lands for the construction of a public ditch on the ground that the court had no jurisdiction as to the owner because the notice required by the statute to contain the names of all the owners of land affected described his land as being owned by another person, and his name did not appear in the notice or subsequent proceedings, and he had no notice thereof in time to resist the assessment of benefits to his land on the ground that 60 L. R. A.

no benefits accrued. *Vizzard v. Taylor*, 97 Ind. 90.

A proceeding to establish a drain is fatally defective where it is not shown that the requisite notice was served upon the persons entitled thereto. *Purdy v. Martin*, 31 Mich. 455; *Daniels v. Smith*, 38 Mich. 660; *Lane v. Burdnap*, 39 Mich. 736.

Proceedings to lay out a drain will be quashed where it does not appear that notice was given to the parties concerned, or that the commissioner endeavored to obtain a conveyance and release of damages from the persons through whose land the drain would be cut, as required by statute. *Dickinson v. Van Wormer*, 39 Mich. 141.

The court is without jurisdiction to appoint special drain commissioners in the absence of proof by affidavit that the citation issued to those whose lands will be traversed by the drain has been served. *Bennett v. Olney*, 56 Mich. 634, 23 N. W. 449.

The establishment of a drain by a special commissioner, and the levy of a tax for its construction, are void where no notice of the application for the appointment of the drain commissioner was given to interested parties. *Whiteford Twp. v. Phinney*, 53 Mich. 130, 18 N. W. 593.

The appointment by the court of a special commissioner in drain proceedings is void where no notice of the petition for such appointment was previously given to the persons interested, and whose property would be taxed for the construction of the ditch. *Bettis v. Geddes*, 54 Mich. 608, 20 N. W. 608.

A proceeding to lay out a ditch will be quashed where the record does not show that any notice was given of the application for the appointment of commissioners to determine the necessity of constructing the ditch and to assess damages. *Lampson v. Ingham County Drain Commissioner*, 45 Mich. 150, 7 N. W. 772.

Under an act requiring that notice to sewer a street be addressed to the owners of the premises abutting thereon, such notice must be given to all such property owners, and the failure so to do renders the subsequent proceedings by the local authorities to construct the sewer void, and none of the frontagers are liable for the expenses incurred. *Handsworth Urban Council v. Derrington*, 66 L. J. Ch. N. S. 691 [1897] 2 Ch. 438, 77 L. T. N. S. 73, 61 J. P. 518.

It is no defense to a proceeding to set aside the location, establishment, and apportionment of a ditch by one to whom no sufficient and proper notice was given, as required by law.

itants of the city, were and still are collected and discharged into the Naugatuck river in such manner that they have been carried down the river and deposited in and about the canals and pond by which the water privilege of the respondent is made available for the manufacturing establishments upon its land, and thereby serious injury to the health of those living upon, or employed about, the premises has been caused, and the respondent has been restricted in the use of its water privilege, especially in the seasons of low water and warm weather, and its rights of property in its land and water privilege have been invaded to its great damage; and thereby the property rights and privileges of the respondent were appropriated and required for the purpose and maintenance and use of said sewers. Said city will be compelled,

that he had personal knowledge of the pendency of the petition to establish, that he stood by while the work was being done, and that he was benefited thereby, where it does not appear that any work was done on his own land. *Rice v. Wellman*, 5 Ohio C. C. 334.

2. To whom.

Where private property is to be taken or injured by the construction of the drain, of course notice must be given, and the compensation fixed with all the certainty which pertains to judicial proceedings.

Under the ditching act which places in the county court the right to exercise eminent domain in the matter of ditches, and provides that the landowner may intervene and show cause why the power should not be exercised, the notice required to be given to the landowner is designed for his protection, and it must be given in the manner prescribed. *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707.

A proceeding to lay out a township ditch will be quashed if it does not appear that the notice was given to the interested parties of the application for the appointment of drainage commissioners to assess damages, or of their appointment. *Reinig v. Munson*, 46 Mich. 188, 8 N. W. 723.

The persons entitled to personal service of notice of a proposed improvement of a natural water course and lateral or spur ditches there-to under ditch laws because "affected" thereby are not merely those whose lands are to be assessed, but include those proprietors below the improvement the flooding of whose lands may be increased thereby; and such notice is not dispensed with by personal knowledge of such persons who have not estopped themselves by not objecting; and they are entitled to an injunction restraining the commissioners from proceeding to make the improvement until they have been heard and their rights to compensation ascertained and settled. *Neff v. Sullivan*, 9 Ohio Dec. Reprint, 785.

Personal notice to the owner of land sought to be taken for the construction of a ditch is not indispensable in order to its condemnation and appropriation, but notice by publication, provided for by a statute regulating such taking, is sufficient, and not a violation of any constitutional rights of the owner; nor is a provision for waiver of the right to compensation in case of failure to make application therefor within a time limited by such act, based upon constructive notice, unconstitutional. *Cupp v. Seneca County*, 19 Ohio St. 178.

The notice referred to in the Illinois drainage 60 L. R. A.

and intends, to collect and discharge into the river said noxious substances in the same manner and with the same effect for the period of five years from the 1st day of June, 1903, before which time the city will change the method of disposing of said sewage, and after that time the property of said respondent will not be needed for the maintenance and use of said sewers. By judgment of the superior court the city has been compelled to pay the respondent the amount of damages thus done to its property prior to April 23, 1901. The city authorities have been unable to agree with the respondent upon the amount of damage so done its property since April 23, 1901, and upon the amount of compensation for appropriating its property till the expiration of the period of five years. Wherefore, by authority of § 4 of an act amending the city

act, "to all persons interested" to appear and present their claims for damages for the construction of drainage ditches does not require notice to others whose lands are outside the district being organized, but affects those owners only whose lands are within the district. *Santa Fé Drainage Dist. v. Waelts*, 41 Ill. App. 575.

To taxpayer.

As indicated above, VII. d. 1, the courts are not fully in accord as to whether or not the taxpayer is entitled to notice.

So far as sewer assessments are concerned, which are made at a uniform rate according to area, the weight of authority is that notice is not necessary.

A sewer is constructed in the exercise of the police power, and that power is exercised solely at the legislative will, so that notice to taxpayers of the intention to construct the sewer and their assent to the proceeding are not necessary. *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

A statute authorizing assessments for a sewer, which are to be made according to the number of feet frontage which a lot has on a street, is not unconstitutional because it does not direct any notice to be given of the assessment, and does not give any right of appeal by which errors in the assessment may be corrected. *Cleveland v. Tripp*, 13 R. I. 50.

Under the Massachusetts statutes, a person benefited by the construction of a sewer may be assessed for his proportionate part of the expense without giving him notice and an opportunity to be heard before the making of the sewer. *Allen v. Charlestown*, 111 Mass. 123.

An act of legislature authorizing the levy of special assessments on property adjoining or with access to a sewer for the cost thereof at a fixed and uniform rate per foot of frontage and per square foot of area to a certain depth, without notice to the property owners, is not unconstitutional as "without due process of law," since, the amount of the assessment being a mere mathematical calculation with no question of value or matter of judgment involved, an opportunity for a hearing would be useless and futile, especially as such owners could at the proper time contest the constitutionality of the act, and institute proceedings for the correction of injustice, fraud, or error in making the required mathematical calculations. *English v. Wilmington*, 2 Marv. (Del.) 63, 37 Atl. 158.

A notice of the assessment of a special tax for the construction of a sewer is not neces-

charter, approved April 14, 1881, and § 7 of an amendment to said charter, approved May 23, 1867, the applicant applies for the appointment of a committee to appraise the damage heretofore done to the respondent's property, and to fix the compensation to be paid for its property taken for the public use, as aforesaid, for the period of five years." The only reason of appeal assigned is the claimed error of the court in sustaining a demurrer to this application on the ground that the proceeding was not authorized by the applicant's charter.

Mr. Henry Stoddard for appellee.

Messrs. John O'Neill and Lucien F. Burpee, with **Mr. John P. Kellogg**, for appellants:

In the exercise of the right of eminent domain the legislature is the sole judge to

sary before issuing the tax bill, where the statute under which it was assessed required the assessment to be based upon the area of each parcel assessed, without including improvements. *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, Affirmed in 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645.

The provision of the United States Constitution forbidding the taking of property without due process of law is not violated by reason of failure to notify a taxpayer of the apportionment of a sewerage tax assessed according to area, which would be a mere mathematical calculation, where notice is provided for as to the making and performance of the sewer contract. *Gillette v. Denver*, 21 Fed. 822.

An assessment for the expense of constructing a sewer is not invalid because of omission to give to the owner of the lots assessed a personal notice that an assessment is to be imposed. *Re De Feyster*, 80 N. Y. 585.

A statute authorizing a city to provide for the construction of sewers and drains, and to tax the cost upon the lots or ground in the district in which the sewer is situated, is not rendered unconstitutional and void by failure to require notice to the property owners to be charged therewith; but notice must, nevertheless, be given to such owners to sustain the tax, the city having a broad discretion with reference to the kind of notice and the manner in which it may be given. *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781.

All that is required in giving notice to property owners to be charged for the cost of sewers and drains is that the notice shall be given before the taxes shall have become such a fixed and permanent charge that the owners can have no adequate remedy to test their validity and fairness. *Ibid*.

The courts do not all agree to that doctrine, however, as appears from the following cases.

The want of any provision for notice to a lot owner, either actual or constructive, of the proceedings in making assessments for sewers, renders the provisions of that part of the city charter authorizing such assessments unconstitutional and void. *Diets v. Neenah*, 91 Wis. 422, 64 N. W. 299.

In the absence of statutory provision, reasonable notice is required to be given of the time when a hearing can be had upon a proposed assessment for sewers, and ten days' notice is then sufficient. *Auburn v. Paul*, 84 Me. 212, 24 Atl. 817.

One upon whose property a sewer assessment is imposed is entitled as of right to be heard at some stage of the proceedings before the tax 60 L. R. A.

what extent the public use requires the extinguishment of the owner's title.

Brooklyn Park v. Armstrong, 45 N. Y. 234, 6 Am. Rep. 70; 1 Lewis, Em. Dom. 2d ed. § 278; *Clark v. Worcester*, 125 Mass. 226; *Washington Cemetery v. Prospect Park & C. I. R. Co.* 68 N. Y. 591; *Newton v. Perry*, 163 Mass. 319, 39 N. E. 1032; *State, Mangles, Prosecutor, v. Hudson County*, 55 N. J. L. 88, 17 L. R. A. 785, 25 Atl. 322.

It would be illegal for the legislature to authorize the taking of more than is necessary for the purpose of the work contemplated.

Corbin v. Marsh, 2 Duv. 193; *Tyler v. Hudson*, 147 Mass. 609, 18 N. E. 582; *Martin v. Gleason*, 139 Mass. 188, 29 N. E. 664; *Clark v. Worcester*, 125 Mass. 230; *Hamor v. Bar Harbor Water Co.* 92 Me. 376, 42 Atl. 790; *Etna Mills v. Waltham*, 126 Mass.

shall become an established charge against him or his property. *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535.

The failure of the drain commissioner to give notice to the parties interested of the time when an assessment for benefits would be made or be subject to review renders such assessment void as to them, where the assessments were made without their knowledge. *Cook v. Covert*, 71 Mich. 249, 39 N. W. 47.

In case of farm drainage, where the assessment cannot be by uniform rule, notice and an opportunity to be heard must be given.

The owner of land lying within a drainage district, whose land has been classified according to the benefit it will receive, of which classification the law requires due notice to be served upon such owner, is not entitled to subsequent notices of the making of assessments for the proposed work in accordance with the previous classification; but he is required to take notice of each succeeding step taken by the drainage commissioners to effect the object for which the district has been organized. *People ex rel. Barber v. Chapman*, 127 Ill. 387, 19 N. E. 872.

An assessment against the land of one who is not named in the ditch proceedings, and who had no notice thereof, is void, and cannot be enforced as a lien. *Broemer v. Kelsey*, 106 Ind. 504, 7 N. E. 569.

A drainage statute which falls to provide that notice of the assessment must be given to property owners is unconstitutional, although an appeal is authorized and provision made for a hearing. *Re Lent*, 47 App. Div. 349, 62 N. Y. Supp. 227.

A personal tax levied against a resident landowner, as his part of the cost of a county ditch which affects his lands, is illegal, and its collection will be perpetually enjoined, where such landowner had neither notice nor knowledge of the proceedings, and his first knowledge thereof was when the tax had been placed upon the duplicate for collection. Such proceedings being *in personam*, personal notice was necessary to charge him, and a trial *de novo* under the remedial provisions of §§ 4490, 4491, Rev. Stat. would not afford adequate relief; and such statute does not apply to such a case. *Miller v. Graham*, 17 Ohio St. 1, Distinguished in *Baltimore & O. & C. R. Co. v. Wagner*, 43 Ohio St. 75, 1 N. E. 91.

To what persons.

In proceedings under the drainage statute, notice to a mortgagee who has taken title, but not possession, under a foreclosure sale of the

422; *Bishop v. North Adams Fire Dist.* 167 Mass. 369, 45 N. E. 925; *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Kerr*, 27 N. Y. 188; *Albany Northern R. Co. v. Brownell*, 24 N. Y. 349; *Heard v. Brooklyn*, 60 N. Y. 242, *Re Rochester Waters Comrs.* 66 N. Y. 413; *West River Bridge Co. v. Dix*, 6 How. 535, 12 L. ed. 546; *Re Amsterdam Water Comrs.* 96 N. Y. 351.

The state, in the exercise of the right of eminent domain, or a corporation having the delegated power, may acquire such an interest or estate as, in the judgment of the legislature, the public services may demand.

Heyward v. New York, 7 N. Y. 314; *Sixth Ave. R. Co. v. Kerr*, 72 N. Y. 333; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427; *Taylor v. Baltimore*, 45 Md. 576; *Windsor v. Field*, 1 Conn. 279.

lands of a married woman, and to her husband, who occupies them with his wife, is sufficient; and, inasmuch as such married woman has been divested of legal title, she cannot maintain certiorari to review. *State, Berryman, Prosecutor, v. Little*, 49 N. J. L. 182, 6 Atl. 519.

Under the Michigan drain law of 1885, requiring notice of the hearing for the appointment of special commissioners to be served upon every person whose lands are traversed by such drain, or who will be liable to assessment therefor, neither mortgages nor the possessor of a leasehold interest of five years' duration are entitled to notice. *Kinnie v. Bare*, 80 Mich. 345, 45 N. W. 345.

Service of notice of a drainage assessment on the person who is described in the petition and named on the tax duplicate as the owner of land will be deemed sufficient in the absence of proof that the real owner had been misled or injured by the failure to serve notice on him, or that he was known to be the owner. *Carr v. State use of Cottingham*, 103 Ind. 548, 3 N. E. 375.

The actual, though not record, owner of land cannot enjoin the construction of a public ditch through his land on the ground that the proceedings were void because he had no notice thereof, under a statute requiring notice to state the names of owners so far as they can be ascertained from reasonable inquiry and search of the records,—especially where large sums of money have been expended in the construction of a large portion of the ditch, which promises great public and private benefit. *Kepler v. Wright*, 136 Ind. 77, 35 N. E. 1017.

A proceeding to lay out a township drain is void as to a nonresident landowner affected thereby, who was not named in the proceeding or notified of it, but whose husband was assumed to be the owner of the property. *Bixby v. Goss*, 54 Mich. 551, 20 N. W. 581.

3. Of what.

Where the charter of a municipal corporation only requires notice of the assessment for a local improvement to be given to the owners of property to be affected thereby, no notice need be given of the action of the common council in defining the area of an assessment for a sewer. *Works v. Lockport*, 28 Hun, 9.

In the establishment of a drainage district, the matter as to which the property owner is entitled to notice is that his land is included within the body or district of land that is to be subject to general assessment for such improvement; and therefore, where parties had 60 L. R. A.

The limitation as to the time during which it is intended to take and damage the property in the manner described is as proper as any other limitation.

Randolph, Em. Dom. § 233; *Wheelock v. Young*, 4 Wend. 651; *Brook v. Barnet*, 57 Vt. 172; *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484.

If the municipality seizes private property for temporary uses, and its occupancy carries with it the right to adapt the property to such uses as its purposes require, the damage must be figured with reference to these and all elements involved; and the time of occupation is as essential in the reckoning as the purpose of the occupation or the use actually made of the property.

United States v. Gettysburg Electric R. Co. 160 U. S. 668, 685, 40 L. ed. 576, 582, 16 Sup. Ct. Rep. 427.

notice of the general boundaries of a drainage district to be created, such notice is sufficient. *Oliver v. Monona County (Iowa)* 90 N. W. 510.

Failure to provide a landowner whose property is not traversed by a drain, but lies within the assessment district, an opportunity to contest the public necessity for the drain, as to which question the determination of the drain commissioner is conclusive by statute, in the absence of condemnation proceedings, does not constitute a taking of his property without due process of law, where the statute provides for notice of the assessment, and gives him an opportunity to be heard thereon. *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1091.

A landowner may, in a proceeding for judgment against his land for a delinquent tax, contest the fact of the jurisdiction of the court in including his land within the district when originally organized, where that court had no jurisdiction of the person of such owner by reason of the failure to serve him with the statutory notice of the organization of the district. *Payson v. People ex rel. Parsons*, 175 Ill. 267, 51 N. E. 588.

The owner of land to be affected by the construction of a proposed sewer is not entitled to notice of the passage of an ordinance laying the foundation for the condemnation proceedings to secure the necessary lands therefor. *Joplin Consol. Min. Co. v. Joplin*, 124 Mo. 129, 27 S. W. 406.

The building of a sewer in a public street is not, ordinarily, such a taking of private property for a public use as requires compensation to be made; it is rather to be considered an improvement or repair to a highway such as the authorities are empowered to make. Hence, the abutting owner, subject to assessment for the expense thereof, is not entitled to notice of intention to construct. *Woodhouse v. Burlington*, 47 Vt. 300.

A requirement of a statute providing for construction of a sewer, of the publication of notice containing a statement of the size of the sewer, must be complied with to make the assessment of abutting property enforceable. *Atlanta v. Gabbett*, 93 Ga. 266, 20 S. E. 306

4. Form.

A statute authorizing municipal corporations to construct sewers or drains and assess the cost thereof upon property lying within the district drained by service on the owners thereof of constructive notice by publication is not unconstitutional as without due process of law, since it is within the legislative discretion to deter-

Hamersley, J., delivered the opinion of the court:

The essential averments of fact contained in the application may be stated thus: For some years past the city of Waterbury has conveyed, by means of the Naugatuck river, portions of the filth and noxious substances accumulated by its inhabitants to the premises of the defendant, and the putrefaction of the substances thus deposited has damaged the property of the defendant, and seriously endangered the health of those living on the premises and employed about the manufacturing establishments thereon. By a judgment of the superior court the city has been compelled to pay the damages suffered by this defendant by reason of these wrongful acts prior to April 23, 1901. The city intends to continue on the defendant's premises the nuisance described until it has

discovered and carried out some feasible plan for otherwise disposing of said substances. It has used due diligence to discover said plan, and will discover and carry out said plan within a period of five years. The city has been unable to agree with the defendant as to the amount of damage resulting from its acts, past and intended. The legislature conferred upon the city by an act amending its charter, approved April 14, 1881, the powers described in § 4 thereof. Said filth and noxious substances were collected and discharged into the Naugatuck river by means of certain sewers constructed by said city under the authority given in said act. Upon these facts the city claims relief through the appointment of a committee which shall fix and determine the damages the defendant has suffered and will

mine the kind of notice to be given and the manner of giving it. *Swain v. Fulmer*, 185 Ind. 8, 84 N. E. 639.

Drainage proceedings, under the law, to establish and construct a public ditch, and to assess the cost thereof upon the land specially benefited, are actions *in rem*, and belong to that class of cases in which constructive notice only of the filing of the petition is required, and in which notice to nonresidents and unknown owners may be made by publication. *Otis v. DeBoer*, 116 Ind. 531, 19 N. E. 817.

Notice by publication to the nonresident owners of lands adjacent to a proposed ditch is sufficient, although not addressed to them by their individual names, but only "to the nonresident owners of" certain described lands. *Miller v. Graham*, 17 Ohio St. 1.

In a proceeding to establish a drain personal service of notice is not necessary, when notice by publication has been given as required by statute. *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22.

Notice by publication is a sufficient notice to the taxpayer of proceedings for the assessment of a tax on his property for the construction of a sewer. *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

Notice of an intention to file a petition for the establishment of a ditch which will affect the lands of others, by posting and without personal notice, as provided by statute, is sufficient. *Carr v. State use of Cottingham*, 103 Ind. 548, 3 N. E. 375.

Sufficient constructive notice to property owners of proceedings to construct a sewer, the cost of which is to be assessed against their property, and sufficient opportunity to be heard to constitute due process of law, are provided under a charter requiring the publication in the official paper of the city of the fact that a plan for the sewer to be constructed within designated boundaries has been completed and is open for inspection, and offering an opportunity to be heard, also requiring the publication of the action ordering the construction of the sewer, and of the advertisements for bids for doing the work, and giving the council the option to publish notice of the letting of the contract, and that a statement showing the amount of special assessments chargeable to lots benefited is on file with the city clerk, and requiring publication of the resolution for issuing bonds to pay for the work in case the assessments are not paid. *Hennessy v. Douglas County*, 99 Wis. 129, 74 N. W. 983.

An assessment on township highways for benefits conferred by the construction of a 60 L. R. A.

ditch cannot be enforced where neither the petition for, nor the notice of, the establishment of the ditch mentioned or contained the name of the township or its officers, and the only notice they had of the assessment was the recording in that county of a copy of the assessment, where the drainage law under which the ditch was established requires either the lands affected to be described in the petition, or the names of their owners to be given, and for a like description in the notice, and provides that notice shall be given to such owners. *Young v. Wells*, 97 Ind. 410.

A general notice by advertisement not giving the names of owners or describing the lands affected by the construction of a sewer, and before it can be known by them what property is benefited thereby, is a reasonable one within the legislative power, and an assessment based thereon is valid. *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144.

It is a prerequisite to the validity of an ordinance for building a sewer in Perth Amboy, New Jersey, that the advertised notice to interested parties to appear and be heard should name a time and place for the hearing; and an objection grounded upon failure to give such notice is not waived by appearing at a meeting to hear objections to the assessment and protesting that the sewer is uncalled for, that all the proceedings are unjust and unfair, and that property owners were not consulted. *State, Brinley, Prosecutor, v. Perth Amboy*, 29 N. J. L. 259.

Defective notice in a ditch proceeding will protect the proceeding from collateral attack. *Pickering v. State use of Dyar*, 108 Ind. 228, 6 N. E. 611.

Defect of notice is not sufficient ground for collateral attack upon a drainage proceeding if some notice was actually given upon which the court took jurisdiction of the proceedings. *Deegan v. State use of Stoddard*, 108 Ind. 155, 9 N. E. 148.

A notice served on a property owner, stating that a commissioner appointed to locate a ditch had reported in favor of the location, and that all objections thereto must be filed before a certain date, or that action would be taken and the ditch located without reference to any objections, while not in the exact language used by the statute, is not so defective as to constitute no notice, so that the action of the board of supervisors holding it to be sufficient can be collaterally assailed. *Oliver v. Monona County (Iowa)* 90 N. W. 510.

One who had actual knowledge of a petition and the proceedings under it for the es-

suffer during a period not exceeding five years, by reason of the acts described.

It is certain that the court has no power to grant such relief unless it is conferred by the statute referred to. It is also certain that authority for such an extraordinary proceeding should not be gathered from doubtful inferences, but should be unmistakably expressed. The claim of the applicant is that it is authorized to act as agent of the state in taking private property for public use, and to take any property of the defendant that can be regarded as appropriated by doing the acts it proposes to do, and its claim, therefore, involves the proposition that what it proposes to do is necessary to the sewerage of the city of Waterbury, as contemplated by the legislature in authorizing the construction of sewers which shall discharge their contents into the Naugatuck

river. It may well be doubted whether the mere authority to construct sewers emptying into a river flowing through an inhabited country can imply authority to do the acts described. The treatment of that part of a city's sewage which comes from the necessity of surface drainage involves different considerations from those applicable to the treatment of that part of the sewage which comes from the necessity of disposing of accumulation of excreta and substances of a similar dangerous nature. It is matter of common knowledge that accumulations of such substances are a source of danger to health, and even life, and for this reason their speedy removal from a city's limits has been regarded as a public necessity; and the same necessity demands that they shall be so removed, or in some way rendered harmless, that other citizens shall not be exposed

to the establishment of a ditch, and who stood by and allowed money to be expended on the faith of the validity of the proceedings without objecting, will be estopped from afterwards moving to dismiss for want of notice, where an attempt was made in the proceedings to comply with the statutory requirements regarding notice, and some, although insufficient, notice was given. *Peters v. Griffie*, 108 Ind. 121, 8 N. E. 727.

A court of equity has no power to set aside a sale of an owner's property for delinquent drainage assessments upon the ground that the statutory notices required to be given to landowners, antedating the order of the county court confirming the report of commissioners, and finding that a drainage district is duly established, were irregular or insufficient. *Calkins v. Spraker*, 26 Ill. App. 159.

An ordinance requiring notice of the intended construction of a sewer to be given to the owner of land assessed therefor by personal service, or by leaving the same at his place of residence, is not complied with by leaving the notice on the desk at his place of business during his absence. *Mills v. Detroit*, 95 Mich. 422, 54 N. W. 897.

Persons who by regular notice and appearance are in court in a drainage proceeding, and upon whose remonstrance the first report of viewers had been dismissed, cannot rely on want of notice of a second report to excuse refileing the remonstrance. *West Creek Twp. v. Miller*, 142 Ind. 210, 41 N. E. 452.

A drainage proceeding is not subject to collateral attack because the notice was defective if it was sufficient to give the authorities jurisdiction of the proceeding. *Jackson v. State use of Dyar*, 104 Ind. 516, 3 N. E. 883.

If notice of drainage proceedings was given which the court held were sufficient, the proceedings are not subject to collateral attack because of insufficiency of the notice. *McMullen v. State ex rel. Kendle*, 105 Ind. 334, 4 N. E. 903.

5. *Hearings.*

A statute providing for the construction of drains along a roadbed by railroad companies is invalid when it makes no provision for a hearing as to the railroad company at any stage of the proceeding. *Chicago & E. R. Co. v. Keith* (Ohio) 65 N. E. 1020.

The provision of Cal. Pol. Code, § 3493½, for an action by reclamation districts to determine the validity of an assessment, whereby the determination of such question is merely permitted to be made in advance of the action upon the 60 L. R. A.

assessment wherein the owner previously made his showing, and is made conclusive as to the parties, and in which the owner is given the hearing to which he is entitled,—is not unconstitutional. *Lower Kings River Reclamation Dist. No. 531 v. McCullah*, 124 Cal. 175, 56 Pac. 887.

The statute providing for the assessment of damages for the taking of land for a drainage district by a jury, but without an opportunity to the owner to be present at the impaneling of the jury and object to jurors, or to cross-examine witnesses and offer testimony at the original assessment of damages, is unconstitutional, even though it gives him the privilege of objecting to such assessment after it is made. *Wabash R. Co. v. Coon Run Drainage & Levee Dist.* 194 Ill. 310, 62 N. E. 679.

In *Reclamation Dist. No. 108 v. Evans*, 61 Cal. 104, it is held that the failure of statutory provisions relating to the assessment of lands within reclamation districts to provide for any mode by which a party assessed shall have notice of the proceedings and an opportunity to object to the amount charged against his land is immaterial, and does not render the provisions unconstitutional and void, where no assessment against any tract of land can be enforced except by action to which the owner of the tract is a party, in which there is no limitation upon the defenses he may raise, and he is given a full opportunity to contest the charge. See also *Reclamation Dist. No. 3 v. Goldman*, 65 Cal. 635, 4 Pac. 676; *Reclamation Dist. No. 108 v. Hagar*, 66 Cal. 54, 4 Pac. 945.

A statute authorizing municipal corporations to levy assessments for the construction of sewers is not unconstitutional as failing to provide notice to landowners, and giving them no opportunity to test the validity of the proceedings, where it provides for notice to be given by the town treasurer that the benefits assessed are in his hands for collection, and for the enforcement of the lien created by such assessment in a court of competent jurisdiction, although it limits the owners' defense to proof that the assessment has been paid, and that his lands are not benefited to the amount assessed against them. *Klizer v. Winchester*, 141 Ind. 694, 40 N. E. 265.

6. *Other matters.*

A landowner cannot object to the validity of the laying out of a sewer for want of previous notice to him after he has entered his private drain into it. *Butler v. Worcester*, 112 Mass. 541.

Joining in a remonstrance against drainage

to the dangers from which the inhabitants of a city are relieved. Assuming the power of the legislature to authorize a city to maintain nuisances such as are described in the application, even where no controlling necessity exists, it is certainly unlikely that any legislature, in the absence of such necessity, would specifically give to a city such authority; and, where the authority is not clearly given, its inference, from the use of broad phrases or doubtful expressions, would be difficult to justify. In *Platt Bros. v. Waterbury*, 72 Conn. 531-550, 48 L. R. A. 691, 45 Atl. 154, we intimated the opinion that, if the charter gave the city power to take the respondent's property in this manner, its provisions for instituting proceedings to determine compensation for any property taken should be broadly construed as applicable to all property that might be taken in

view of the rule which requires a law to be so construed, if reasonably possible, as to give it validity. But the question of charter authority to thus take property for the purpose of sewerage, as well as the question of authority to institute proceedings for condemnation, was not then material, and we did not pass upon it. In the present case the applicant admits that the acts it intends to do are not necessary for the purpose of sewerage. The application affirms its desire and intention of disposing in other ways of the filth it has cast upon the defendant's premises. The very basis of its application is, not the necessity of taking the defendant's property for the purpose of sewerage, but the necessity of taking the property for the purpose of enabling it to continue the nuisance described until it has provided for its abatement. The public use for which it

proceedings will constitute a waiver of notice of such proceedings. *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867.

The fact that one or more landowners are not notified of proceedings to establish a ditch does not vitiate to proceedings as to those having notice. *Carr v. Boone*, 108 Ind. 241, 9 N. E. 110; *Poundstone v. Baldwin*, 145 Ind. 189, 44 N. E. 191.

The fact that no notice was given to one of the parties against whom an assessment was levied for the construction of a ditch, as required by the law under which it was constructed, does not render the proceedings void as to others properly notified, unless such failure renders them absolutely void. *Grimes v. Coe*, 102 Ind. 406, 1 N. E. 735.

e. Letting contract.

A municipal corporation may construct public drains or ditches by its officers or servants, and is not bound to let such work out to independent contractors, where the work is not to be done at the expense of adjacent property owners. *Platter v. Seymour*, 86 Ind. 323.

Public notice of the letting of contracts for the construction of a township drain is required by *How. Stat. (Mich.)* § 1708. *Burnett v. Scully*, 56 Mich. 374, 23 N. W. 50.

The fact that the construction of a sewer is a sanitary measure requiring prompt attention does not render a contract for its construction and the tax bill issued thereon valid where the advertising for its letting was done before the ordinance authorizing it went into effect. *Keane v. Klausman*, 21 Mo. App. 485.

An assessment for sewer construction cannot be maintained so long as it includes an item which was not submitted to competition, where the statute requires it to be done. *Mutual L. Ins. Co. v. New York*, 144 N. Y. 494, 39 N. E. 386, *Affirming* 79 Hun, 482, 29 N. Y. Supp. 980.

A clause in an ordinance of a municipal corporation for the construction of a sewer, in conflict with a statutory provision requiring all contracts exceeding \$500 for the making of public improvements to be let to the lowest responsible bidder, does not vitiate the balance of the ordinance, but may be rejected as nugatory, leaving the balance of the ordinance in force. *Walker v. People ex rel. Kochersperger*, 170 Ill. 410, 48 N. E. 1010.

A statutory requirement that contracts for sewers or sewer construction shall be let to the lowest bidder applies only to the contract for an original construction, and not to a reletting of the contract in case the original con-

tractor fails to perform his contract. *Re Leeds*, 53 N. Y. 400.

When an ordinance is passed for the deepening and enlarging of a sewer by enlarging a portion, constructing a portion under a race, and deepening another portion, and after advertisement the contract is awarded for the work, a portion to be under the race and a portion to be open cut, the municipality may change the contract with the same contractor so as to require the whole work to be tunneled without re-advertising. *Lutes v. Briggs*, 64 N. Y. 404.

That, after the one to whom a contract for a sewer had been let refused to comply with his contract, the contract was let to the next lowest bidder without re-advertising, will not, after the work has been completed, entitle the owners of property assessed to avoid their assessments where the officials have authority to reject any and all bids. *Johnson v. Duer*, 115 Mo. 866, 21 S. W. 800.

A landowner who stands by with full knowledge and without objections while a contractor expends his money in the construction of a ditch, established under the law in a proceeding in which the court had jurisdiction, cannot, after the completion of the work and the making of the assessment, enjoin the collection thereof on the ground of irregularity in the proceeding, unless he first tender the amount equitably due such contractor for benefits conferred on his land by the work done. *Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795.

Where, by reason of its grades, the drainage of a particular street must be done in sections with different outlets, the fact that one section of the work was begun at the time of the adoption of a city charter will not bring the entire work within the exception of a clause requiring all work to be let by contract excepting work already in progress. *Re Blodgett*, 91 N. Y. 117.

The requirement of a statute that work upon sewers shall be let by contract, after advertisement, to the lowest bidder is not complied with by fixing the price for rock excavation in the proposal and thereby withdrawing it from competition. *Re Manhattan Sav. Inst.* 82 N. Y. 142.

A contract for sewer work may reserve the right to increase or diminish the gross length, number, or height of any item without impairing the validity of the contract so as to avoid an assessment in the absence of fraud. *Re Merriam*, 84 N. Y. 596; *Re Metropolitan Gas-light Co.* 85 N. Y. 526, *Reversing* 23 Hun, 327.

The mere fact that the advertisements for proposals for sewer work do not involve the

claims authority to take property is a condition arising from its delay—reasonable, as is alleged—in providing the appropriate means for exercising the powers given it by the legislature in authorizing the construction of its sewers, and, unlike the public use of sewerage, is a use temporary in its nature. A public use permanent in its nature and indefinite in duration differs from a public use of a temporary nature. The trial court correctly held that authority to take property for a public use of the former kind does not necessarily imply the power to take property for one of the latter kind. When the power to exercise the right of eminent domain is delegated to a private or municipal corporation, the extent of the power is limited by the express terms or clear implications of the statute authorizing its exercise. *Currier v. Marietta & C. R. Co.* 11 Ohio St. 228; *Hibernia Underground R. Co. v. De Camp*, 47 N. J. L. 518, 547, 54 Am. Rep. 197, 4 Atl. 318; *Bishop v. North Adams Fire Dist.* 167 Mass. 369, 45 N. E. 925.

But, if the taking of property is authorized for a public use, either of a permanent or a temporary nature, the appropriation

lasts during the continuance of that use. The applicant's charter authorizes it to take land for the public use of highways. It cannot be claimed that such authority to take land implies the right, upon the city's alleging an intention to discontinue the highway laid out, when a feasible plan for laying out other highways has been discovered, and executed, and that it will discover and carry out such plan in five years,—to limit the compensation by a valuation of the property taken for a highway for a period of five years, or to ascertain the whole amount of compensation by a succession of valuations for definite periods. If the legislature can authorize such mode of valuing property taken for public use, whether for the use of highways or use of sewers, it certainly should be clearly expressed. There is nothing in the plaintiff's charter which suggests a legislative sanction for such a mode of proceeding.

There is no error in the judgment appealed from.

The other Judges concur.

cost of rock excavation, but that the price for this item is fixed, does not avoid the whole assessment, but merely presents a case for the deduction of the objectionable item under the New York act of 1870. *Re Merriam*, 84 N. Y. 598.

Collusion between city officers and a bidder, by which the latter was made to appear the lowest bidder and thereby obtained a contract for building a sewer, is a good defense to an action to enforce an assessment therefor. *Cincinnati v. Steele v. Kemper*, 9 Ohio Dec. Reprint, 742.

Where drainage commissioners, after complying with all antecedent requirements with reference to computing costs of improvement, levy or tax, advertising for bids, etc., enter into a written contract for the construction of a ditch, requiring the contractor to enlarge, if ordered by the commissioners so to do, on the basis of payment for the extra work in the same proportion as for the original work, they are not required to advertise again, even though the enlargement involves an expenditure of more than \$500, provided they have money on hand or provided for by levy to meet the additional expense. *Drainage Comrs. v. Lewis*, 101 Ill. App. 150.

Provisions of a statute requiring proposals for sewer construction to be invited by advertisement, and compelling contractors to furnish bond or other security, are to secure proper expenditure of public money, and to protect taxpayers from fraud and imposition in the making of contracts, and are not directory but in the nature of conditions precedent to the building of the sewer, and consequently to the validity of assessments for its cost. *Bowditch v. Superintendent of Streets*, 168 Mass. 239, 46 N. E. 1026.

1. Remonstrance.

Where by charter a municipality has exclusive power to lay out public sewers, the validity of its procedure cannot be attacked so as to defeat an assessment for an improvement on the ground that all the property owners along the route of the sewer remonstrated against its construction. *Park Ecclesiastical Society v. Hartford*, 47 Conn. 89.
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Landowners cannot, after the time for filing remonstrance has elapsed, withdraw their names from a remonstrance against the establishment of a public ditch so as to defeat the statutory right to a dismissal of the petitioner for its establishment, where two thirds of those affected had remonstrated against such establishment. *Sauntman v. Maxwell*, 154 Ind. 114, 54 N. E. 397.

Under a statute merely permitting several landowners affected by a drainage improvement to file a remonstrance, the withdrawal of some who have joined in the remonstrance will not defeat it, or impair or affect in any manner the right of others to proceed the same as if such withdrawal had not occurred. *Munson v. Blake*, 101 Ind. 82.

Under the Jersey City charter and the supplement thereto, the proceedings to construct a sewer can go no further when property owners liable to more than half the assessment therefor file timely remonstrances, although they subsequently withdraw their opposition and erase their names from the protest. *State, Jersey City Brewery Co., Prosecutor, v. Jersey City*, 42 N. J. L. 575; *State, Green, Prosecutor, v. Jersey City*, 42 N. J. L. 565.

When the public authorities are required by law to give a hearing to objections of interested parties to a proposed sewer, and they give due notice thereof, the fact that, in addition, they require objections to be submitted in writing does not invalidate the proceedings. *State Plard, Prosecutor, v. Jersey City*, 30 N. J. L. 148.

A provision in a drainage law allowing the owners of land affected by a ditch only three days to file remonstrances against the assessors' report is not repugnant to any provision of the state or Federal Constitutions, although the time limit seems unreasonable and oppressive. *Hays v. Tippy*, 91 Ind. 102.

Appearing and filing remonstrance against a drain will waive all questions pertaining to jurisdiction of the court over the remonstrant. *Ford v. Ford*, 110 Ind. 89, 10 N. E. 648.

Recognizing drainage proceedings by filing a remonstrance against them on the merits will be a waiver of a defect caused by failure of the commissioners to file their report within

the requisite time. *Blake v. Quivey*, 118 Ind. 124, 14 N. E. 916.

g. Statutory matters.

The levying of an assessment for the construction of a sewer under a drainage law providing for the levying of special assessments according to the mode prescribed by an existing law must follow the mode provided at the time such drainage law was passed, and does not include subsequent additions or modifications of the statute prescribing different modes. *Andrews v. People ex rel. Kochersperger*, 173 Ill. 123, 50 N. E. 335.

Where a statute authorizes the construction of sewers only in public streets, and a sewer is ordered in a private way, but before the construction of the sewer the street is laid out as a public street, an assessment for such sewer is valid. *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

Dike and ditch taxes levied subsequent to the adoption of a state Constitution by districts organized prior thereto are illegal and void when the dike and ditch laws are in conflict with provisions of the Constitution, as the effect of the adoption of the Constitution is to abrogate and annul all territorial laws repugnant thereto. *Pickering v. Ball*, 19 Wash. 185, 52 Pac. 1022.

A municipal corporation cannot divide the levy of a special assessment for the construction of a sewer into instalments, where the statute under which it is constructed provides for the levy and collection of assessments to pay for such work according to the provisions of a general law, which general law did not, at the time such act was passed, provide for dividing special assessments into instalments, although since the passage of that act an amendment has been made to the general law authorizing it. *Charleston v. Johnston*, 170 Ill. 336, 48 N. E. 985.

A general drainage act will supersede earlier provisions of municipal charters relating to the same subject. *State, Vreeland, Prosecutor, v. Jersey City*, 54 N. J. L. 49, 22 Atl. 1052.

When the legislature adopts two drainage acts, the last enactment will, if inconsistent with the earlier one, operate as a repealer by implication; and action taken pursuant to the later statute will not be affected by the repeal thereof, when such action is within a saving clause in the repealer. *State, Britton, Prosecutor, v. Blake*, 35 N. J. L. 208.

A municipal corporation authorized under its charter to make local improvements by special assessments may construct sewers without creating a drainage district, although another statute under which it might have constructed the sewer requires the creation of drainage districts for that purpose. *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

A provision in a drainage law authorizing township trustees to establish public drains for the benefit of highways is so far modified by a subsequent act taking the control of highways entirely out of his charge and giving another official exclusive control thereof as to no longer be enforceable by the township trustee. *Jones v. Dunn*, 90 Ind. 78.

An act of the legislature empowering county courts to authorize the drainage of land when the same shall be conducive to the public health of its inhabitants, the cost thereof to be paid by local assessments on the lands of those benefited, is not repealed by a subsequent act authorizing the several counties to remove ponds, pools, swamps, marshes, or reclaim swamp land that may cause sickness, to be paid for out of the county levy or by taxation of the taxable

property of the county. The second act is intended to apply to cases where the provisions of the first cannot apply, or, at least, not so appropriately. *Duke v. O'Bryan*, 100 Ky. 710, 39 S. W. 444, 824.

A statute providing for a special drainage system for a certain county, which is covered by a general law providing for a general drainage system to be carried out and executed by town and county officers, is not a violation of the Wisconsin Constitution, providing that the legislature shall establish but one system of town and county government, which shall be uniform and practicable, as the drainage of swamps and marshes is not one of the ordinary functions of town and county officers within the meaning of the Constitution, but is a special authority given for a particular purpose, which may be conferred upon any persons or body upon which the legislature may see fit to confer it. *Bryant v. Robbins*, 70 Wis. 258, 35 N. W. 545.

The provision of § 2384, of Ohio Rev. Stat., under the subdivision, *Sewers*, that in no case shall the assessment of sewers exceed \$2 per front foot on the property assessed, does not take the levying of assessments for the construction of sewers outside of the general limitation contained in § 2271, providing that in certain municipal corporations no lot or land shall be assessed for any improvement in excess of 25 per cent of the value of such lot or land after the improvement is made, but, taken together, and giving effect to both, they constitute a declaration that such assessments shall in no case exceed 25 per cent of the value of the property, nor amount to more than \$2 per front foot on the property abutting on such sewer. *Cincinnati v. Connor*, 55 Ohio St. 82, 44 N. E. 582.

If the removal of obstacles from rivers will be rendered necessary by the increased flow of water, or is in any way subsidiary to the drainage system or promotive of its proper objects, it is part of the system, although it may incidentally result in the improvement of those rivers for purposes of navigation; and the expression of such removal in the title of the bill creating the sanitary district is not the expression of another subject, but the enumeration of a particular matter in the general subject already expressed, and relieves such title from the charge of duplicity of subjects prohibited by the Constitution. *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217.

The right to construct a single main sewer under general statutory authority to cities and villages to construct drains and sewers is not dependent upon, or affected by, the condition precedent that abutting lots should need local drainage, attached by other separate statutory provisions to the right to construct a general system of sewerage, which do not expressly or by implication take away any of the former powers, but are merely cumulative and intended to give additional powers. *Hartwell v. Hamilton County House Bldg. Asso.* 7 Ohio Dec. Reprint, 397.

An amendment of the Municipal Code by giving city or village councils the power to determine when it becomes necessary to provide a system of drainage or sewerage for the municipality, and giving authority to proceed in a certain way after such determination to construct such improvements, will restrict power given by existing provisions to "open, construct, keep in repair, and order sewers, drains, and ditches," generally, only in cases where a system of sewerage has been determined to be necessary, and will not prevent the municipality from placing a sewer in a particular street under the old law without providing a system of

sewerage and proceeding under the new law. *Hartwell v. Cincinnati, H. & D. R. Co.* 40 Ohio St. 155.

Under the New York act for draining lands in Orange county, which authorized the commissioners to construct a ditch of such "depth and size as might be found necessary and useful" for leading off the waters, the commissioners are not limited to their first determination, but, in case that proves insufficient, they are empowered to continue widening and deepening until the object is secured. *Houston v. Wheeler*, 52 N. Y. 641.

A sewer is within a law relative to assessing upon benefited property the expense of constructing a "new sewer," although there was an old sewer on the street, but on the other side, no part of it being used in the new construction, it being broken down and useless. *Hall v. Boston Street Comrs.* 177 Mass. 434, 59 N. E. 68.

When a sewer easement across private property has been abandoned for a consideration, it cannot be retaken for such use without the owner's consent, except by proceedings *de novo* under powers of eminent domain. *Strohl v. Ephrata*, 178 Pa. 50, 35 Atl. 713.

A township drain commissioner has no jurisdiction to locate a township drain upon the line of a drain laid by the county drain commissioner, unless such first drain has been legally vacated or abandoned. *Zabel v. Harshman*, 68 Mich. 273, 42 N. W. 44; *Tomlin v. Newcomb*, 70 Mich. 358, 38 N. W. 815.

A drain commissioner has jurisdiction, under a petition for the location and assessment of a drain, to clean out an old drain or a water course which is part of the new drain to be established, and a separate proceeding is not necessary for that purpose. *Strum v. Kelly*, 120 Mich. 685, 79 N. W. 930.

County commissioners as conservators of the public health, convenience, and general welfare have power to cause a ditch, lawfully established but in part imperfectly constructed on a line other than the prescribed line, by the owner of the land on which that part was located, and who was ordered by the commissioners to construct that portion, to be reconstructed under a statute authorizing them to exercise jurisdiction and cause an established ditch to be cleaned out, and to cause the ditch to be widened and deepened; and such owner, having neglected to perform in the prescribed manner the work so ordered done by him is in no position to complain of its proper completion by another under the orders of the commissioners, and the charging of the costs upon his land. *Crawfis v. McClure*, 30 Ohio St. 216.

The power of a municipal corporation to order local drainage is a continuing one, and is not exhausted when exercised once; but the city may, in the proper exercise of its discretion, determine that another local sewer on the opposite end of a lot is necessary, which determination, in the absence of abuse, the court cannot review. *Coburn v. Bossert*, 13 Ind. App. 359, 40 N. E. 281.

Under authority to extend and enlarge sewers and apportion the expense upon lands benefited, municipal authorities may extend the sewer already completed at the expense of abutting owners, and assess the cost upon the property benefited, including that assessed for the original improvement. *Cleveland v. Yonkers*, 115 N. Y. 193, 21 N. E. 1058.

Under a statute providing for drainage commissioners, and that the work shall be completed according to their directions, and that, after completion of the business, they shall make return to the court of their doings under the commission, they have no authority to repeat the action if, by the forces of nature, the

channels provided by them for the drainage of a pond are filled up so that the pond is again raised to its former level. *Smith v. Smith*, 148 Mass. 1, 18 N. E. 595.

Equity will not restrain a municipal corporation from locating a drain on private property when there is a safe, adequate, and complete remedy at law, under the statute conferring powers of eminent domain for that purpose, although such location be in the guise of the re-opening of an old drain or water course abandoned for a consideration. *Strohl v. Ephrata*, 18 Lanc. L. Rev. 1.

Refusal to allow damages for land taken for a sewer exhausts the authority of the municipal authorities, and they cannot subsequently entertain a new petition by the same landowner for the same laying out. *Cambridge v. Middlesex*, 117 Mass. 79.

No provision having been made in a drainage act for pleading a former adjudication as to a petition for the establishment of a drain, it is to be inferred that the legislature did not intend that one failure to secure the drainage petitioned for should bar all future attempts by the same party. *Heick v. Volght*, 110 Ind. 279, 11 N. E. 306.

The provision of an act of the legislature, creating a sanitary district, which confers upon the district the power, and imposes upon it the duty, to remove certain locks and dams in waterways, and to deepen and otherwise improve the same beyond the terminus of its own channel, are a necessary part of the general system of drainage for sanitary purposes embraced within the subject expressed in the title, where the result of constructing the proposed system of drainage will necessarily increase the volume of water flowing through such waterways, and, unless the channels of the same are altered so as to accommodate the increased flow, the waterways, as well as the rights of riparian owners along the same, will be prejudiced thereby, and the whole scheme of drainage will fail. *People ex rel. Longenecker v. Nelson*, 133 Ill. 565, 27 N. E. 217.

h. Details of work.

The legislative power to drain swamps may be exercised through the intervention of a company created for that purpose. *Re New Orleans Draining Co.* 11 La. Ann. 838.

If it is found necessary in deepening a ditch in accordance with statutory authority to extend it into another county, in order to execute the authority the ditch may be extended. *Yeomans v. Riddle*, 84 Iowa, 147, 50 N. W. 886.

A drainage ditch must be so constructed as to prevent its overflow, except in case of extraordinary high water or floods. *Bungenstock v. Nishnabotna Drainage Dist.* 163 Mo. 198, 64 S. W. 149.

Under authority to improve streams flowing through a town for the purpose of surface drainage, and to divert the water, alter the course, or deepen the channel, a straight channel may be constructed, walled and covered by brick, as in the case of a common sewer. *Beals v. James*, 173 Mass. 591, 54 N. E. 245.

The power of trustees to grant permission to box or tile a ditch being limited by statute to those who apply in writing at the time of the hearing of the petition, a contract by them with an objecting owner on whose land a ditch is to terminate, permitting the tilling of the ditch by him, and agreeing that he shall not be required to receive more water than can be conveniently carried through a 5-inch tile, is not valid where made, not upon his application, but on a proposal by the trustees to avoid litigation; and does not prevent their successors

in office from ordering him to take up the tiling and clean out the ditch to its original capacity as established under the petition; and injunction will not issue restraining them from interfering with that portion of the ditch. *Doney v. Truro Twp.* 1 Ohio C. C. 566.

An injunction will not lie to restrain a county auditor from selling allotments of ditch work on an owner's land, unless the proceedings under the statute for the establishment of the ditch are void on the face of the record. *Young v. Sellers*, 106 Ind. 101, 5 N. E. 686.

In an action of trespass against drainage commissioners for the construction of certain ditches upon an owner's land within the drainage district, it must be presumed that the entire damages "consequent upon the construction of the proposed work" resulting to such landowner were considered by the jury in the original condemnation proceedings, and the only question for the jury to determine is whether damages sustained by him by reason of the construction of such ditch in a particular manner were such as were consequent upon its construction, and therefore included within the condemnation proceedings. *Doyle v. Baughman*, 24 Ill. App. 614.

A municipality having the power to require property owners to connect their premises with sewers, the right to do such connecting may be vested by statute in the municipality itself at the time of the construction of a sewer. *Van Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922.

A city has no right to construct house-connection slants to a sewer every 20 feet where the lots are much wider than that, thus casting an additional and unnecessary burden of expense on the property without additional benefit. *Gage v. Chicago*, 191 Ill. 210, 60 N. E. 896.

But a provision in a sewer ordinance for house-connection slants every 20 feet on each side of the sewer does not vitiate the ordinance, in the absence of any proof that such provision is unreasonable or oppressive. *Vandersayde v. People ex rel. Raymond*, 195 Ill. 200, 61 N. E. 1050, 62 N. E. 806.

A provision in a sewer ordinance that house-connection slants "shall be placed on both sides of said sewer opposite each 25 feet of lot frontage" does not amount to an arbitrary subdivision of an unsubdivided lot, when the assessment was made upon the entire tract as a whole, according to its legal description. *Chicago v. Corcoran*, 196 Ill. 146, 63 N. E. 690.

A provision in a sewer ordinance that only one house-connection slant shall be provided for each abutting lot or tract of land, however large, is not a hardship to lot owners, nor unreasonable, where it is also provided that each lot owner shall have the use and benefit of the sewer, and may make additional connection with the sewer. *Gage v. Chicago*, 195 Ill. 490, 63 N. E. 184.

An ordinance of a municipal corporation providing for the putting in of lateral sewer and water-service pipes for house connections on a street by special tax is not void because such improvement does not constitute a local improvement within the meaning of the law, and is not an abuse of the power of the city council to levy special taxation for the cost of local improvements. *Palmer v. Danville*, 154 Ill. 156, 38 N. E. 1067.

The cost of house slants to connect with a sewer cannot be incorporated in the cost of the sewer and assessed upon the abutting property, where the property is vacant farm land, and the slants are planned to be 20 feet apart, while the probability is that if the property is ever subdivided into building lots it will never be
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divided so small as to require slants every 20 feet. *Rickerdike v. Chicago*, 185 Ill. 280, 58 N. E. 1096.

A provision in an ordinance of a municipal corporation for the construction of a sewer, which grants the use and benefit of an out-fall sewer to all property owners obtaining permission to make connection therewith, does not grant away the police power of such municipality, as such clause does not affect its power to regulate the manner of making such connection, or abate any nuisance thereby created. *Gray v. Cicero*, 177 Ill. 459, 53 N. E. 91.

That the owner of land included within the area benefited by the construction of a sewer has no present right under any existing statute to construct connecting laterals from such land to the sewer, or to procure the construction of the same, does not invalidate the assessment against him, since it is unlikely that the needful legislation would be withheld. *McKee Land & Improv. Co. v. Swikehard*, 23 Misc. 21, 51 N. Y. Supp. 399.

An ordinance providing that no connection shall be made with public sewers except on written application to, and permission granted by, the common council does not deplete the board of public works of its power, under the charter, to supervise the construction and repairing of sewers, and forbid anyone to make connection therewith without the consent of the board; but it determines the circumstances under which the council shall permit the work to be done, but leaves the time and manner of doing it to the control of the board of public works. *Zube v. Weber*, 67 Mich. 52, 34 N. W. 264.

The supplement of March 11, 1893, to Laws 1882, p. 60, authorizing a city, when building a sewer, to construct the necessary house connections from the sewer to the curb line of the lots fronting on the street, and charge the costs and expenses to the house peculiarly benefited thereby, is not unconstitutional on the ground of authorizing an arbitrary assessment irrespective of benefits. *Van Wagoner v. Paterson*, 67 N. J. L. 455, 51 Atl. 922.

1. Wrongful acts.

Persons constructing a public drain must keep within the limits of the land given, purchased, or condemned for the purpose of the drain, and are guilty of trespass if they throw earth upon land lying without such limits. *Clark v. Wiles*, 54 Mich. 323, 20 N. W. 63.

A drainage commissioner is personally liable as a trespasser for entering upon and constructing a ditch across the roadway of a turnpike company under authority of a judgment in a proceeding establishing a ditch and ordering its construction, where the judgment is void as to the company because it was not made a party to the proceedings. *Cottingham v. Fortville & N. Turnp. Co.* 112 Ind. 522, 14 N. E. 479.

Turnpike trustees are liable for negligently constructing drains with insufficient catch basins, whereby adjoining land is flooded although acting for the public benefit. *Whitehouse v. Fellows*, 10 C. B. N. S. 765, 30 L. J. C. P. N. S. 306, 4 L. T. N. S. 177, 9 Week. Rep. 557.

A township is not legally liable for illegalities in the proceedings to lay out and establish a drain, or for the misdoings of its officers in collecting the tax for benefits. *Taylor v. Avon Twp.* 73 Mich. 604, 41 N. W. 703.

A drainage district, in the absence of statutory liability, is not liable to the owner of land lying within the same, for damages thereto by flooding caused by the wrongful act of the commissioners in enlarging such district and connecting the drainage of the additional territory with the ditches cut through such own-

er's land, thereby increasing the volume of flow of water beyond the capacity of such ditches. *Elmore v. Drainage Comrs.* 135 Ill. 269, 25 N. E. 1010.

A county is not liable for the negligence of the contractor to whom the work of excavating a drain is let, or for his failure to do the work in accordance with the plan adopted, to one whose land is flooded as the result of such imperfect work. *Thompson v. Polk County*, 38 Minn. 130, 36 N. W. 267.

A drainage district is not liable for the wrongful and unlawful acts of its agents done in the execution of corporate duties or powers, in the absence of express statutory liability. It is a public, involuntary, quasi corporation. *McGillis v. Willis*, 39 Ill. App. 311.

Drainage commissioners are not personally liable for the overflow of an owner's land caused by the construction by contractors of a dam necessary in prosecuting the work of the district, where they merely acted under the order of the court in letting the contract for the work, and had no immediate supervision of its execution. *Ibid.*

A county is not liable in damage for negligently constructing or failing to keep open a ditch constructed under authority of Iowa Code, § 1207, authorizing the construction of ditches whenever they shall be conducive to the public health, convenience, or welfare, by reason of the overflow of plaintiff's crops. *Dashner v. Mills County*, 88 Iowa, 401, 55 N. W. 468.

A county is not liable for negligence in the construction of a drain across a highway upon the ground that it is a territorial and political division of the state created for governmental purposes, and gave no assent to its creation; and, since the county itself is not liable, its agents cannot be made liable. *Packard v. Volts*, 94 Iowa, 277, 62 N. W. 757.

Drainage districts organized under the drainage laws of Illinois are mere public involuntary quasi corporations, and not private corporations, and are not liable to respond in damages to an individual, injured by the negligence or wrongful acts of its officers, agents, or servants in turning water out of its natural channel through ditches to the injury of adjoining owners. *Elmore v. Drainage Comrs.* 135 Ill. 269, 25 N. E. 1010, Affirming 32 Ill. App. 122.

A drainage district is not liable for damages to an owner of land lying outside the same from overflow caused by the wrongful and injurious manner in which a district levee was constructed so as to obstruct the natural flow of water. The remedy is against the commissioners personally. *Santa Fé Drainage Dist. v. Waeltz*, 41 Ill. App. 575.

Drainage commissioners, although acting as public servants, carrying out a public purpose, are liable for the negligence of their servants whereby adjoining lands are flooded. *Coe v. Wise*, L. R. 1 Q. B. 711, 37 L. J. Q. B. N. S. 262, 14 L. T. N. S. 891, 7 Best & S. 831, Reversing 5 Best & S. 440, 33 L. J. Q. B. N. S. 281, 10 Jur. N. S. 1019, 10 L. T. N. S. 666, 12 Week. Rep. 1036, where it was held that drainage commissioners acting without reward, having employed skillful and competent persons in constructing and maintaining a sluice near the opening of a cut for the purpose of excluding tidal waters, are not liable for the negligence of their agents which results in the bursting of the sluice whereby tidal waters come in and flood the neighboring lands.

Drainage commissioners are liable for the entire damages resulting from the flooding of lands caused by the negligent construction of their works, although the damages may have been increased by the act of different landown-

ers in attempting to protect their property from the action of the water, as, although such adjoining owners may have been wrongdoers, the primary cause of the injury was the negligence of the commissioners, and the damages cannot be apportioned between the several wrongdoers. *Collins v. Middle Level Comrs.* L. R. 4 C. P. 279, 38 L. J. C. P. N. S. 236, 20 L. T. N. S. 442.

A drain commissioner who casts upon land water which does not belong there is liable in damages to the owner, unless he provides a proper outlet to take it away from the premises. *Chapel v. Smith*, 80 Mich. 100, 45 N. W. 69.

If a surveyor of a highway without the approbation of the selectmen cause a water course occasioned by the wash of the highway to be constructed on the side of the road and within its limits, to the inconvenience of an abutting owner, the remedy is not by common-law action, but under the statutes forbidding such act. *Benjamin v. Wheeler*, 15 Gray, 486.

One whose land is not injured by the construction of a drain may not maintain an action against the drainage commissioner to enjoin its completion. *Swan Creek Twp. v. Brown* (Mich.) 9 Det. L. N. 52, 90 N. W. 38.

A property owner will not be left to an action against a drain commissioner to recover damages resulting from the flooding of his land due to the construction of a ditch with an inadequate outlet, but he is entitled to an injunction restraining the construction of the drain. *Brugink v. Thomas*, 125 Mich. 9, 83 N. W. 1019.

When the construction of an engine for the purpose of draining lands into a river is not of itself a nuisance, but its operation may result in injury to the navigation, and in flooding other lands, the possibility of its so doing being uncertain, the party asking that the construction of the engine be restrained must do so in the first instance before work upon it has commenced; but, if he delays application to the court until after that time, he must first prove the injury by an action at law. *Ripon v. Hobart*, 3 Myl. & K. 169, 8 L. J. Ch. N. S. 145, Co-op. Sel. Cas. 333.

So, where complainant, in asking for an injunction restraining the construction of engines for the purpose of draining land into a river, on the ground that such drainage would injure the navigation and flood the land, contended that the construction of the engine, and not merely its operation, should be restrained, it cannot have such relief, where it has delayed the proceedings to procure it until after large sums of money have been expended in the construction of the engine. *Ibid.*

It is no answer to a charge of negligent construction of a municipal ditch so that injury results to say that it was constructed under authority of law, compensation having been tendered for the land taken. *Stonehouse v. Ennis-killen Twp.* 32 U. C. Q. B. 562.

The landowners upon whose petition drainage proceedings were instituted and a judgment of a court of competent jurisdiction obtained establishing a ditch and ordering its construction are not liable in a civil action for damages for injuries resulting to the land of another by its overflow from the ditch, upon a reversal of the judgment establishing it on the ground of error, and a dismissal of the proceedings upon appeal, during the pendency of which the ditch was constructed, where the appeal was taken by such landowner without a stay of proceedings, and no showing is made that such petitioners have, by means of the erroneous judgment, received benefits in excess of the amount paid by them for the construction of the ditch equal to the amount of such owner's damages, or that such damages inured to the special benefit of their

property. *Thompson v. Reasoner*, 122 Ind. 454, 7 L. R. A. 495, 24 N. E. 223.

The owner of land is not liable criminally for obstructing an attempt of an overseer of the roads to construct a ditch through his farm for the purpose of draining a public road, there being no natural drainway through his land, when there is no authority given by the public laws for either entry upon or compensation for land taken for such a purpose. *State v. New*, 130 N. C. 731, 41 S. E. 1033.

j. Compensation for injury.

Under § 384 of the local government act of 1874, the owners and occupiers of land injured by the construction of a ditch or drain authorized by the statute are entitled to recover compensation, not only for past damages, but for all future and prospective damages. *Colac v. Summerfield* (1893) A. C. 187.

If, by reason of the unskillful construction of a drainage canal, the land upon which it is constructed is rendered less valuable, the owner is entitled to damages therefor, to be measured by the difference between the value of his farm before the ditch was dug and after it was dug. *Bungenstock v. Nishnabotna Drainage Dist.* 163 Mo. 198, 64 S. W. 149.

But a drainage district is not liable to an owner of land lying within the same for the flooding of his land by the construction of district levees. The remedy must be enforced against those causing the injury. *Russell & A. Drainage Dist. v. Pinkstaff*, 41 Ill. App. 504.

If the statute, in giving a municipal corporation power to improve a stream to prevent its overflow, provides a method of assessing damages, that method is exclusive, and an action at law cannot be maintained for the injury. *Boston Belting Co. v. Boston*, 149 Mass. 44, 20 N. E. 320.

The Massachusetts drainage laws provide no remedy where, for the purpose of draining certain land, a ditch is dug which throws the water onto lands of persons not parties to the proceeding. *Day v. Hulburt*, 11 Met. 321.

Under a statute providing that, in fixing compensation for the injury done by laying out a sewer, regard shall be had to all damages done to the property, whether by taking such property or injuring it in any manner, compensation must be allowed for injury done by the draining of a well, although no land of its owner is taken. *Blickford v. Hyde Park*, 173 Mass. 552, 54 N. E. 343.

A statute empowering canal commissioners to hear and determine the claim of a certain person for damages sustained by the appropriation of land for the deposit of shale and stone taken from a river in the prosecution of work for draining certain marshes for private benefit will not give them authority to include damages for destruction of property by fire negligently set out by workmen engaged in prosecuting the work upon property of the claimant not taken. *People ex rel. Wasson v. Schuyler*, 69 N. Y. 242.

In the absence of any authorized declarations to the contrary, it will be assumed that the rights of riparian proprietors in a stream are not lost, so far as they are capable of subsisting therein, by the action of drainage commissioners in improving the bed of the stream. *Palmer v. Perse*, Ir. Rep. 11 Eq. 616.

The fact that, after the passage of an act for the drainage of a marsh, the stream through which the water flows is appropriated for canal purposes, the effect of which is that in case the marsh is drained away from the stream mill sites along its course will be injured, will not give the mill owners the right to injunction against such drainage,—especially where they

have an adequate remedy at law to ascertain and collect any damage for injuries sustained by them. *French v. Kirkland*, 1 Paige, 117.

The question of compensation for injuries done usually arises with respect to the right and duty as to drainage, and additional authorities will be found in the note on that subject *post*, —, and in the one on rights and duties of municipalities in the respect to surface water, *post*, —.

k. Other matters.

Mandamus will not lie to compel the construction of a drainage ditch, on behalf of one who is not shown to have any interest in the improvement independent of that which he has in common with the public at large. *Van Horn v. State ex rel. Allen*, 51 Neb. 232, 70 N. W. 941.

A taxpayer cannot compel a committee of the common council to proceed with the construction of a sewer for which an ordinance has been passed, where the council refuses to compel it to do so, and resists the attempt to compel it to do so. *Congregation of St. Vincent de Paul v. Bordentown Street & Sewer Committee*, 56 N. J. L. 48, 27 Atl. 799.

The judgment of the original petitioners for the establishment of a public ditch as to the lands affected thereby is not conclusive so as to deprive others actually affected thereby of the right to be made parties to the proceedings. *Zumbro v. Parnin*, 141 Ind. 430, 40 N. E. 1085.

A township, made liable under the drainage law for the assessment of benefits to highways by the construction of a ditch, is a necessary party to the ditch proceedings, and, for the purpose thereof, must be regarded as a property owner with all the rights given by law to such owners. *Ibid*.

An application to establish a ditch is in the nature of a proceeding *in rem*, and, in order to authorize the court to make an order therein, the persons upon whose lands the ditch is to be constructed must be before the court, either by notice or appearance; and this applies as well to orders concerning others who are before the court, for the reason that a ditch is an entire thing, and, in order to establish it, all the necessary parties must be before the court,—especially where the statute authorizing such ditches provides for an allotment, to those affected, of the construction of portions thereof. *Wright v. Wilson*, 95 Ind. 408.

The statute of limitations will not run against the liability of a city under its agreement, upon voluntarily purchasing with drainage warrants a plant for purifying its drainage system, to facilitate the collection of assessments, and not to divert such collections from payment of the warrants, until it repudiates the trust, although judgments are substituted for the warrants against its own property. *New Orleans v. Warner*, 175 U. S. 120, 44 L. ed. 96, 20 Sup. Ct. Rep. 44.

The statute of limitations does not begin to run for injury caused by a ditch at the time the ditch was dug, when the evidence shows that no damage resulted until several years later. *Miller v. Keokuk*, & D. M. R. Co. 63 Iowa, 680, 16 N. W. 567.

The statute of limitations begins to run against an action to recover damages for the insufficient construction of a ditch in such a manner that the flow is so great as to cause the water to cut the earth away backward up the stream by an adjoining owner, as soon as it becomes apparent that such will be the result of the action of the water, although his land is not yet affected. *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792.

Where damage results to a landowner from

the construction of a sewer or ditch on the land which is taken for that purpose, the cause of action accrues, and the statute of limitations commences to run, at the time of the construction of the ditch, and not at the time that the injury is actually sustained. *Dallas v. Ross*, 2 Tex. App. Civ. Cas. (Willson) § 279, p. 211.

A drainage commissioner appointed under a drainage law to construct a ditch has no power, nor is it his duty, to build a bridge over the ditch at a highway crossing, and pay for it out of the ditch funds, where neither the act under which the ditch is established, nor any other act, makes it his duty to build such bridges, and no provision is made for the collection of money for that purpose, notwithstanding the township in which the bridge lies is assessed for the construction of the ditch. *Rigney v. Fischer*, 113 Ind. 313, 15 N. E. 594.

When a farm drainage district acquires by condemnation an outlet for the water collected in its drains outside of the district by enlarging and deepening a natural channel across the lands of another, rendering the same impassable which before was passable, such outlet becomes, by operation of law, one of the ditches of the district for all the purposes for which it was acquired, and its duty to bridge the same attaches the same as if it were within the district, and, being its duty, the cost of a bridge was not an element of damage awarded the owner of such land in the condemnation proceeding; and hence, such district can be required to build and maintain a bridge or proper passageway over the same. *Union Drainage Dist. v. O'Reilly*, 132 Ill. 631, 24 N. E. 426.

The legislature may authorize a drainage district to remove a county bridge across a stream which it is necessary to widen for drainage purposes, and require the county to replace it at its own expense. *Heffner v. Cass & Morgan Counties*, 193 Ill. 439, 58 L. R. A. 353, 62 N. E. 201.

In a proceeding to establish a public drain, the burden of proof of matters set forth by the petition, by the report of the viewers, but controverted in remonstrances, is on the petitioners. *Trittip v. Beaver*, 155 Ind. 652, 58 N. E. 1034.

VIII. Supervision by court.

a. By appeal.

Many of the statutes contain provision for a review of some portion, at least, of the drainage proceedings by direct appeal to the courts. In such cases the procedure and the questions which are open are entirely governed by the statute.

A provision in a statute authorizing municipal corporations to construct sewers by special assessments, which provides that upon appeals from precepts issued for their collection no question of fact shall be tried which may arise prior to the making of the contract for the improvement, renders it incompetent for the appellate court to inquire into the regularity of the proceedings had before the contract was let; and such provision is constitutional and valid, since such questions can be settled before the contract is let. *Allen County v. Silvers*, 22 Ind. 491.

The right of appeal in a landowner whose land had been assessed for the construction of a drain, and who is named in the assessment, from the decision of the commissioners that the drain will be of public utility and ordering the same to be established, cannot be cut off on the ground that his name is not on the petition for its establishment, and, therefore, he is not a party to the proceedings, since the act of as-

sessing his land and including his name upon the assessment roll brings him into the proceedings, and makes him a party thereto. *Houk v. Barthold*, 73 Ind. 21.

Some of the courts find authority for the appeal under general statutes.

The county commissioners are charged with a judicial duty to hear and determine the question of the public utility of a proposed drain, and not with discretionary power, under the statute, to enable owners of wet lands to drain the same, which provides that if, upon a hearing, the county commissioners "become satisfied" that the contemplated ditch is of public utility, they shall appoint appraisers, etc., and persons aggrieved by their decision may appeal therefrom, although the statute makes no provision for an appeal from such decision. *Bryan v. Moore*, 81 Ind. 9.

A landowner affected by the decision of county commissioners that a proposed drain will be of public utility is entitled to an appeal from that decision and a trial *de novo* in the appellate court, although the statute under which the proceedings are had does not expressly give the right of appeal from such order, since the appeal may be taken under the general statute allowing appeals from decisions. *Meehan v. Wiles*, 93 Ind. 52.

An act providing for the construction of drainage ditches does not seek to deprive the owners of property of the same without due process of law in the violation of the 14th Amendment of the Constitution of the United States because it makes no provisions for confirming and contesting the charge imposed, in the courts, when a remedy is given such owners under 2 Ballinger, Anno. Codes & Statutes, §§ 5740-5757, by writ of certiorari. *State v. Henry*, 28 Wash. 38, 68 Pac. 368.

Upon an appeal by a landowner from an assessment by appraisers of the benefits to his land by the construction of a drain, the case must be tried *de novo*, and the report of the appraisers is not proper evidence to sustain the assessment, and raises no prima facie presumption of its correctness. *McKinsey v. Bowman*, 58 Ind. 88; *Beck v. Pavey*, 69 Ind. 304.

A petition for the establishment of a ditch over the lands of others, which fails to allege that the same will be of public benefit or utility, goes to the jurisdiction of the county commissioners; but, as they had jurisdiction of the subject-matter, it is competent for the circuit court, upon appeal from their decision, to allow the petition to be amended so as to supply the omission. *Coolman v. Fleming*, 82 Ind. 117.

Where an appeal from a sewer assessment is required to be made within three months, upon one month's notice to the municipal corporation in writing, it is not sufficient to merely serve the notice within the three months. *Custy v. Lowell*, 117 Mass. 78.

The statute of 23 Hen. VIII., passed for the reclamation of marsh lands, which provided for a system of drainage, and conferred power upon the commissioners to levy taxes and assessments for the drains and to enforce payment by distraint, did not give the persons taxed the right to take their taxation by appeal before a jury for revision. *Bishop v. Tripp*, 16 R. I. 198, 14 Atl. 79.

An appeal does not lie from the determination of the board of supervisors that land was in the vicinity of a ditch constructed under authority of a statute to change the direction of a water course, and therefore liable to a tax of the cost of the ditch, where the statute allows an appeal in favor of certain persons affected by the proceeding, but none in favor of

the tax payers. *Lambert v. Mills County*, 58 Iowa, 666, 12 N. W. 715.

Under statutes which contemplate an appeal to the courts in drainage proceedings from decisions of the board of commissioners, the court and jury succeed to all the substantial duties which devolved upon the viewers before the commissioners, so that matters stand for trial *de novo* and a finding or direction in detail upon all matters in issue between the parties is contemplated. *Hardy v. McKinney*, 107 Ind. 364, 8 N. E. 232.

b. On collateral attack.

There is very little hope of success in attempting to induce a court to review the doings of drainage officers on collateral attack. The method pointed out by the statute for direct review must be followed, or the defects must be such as to destroy the proceedings completely, to receive aid from the court.

When the matter of establishing sewer districts is intrusted by the legislature to the common council, its action is conclusive on a collateral attack. *Heman v. Schulte*, 166 Mo. 409, 66 S. W. 163.

Equity will not interfere with the discretion of commissioners appointed under an act for the drainage of drowned land as to the best method to effect the drainage. *Phillips v. Wickham*, 1 Paige, 590.

The building of public sewers by a municipal corporation is the exercise of a legislative discretion, and courts of chancery have no power to control this discretion, or compel the construction of sewers in particular localities or directions, no matter how badly the same are needed. *Horton v. Nashville*, 4 Lea, 39, 40 Am. Rep. 1.

The selection of the route of a public ditch being vested by statute within the discretionary power of county commissioners, the practicability of the route selected by them in the exercise of that discretion is not reviewable by the court in the absence of its abuse. Selecting the line of a former ditch is not such an abuse. *Sample v. Carroll*, 132 Ind. 496, 32 N. E. 220.

The location of a public ditch upon the best, cheapest, and most available route, being a matter left by statute to the jurisdiction of the county commissioners, is not, in the absence of fraud, subject to review by the courts. *Chandler v. Beal*, 132 Ind. 596, 32 N. E. 597.

A landowner cannot maintain a suit to set aside a sale of his land for delinquent taxes levied for the construction of a ditch, on the ground that the contractor did not properly perform the work, or that the drain was not of public benefit or utility or conducive to the public health and was never found to be such, without showing that he ever paid or offered anything for the work done on his land, or that the same was sold without legal authority. The proceedings establishing the ditch, and the decision of a competent authority that the work was completed, cannot be thus collaterally attacked. *Simonton v. Hays*, 88 Ind. 70.

An ordinance of a municipal corporation for the construction of a sewer with an outlet in a stream cannot, in a proceeding to confirm a special assessment for the construction of the same, be declared invalid on the ground that the discharge of sewage into such stream will so pollute the water thereof as to be a nuisance to the cities and towns on the stream below. *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741.

It is entirely within the discretion of the drain commissioner to fix the width or depth of a drain, or to decide to what extent a stream may be deepened or widened so as to drain adjoining land, and the courts cannot substitute

their judgment for that of the commissioner. *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22.

In an action to restrain the collection of an assessment for the construction by a municipal corporation of a culvert, the improper construction or inadequacy of the culvert are not subjects of review by the court, as such matters are wholly for the consideration of the city council. *Murphey v. Wilmington*, 5 Del. Ch. 281.

The courts will not examine the proceedings generally of boards of commissioners of drainage districts on sweeping allegations of irregularity, but will presume them to be legal and regular unless expressly attacked on specific grounds. *De Gravelle v. Iberia & St. M. Drainage Dist.* 104 La. 703, 29 So. 302.

A court of equity will not interfere by injunction to prevent the construction of a sewerage system according to a comprehensive plan with an outlet deemed suitable and proper, adopted in good faith by city officers in the exercise of discretion and in accordance with their judgment after due consideration, solely on the ground that the outlet thus chosen was ill judged, and that a continuous nuisance to the plaintiff would inevitably result therefrom, such outlet being down the stream from, and not on, the plaintiff's premises. *Soden v. Emporia*, 7 Kan. App. 583, 52 Pac. 461.

The decision of the supervisors that a drainage ditch was completed to the required depth and width is conclusive in the absence of fraud or improper practices. *Patterson v. Baumer*, 43 Iowa, 477.

But in Indiana it was held that the report of drainage commissioners that a ditch has been fully completed according to the contract and to the plans and specifications is not conclusive, but, upon exceptions filed by landowners there-to, the question may be tried by the court, and the report rejected if there are material departures from such plans and specifications. *Racer v. Wingate*, 138 Ind. 114, 36 N. E. 538.

The determination of a city council as to the amount of land necessary to be taken for a proposed sewer outlet is not final, but is subject to review by the court. *Bennett v. Marlon*, 106 Iowa, 628, 76 N. W. 844.

The courts have the power to determine, as a question of law, whether the exercise by a municipal corporation of a general power "to regulate the construction, repairs, and use of vaults, cisterns, areas, hydrants, pumps, sewers, and gutters" is reasonable or arbitrary, unreasonable, and oppressive. *Title Guarantee & Trust Co. v. Chicago*, 162 Ill. 505, 44 N. E. 832.

An ordinance providing for the construction of a district sewer to connect with a stream or ravine is not conclusive as to the character of such stream as a natural course of drainage under a municipal charter declaring that district sewers must connect with another sewer or with the natural course of drainage; but such question is one for the determination of the court. *Bayha v. Taylor*, 36 Mo. App. 427.

The fact that a contractor building a sewer employs members of the common council at high wages as superintendents of the work for the purpose of influencing the council to accept the work though not properly done, and does so influence them, amounts to fraud, and is a defense to an action for collection of assessments. *Green v. Shanklin*, 24 Ind. App. 608, 57 N. E. 269.

The order of a board of supervisors creating the district for the reclamation of swamp lands is an act of legislation in the exercise of the taxing or police power of the state which is not reviewable by certiorari. *Williams v. Sacramento County*, 65 Cal. 160, 3 Pac. 667.

Where the statute permits an appeal to the

courts from a judgment assessing damages in a drainage proceeding, such remedy will be regarded as adequate as to all errors which may be reviewed thereby, so that certiorari will not lie, although the lien of the judgment may attach to the property assessed pending the appeal. *State ex rel. Nelson v. King County Super. Ct.* (Wash.) 71 Pac. 601.

IX. Acquisition of funds.

a. Use of public funds or credit.

Many of the grants of swamp land by the general government to the respective states contained a provision that the proceeds of sales should be used to drain and reclaim the lands. The question has arisen how far such provision could be enforced by purchasers.

A purchaser of swamp land cannot complain that the money paid for his scrip was not appropriated to the reclamation of his land by the construction of levees under the act of Congress of March 16, 1852, since the duty imposed by that statute upon the swamp-land commissioners to levee and drain overflowed lands is general, and for the public good. *Baugh v. Lamb*, 40 Miss. 493.

An individual, although living in the vicinity of swamp and overflowed lands, may not, although he alleges that the health of himself and family is injuriously affected by ponds which could be removed by proper drains, insist upon the application of the proceeds of the sale of such lands to their drainage, although in the grant of the land by the United States to the state the proceeds were to be applied exclusively, as far as necessary, to the purpose of reclaiming the lands. If the United States is satisfied with the disposition which the state has made, or authorized to be made, of these lands, individual citizens must remain content. *Barrett v. Brooks*, 21 Iowa, 144.

An individual citizen may not maintain an act to enforce a trust charged by the United States as donor upon the swamp lands granted to the states and by them to the county, to apply the proceeds of the sale, as far as necessary, to the draining and reclaiming of such lands, when he has accepted a conveyance of the lands from the county without requiring a covenant or agreement to drain or reclaim the lands. *Keltner v. Story County*, 28 Iowa, 35.

Under the provisions of an act of Congress granting all the swamp and overflowed public land unfit thereby for cultivation to the states in which the same are located, and directing the issuing of a patent therefor, a fee-simple estate passed to such lands to the states availing themselves of the privileges of that act; and the fact that such act provided that the proceeds of the sale of such land by the states should be applied exclusively, as far as necessary, to the purposes of reclaiming the land by means of drains and levees does not limit or qualify the power of the state legislature over them and their proceeds to dispose of as they see fit, but is, at the utmost, but the expression of a wish or desire on the part of Congress that such proceeds should be so expended, but not making it a condition of the grant. *Whiteside County v. Burchell*, 31 Ill. 68.

A purchaser of swamp land who acquired his title thereto under the existing system of disposing of the swamp lands of the state, which provided that the proceeds from such sales should be applied in reclaiming such lands by the construction of drains, and that the same should be laid out in districts and the work let to the lowest bidder, and, if a purchaser thereof is the lowest bidder, that he be allowed to pay his purchase price in that way, but, if not the

lowest bidder, that he should pay cash or execute his note and mortgage therefor,—cannot compel the county in which his lands are located to take its pay for notes given by him in labor in ditching the lands, where no contract exists between him and the county giving him that right, and the county never called for bidders to reclaim such lands, because, by subsequent acts of legislature, the system was abandoned, and the proceeds diverted to other public objects. *Ibid.*

The right of the state of Illinois to grant to the several counties in the state the swamp and overflowed lands within their respective limits, title to which was derived under an act of Congress, and to remit to such counties the exclusive control over the same and over their proceeds, cannot be questioned by the courts. And, if such lands were granted to the state by Congress upon the trust that the proceeds thereof should be expended in reclaiming them, such trust, being of municipal, and not of judicial, concern, would be exclusively within the power of the state, which could not be compelled by the courts to execute such a trust. *Ibid.*

A purchaser of swamp lands cannot recover back the purchase price paid by him therefor on the ground of a breach of trust on the part of the county in diverting the proceeds from the swamp lands within its limits to other purposes than their drainage, since, by a former decision of the supreme court of Illinois (*Whiteside County v. Burchell*, 31 Ill. 68), it was decided that no such trust existed, and that the purchasers of swamp lands from the county were remediless. *Bureau County v. Thompson*, 39 Ill. 566.

A purchaser of swamp lands from a county, who executed his notes for the purchase price, cannot plead a want of consideration therefor because the county did not use the proceeds from the sale of its swamp lands for their reclamation, where, by subsequent legislation, the policy of the state with reference to swamp lands has changed, and the laws in force when such purchase was made, requiring the counties to appropriate the proceeds from the sale of such lands in their respective counties to their reclamation, were repealed, and the counties were given full control over such lands with the right to apply the proceeds therefrom to other public objects if deemed best. *Newell v. Bureau County*, 37 Ill. 253.

But where swamp and overflowed lands granted by the general government to a state, and by the state to the several counties, are conveyed by a county to a company, incorporated for such purpose, on the condition that such company, in addition to paying a specified sum of money therefor, will drain the lands, the latter takes the lands burdened with the trust arising under such condition, and a court of chancery will require it to account for the funds received from the sale of such lands, where the company fails to execute such trust, but sells portions of the land and divides the remainder among the members thereof, the contract for draining being too vague and uncertain to justify a decree of specific performance. *Henry County v. Winnebago Swamp Drainage Co.* 52 Ill. 455.

It is no defense to an action for an assessment against landowners in a reclamation district, that the Arkansas act granting swamp lands to the state of California provided that the proceeds of the sale of such lands should be used, as far as necessary, for the reclamation thereof, as no contract or trust was created thereby which such assessment impairs, and, even if such a contract was thereby created, such owners, not being parties thereto, cannot

complain. Reclamation Dist. No. 108 v. Hagar, 86 Cal. 54, 4 Pac. 945.

In some instances municipal corporations are authorized to make drainage improvements and raise the funds by the issuance of their own bonds.

A city having the right to make regulations to secure the general health of the city, and the authority to construct sewers, keep them in repair, and regulate their use, may issue bonds to provide the necessary money for the construction of a sewer for the purpose of draining one of its streets. *State ex rel. Norfolk v. Babcock*, 22 Neb. 614, 35 N. W. 941.

An act providing for an issue of bonds by three several towns to an arbitrary maximum amount each, the proceeds of which are to be used in paying, as it progressed, for work on a sewer draining an area embraced in them all, on the completion of which work the total expense incurred is to be apportioned according to benefits conferred, and the excess or deficiency in the amount of bonds issued to carry it on is to be adjusted by the assessors, is not a delegation of legislative powers, nor does it confer on the assessors power to fix debts on the towns; hence, assessments made pursuant to it are valid. *State, King, Prosecutor, v. Reed*, 43 N. J. L. 186, Affirmed in 48 N. J. L. 370.

Drainage of creeks, swamps, and ponds around a city, and the construction of sewers and waterworks, being methods by which the health, convenience, and comfort of the residents of the city are directly affected, are municipal purposes within the meaning of a charter, giving power to issue bonds for such purposes. *Greeley v. Jacksonville*, 17 Fla. 174.

Under the drainage laws of Illinois, a drainage district has no power to issue bonds, binding itself for the payment of an assessment made in one of its subdistricts for work done in and solely for the local benefit of such subdistrict. *People ex rel. Pollard v. Swigert*, 130 Ill. 608, 22 N. E. 787.

Although the drainage commissioners of a special drainage district have power, under the statute, to form subdistricts for the purpose of making assessments of benefits for the local work to be done therein, yet they are given no power to issue subdistrict bonds for an unpaid assessment, or any part thereof, made in one of such subdistricts. *Ibid.*

In other jurisdictions there is a direct prohibition of the loaning of the public credit for the making of local improvements.

A drainage law which provides for payment of the cost of the work from the proceeds of bonds to be issued by the county, which is to be repaid by special assessments laid under the law, violates a constitutional prohibition against the loaning of county credit; and it is immaterial that the county might have originally been made liable for the whole cost. *Martin v. Tyler*, 4 N. D. 278, 25 L. R. A. 838, 60 N. W. 392; *Bye v. Stafford*, 4 N. D. 304, 60 N. W. 401.

But under § 7 of the drainage law of North Dakota (Laws 1895, being chap. 51), which provides that the county drain commissioners may issue warrants drawn upon the county treasurer and payable out of the drainage fund (which could be raised only by special assessments within a limited district), and negotiate the same, for the purpose of raising funds with which to pay damages allowed for right of way for drains, such warrants would create no general liability against the county, and their issuance would not constitute a loan of the credit of the county, within the meaning of § 185 of the state Constitution. *Redmon v. Chacey*, 7 N. D. 231, 73 N. W. 1081.
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A statute providing for the reclamation of swamp or overflowed lands upon petition of the owners, and directing that the expense be borne by the lands benefited, except such part as might be assessed to the county at large on account of the benefit accruing to it, and empowering the county to issue bonds in lieu of immediate taxation for the improvement, does not authorize the county to loan its credit to any company, association, or corporation in violation of the state Constitution. *Shelley v. St. Charles County*, 5 McCrary, 474, 17 Fed. 909.

The legislature may appropriate money from the state treasury to aid in paying the cost of providing a system for sewage disposal embracing in its benefits a number of cities, towns, and a large population. *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778.

Public sewers should be constructed by taxes levied upon the property of the whole city. *Johnson v. Duer*, 115 Mo. 371, 21 S. W. 800.

A municipal corporation which has authority to divide the city into sewerage districts in such manner as the council may determine may constitute the whole municipality one district. *Grimmell v. Des Moines*, 57 Iowa, 144, 10 N. W. 330.

Where the cost of lateral sewers has been assessed to abutting property, but the main arteries have been constructed at the expense of the city, a plan to construct other sewers by a special tax upon the city at large is not inequitable. *Grunewald v. Cedar Rapids (Iowa)* 91 N. W. 1059.

A recommendation by the village board of health that sewers be constructed does not authorize the village authorities to pay for their construction out of the village treasury instead of by assessment upon the property benefited in the manner provided by law. *Re Plattsburgh Taxpayers*, 27 App. Div. 353, 50 N. Y. Supp. 356.

The imposition of a general tax upon the inhabitants of a city for the construction of a sewer cannot be upheld by reason of the inherent power of a city to impose taxation for the preservation of the public health or safety, but such power, if it exists, must be derived from its charter. *Bryne v. Covington*, 15 Ky. L. Rep. 33, 21 S. W. 1050.

The legislature has authority to provide that school lands benefited by the construction of drainage ditches, shall be taken into consideration in apportioning the cost of the improvements. *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368.

b. Local assessment.

1. Authority to make.

That the legislature has authority to authorize special assessments for local improvements is fully established by the authorities set out in the note to *Heffner v. Cass & Morgan Counties (Ill.)* 58 L. R. A. 353. The only question is as to how far the authority has been exercised or conferred upon some municipal subdivision.

Express legislative authority is necessary to authorize a municipal corporation to assess the expenses of a sewer upon abutting property. *Watertown v. Fairbanks*, 65 N. Y. 588.

When sewers have been constructed according to a plan devised pursuant to a statute, and no fraud has occurred in any of the proceedings, nor any legal irregularity at all affecting the rights or interests of the owners, an assessment to defray the expense is valid. *Re New York Protestant Episcopal Public School*, 47 N. Y. 561.

An assessment for the construction of a drainage ditch cannot be made under the New York

act of 1867, if the drainage commissioners acquired no title to the land across which the ditch was constructed. *People ex rel. Williams v. Haines*, 49 N. Y. 587.

The fact that 25 acres of land not originally included within the lines of a sewer district have been drained into a sewer constructed as a district sewer does not render it a public sewer so as to relieve owners of property within the district from liability on their special tax. *Heman v. Allen*, 156 Mo. 534, 57 S. W. 559, Affirmed in 181 U. S. 402b, 45 L. ed. 922, 21 Sup. Ct. Rep. 645.

While an assessment for the expense of the drainage of certain land may, by reason of inveterate usage, be based otherwise than on benefits received, nevertheless, owners of land outside the district drained may not be assessed without giving them any voice in the management of the work. *State, Benjamin, Prosecutor, v. Bog & Fly Meadow Co.* (N. J. L.) 52 Atl. 215.

A provision in the drainage law of Illinois authorizing the assessing of railroad companies' rights of ways and tracks, and providing the method of classifying them in proportion to the benefits received by them, which is subject to review on appeal, and which provides that assessments based thereon, when levied, are likewise subject to appeal on the one question as to whether such tax exceeds the benefits, is not unconstitutional and void as violating the rule that special assessments shall not exceed the benefits, or that the whole costs of the improvement must not exceed the benefits. *Illinois C. R. Co. v. East Lake Fork Special Drainage Dist.* 129 Ill. 417, 21 N. E. 925.

An act of the legislature vesting the corporate authorities of cities and villages with power to construct and maintain drains, levees, dykes, and pumping works for drainage purposes by special assessment upon the property benefited thereby is not unconstitutional as exceeding the power granted by a clause in the Constitution authorizing cities, etc., to make local improvements by special assessment, but does not authorize such assessments to maintain the same, since the authority to pass such act is derived from an amendment to the Constitution authorizing the establishment of drainage districts, and vesting the corporate authorities thereof "with power to construct and maintain drains . . . by special assessments," which amendment controls as to assessments of this character regardless of the provisions of the original Constitution. *Hyde Park v. Spencer*, 118 Ill. 446, 8 N. E. 846.

Under a constitutional provision "that the general assembly may delegate the taxing power, with the necessary restriction, to the state's subordinate, political, and municipal corporations, to the extent of providing for their existence, maintenance, and well being," the legislature is not required to delegate the power to levy sewer taxes to city councils, but may delegate the power to a board of local improvement representing one of the improvement districts of a city; and an act is constitutional which provides that such board shall report to the city as to the cost of the improvement, and that the city council must levy a tax regarding such report, although the council has no discretion as to the levy of the tax; and where it falls to make the levy it may be compelled to do so by mandamus. *Little Rock v. Little Rock Bd. of Improvement*, 42 Ark. 153.

It is within the scope of the power of the board of trustees of a village to determine whether the removal of an old culvert and construction of a new one should be regarded as a local improvement to be paid for by special as-

sessments. *Shannon v. Hinsdale* 180 Ill. 202, 54 N. E. 181.

The power of the general assembly to authorize local assessments in proportion to benefits conferred, for the drainage of lands, recognized under a former Constitution and prior legislation of the state of Ohio, and sanctioned by the urgent necessities of portions of the state, was not limited to authorizing its exercise by cities and villages by a constitutional provision that the general assembly should provide for the organization of cities and incorporated villages by general laws, and restrict their power of assessment so as to prevent abuse; since such provision contains no express grant of the power of assessment, and no affirmative declaration of its existence, to which the maxim, *Expressio unius est exclusio alterius*, applies, but merely recognizes the general existence of the power, and, by providing against its abuse by such agencies, intended no restriction of its exercise to those agencies alone. *Reeves v. Wood County*, 8 Ohio St. 333.

A special assessment for the construction of the main artery of a sewer system of a particular district may not be levied and collected on the real estate of the district in advance of its completion, when the ordinance authorizing its construction, and providing for the assessment of the cost thereof, contemplated a completion before the levy was made. *Sanborn v. Mason City*, 114 Iowa, 189, 86 N. W. 286.

That a ditch was not legally laid out is not material, where the owner of the land crossed by it consented to the work, nor is it important that the parties interested did not originally agree as to the exact line of the ditch, if they consented to what was done. *Freeman v. Weeks*, 45 Mich. 335, 7 N. W. 904.

The California statute authorizing the assessment of reclaimed swamp land does not impair the obligation of any contract between the United States and California, or the United States and its patentees and grantees, or between such state and purchasers from it or grantees of the United States, or of any contract in the charter of the reclamation district. *Reclamation Dist. No. 108 v. Hagar*, 6 Sawy. 567, 4 Fed. 366.

A sewer constructed exclusively for the drainage of abutting lots does not, because it drains the surface water from the streets, lose its character of a local sewer, within the Ohio statutes declaring a local sewer to be the one intended for use exclusively for the drainage and accommodation of lots abutting thereon, as the city is not compelled to take care of surface water on the streets, but such water is a common enemy which abutting lot owners must themselves keep off, and the street is not a lot by itself distinct from the abutting lots, but belongs to the owners thereof subject to the public easement; and assessments for the construction of such a sewer are therefore void where assessed in proceedings by the board of public affairs without the action or concurrence of the council, under a statute dispensing with such action only in the case of trunk or main sewers. *Cincinnati use of Deters v. Standard Wagon Co.* 1 Ohio N. P. 387.

An ordinance providing for a special tax for the ascertained cost of a completed sewer is not directory, but mandatory to the extent that the tax may not be levied before the completion of the sewer. *Sanborn v. Mason City*, 114 Iowa, 189, 86 N. W. 286.

2. What is liable.

(a) In general.

All classes of real property are subject to as-

assessment for local improvements unless there is some particular reason for exemption.

Land used as a wharf is liable to assessments for the construction of a sewer, although unconnected with it, where such sewer drains higher land of water which might otherwise flow over the wharf land to the river. *Boeres v. Strader*, 13 Ohio Dec. Reprint, 414.

The fact that a toll bridge drains directly into a river does not exempt it from liability to assessment for the construction of a sewer on the ground that it derives no benefit from the sewer, as it derives the general benefit and advantage of being accessible, and all its approaches and neighboring public ways being properly drained and cleansed. *Hammersmith Bridge Co. v. Hammersmith*, L. R. 6 Q. B. 230.

Assessments for the cost of a sewer are to be levied on parcels of land belonging to a railroad company aside from that made use of in carrying on business peculiar to railroading, and enforced in the same way as provided for any other property. *Minneapolis & St. L. R. Co. v. Lindquist* (Iowa) 93 N. W. 103.

An assessment against lands of infants for the construction of a drain without the appointment of a guardian *ad litem* is not void so as to be subject to collateral attack. *McBride v. State use of Clandy*, 130 Ind. 525, 30 N. E. 699.

Where a township is separated, part of it being incorporated into a village, the liability to assessment for government drainage, the assessment for which had not been completed, is not a matter to be arbitrated on as being a debt of the township to which the village ought to contribute, but each corporation is bound to raise the amount assessed in respect to the land locally situated within it. *Point Edward v. Barnia Twp.* 44 U. C. Q. B. 461.

(b) *By whom selected.*

The methods of selecting the land upon which the assessment shall be laid are quite various, and the persons authorized to make the selection are usually disclosed by the method employed. The assessment may be laid upon all property abutting on the improvement, or upon all benefited, or upon all within a certain district; or a district may be organized to make the improvement, and all property within the district made to bear a share of the expense. The persons who are intrusted with the selection will, for the most part, be the representatives of the organization having the work in charge.

Whether property will be benefited by the construction of a sewer is a question within the exclusive jurisdiction of the legislative department of a municipality, and, in the absence of fraud, cannot be reviewed by the courts. *Prior v. Buehler & C. Constr. Co.* (Mo.) 71 S. W. 205.

The city council's determination of the benefits to lands from the construction of a sewer is final and conclusive, and not reviewable by the court on appeal, under a statute not specifying that as one of the questions to be examined on appeal; and it is within the legislative power to deny its consideration. *Klein v. Tuhey*, 13 Ind. App. 74, 40 N. E. 144.

The finding made by the assessing committee of a city council as to the amount of benefits accruing to property respectively in the sewer district, from the construction of a main sewer, is, under the Ohio statutes, conclusive upon the courts unless fraud or great oppression is shown. *Toledo use of Macgahan v. Ford*, 20 Ohio C. C. 200.

The question of benefits to property in a city from the construction of a sewer having once been passed upon by the common council, under the authority of a statute empowering municipal corporations to construct sewers and provide

for the payment of the cost by special assessment, to be levied by the common council upon such lands as may be benefited thereby in such equitable proportion as they may deem just, no other court or tribunal has any power, except in case of fraud or corruption, to review or pass upon it. *Ft. Wayne v. Cody*, 43 Ind. 197.

Stat. 1867, chap. 106, providing for the construction of sewers, the expense thereof to be met by the mayor and aldermen assessing the real estate along the line of the sewers and some other specially benefited land its proportionate share of the expense, is not unconstitutional on the ground that it authorizes an assessment exceeding the benefit received by the estate assessed. *Smith v. Worcester*, 182 Mass. 232, 65 N. E. 40.

Property is benefited by the construction of a sewer so as to be subject to assessment for its construction, although not strictly connected with it, when without it the service is inadequate, causing, in times of freshets, the sewage to back up and overflow streets, sidewalks, and cellars in the low lands, and even forcing gases and odors into houses situate on high lands as the premises in question are situate. *Prior v. Buehler & C. Constr. Co.* (Mo.) 71 S. W. 205.

The formation of sewer districts having been left by the legislature to the discretion of the mayor and council of a city, the establishment of a district will not be judicially interfered with because of the noninclusion therein of certain territory, in the absence of proof of actual fraud. *Topeka v. Huntton*, 46 Kan. 634, 26 Pac. 488.

The question of the invalidity of a sewer assessment by reason of the omission therefrom of persons benefited by the sewer cannot be raised in an action to recover money paid under protest upon such assessment. *Kelso v. Boston*, 120 Mass. 207.

That a person has a revocable license to enter his private drain into a sewer does not render it necessary to assess him for the improvement if it is not contemplated that he shall permanently avail himself of the sewer, and other accommodations are contemplated for his property. *Fairbanks v. Fitchburg*, 132 Mass. 42.

Drainage districts.

Provisions for farm drainage should be construed more strictly than those for sewers in cities. There is not the public necessity for them, and there is greater temptation to provide the drainage for the benefit of private individuals. So much is this so that it has been held that an act of legislature creating a drainage district within specified boundaries, and incorporating a company with power to levy taxes on all the lands within that district, equally, to defray the cost of such drainage, is within the constitutional prohibition against the taking of private property for public use without just compensation, and therefore void, where a large portion of the land in such district would be benefited very little, if at all, by such proposed drainage, and the objects and purposes of such act, passed without the knowledge and consent of such owners, and to the provisions of which they have never assented, do not even partake of a public nature, but are confined exclusively to the advantage of those owners whose lands would be greatly benefited thereby. *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.) 350.

So, the limits of a drainage district, empowered to levy a property tax which must be voted for, must be fixed with certainty and precision, a failure in this regard rendering the organization of such drainage district invalid, and any taxpayer residing within the district is a proper party to raise the question of its invalidity

Richard v. Cypremort Drainage Dist. 107 La. 657, 32 So. 27.

The statute allowing a supplemental petition to be filed after the report of the drainage commissioners, asking that lands not mentioned in the report, but which are affected by the drainage, be referred to the commissioners for assessment, should be so construed as to allow such a petition in the case of lands stricken from the report because the owners did not have proper notice. *Osborn v. Maxinkuckee Lake Ice Co.* 154 Ind. 101, 56 N. E. 83.

The determination by the county court on the organization of a drainage district that certain lands should not be included in the district is not such *res judicata* as will prevent the commissioners afterward, when the owners of such lands have made constructive application for annexation by joining their lands by ditches to the ditches of the district, from making the statutory order of annexation of such lands. *People ex rel. Herman v. Bug River Special Drainage Dist.* 189 Ill. 55, 59 N. E. 805.

An order of court fixing the boundaries of a drainage district, including all the lands that will be benefited thereby, does not become a final adjudication upon that question as to lands not mentioned in that proceeding, the owners of which were not parties thereto. *Streuter v. Willow Creek Drainage Dist.* 72 Ill. App. 561.

The land of an owner cannot lawfully be included in a drainage district, unless included by the owner signing the petition for organization of the district, or by having his name included in the petition as a landowner by the petitioners, or by having his name appear in the notice as required by the statute under which such district is organized; and such owner, or others whose lands are included, have the right to make an objection by a writ of certiorari. *Sanner v. Union Drainage Dist.* 175 Ill. 575, 51 N. E. 857, Reversing 64 Ill. App. 62.

Whether the project for the establishment of a ditch was more comprehensive, or embraced and affected more lands, than was necessary in order to accomplish the drainage of the petitioner's land in the cheapest and best manner, is a subject for the exclusive judgment of the commissioners of drainage, and their determination of that question is not reviewable by the court. *Helck v. Voight*, 110 Ind. 279, 11 N. E. 806.

The statutory authority of the township board upon the appeal of a landowner from an assessment for drain benefits as made by the drain commissioner, to correct any "error or inequality in the assessment," does not entitle it to exclude lands from the assessment district which the commissioner had determined were benefited; nor has it the power to determine the validity of the proceedings, or to change the per cent assessed upon the township at large. *Thomas v. Walker Twp. Board*, 116 Mich. 597, 74 N. W. 1048.

An agreement by the drainage commissioners of a district that none of the remaining land of an owner should ever be attached to the district or classified or taxed, whether he connected with the ditches of the district or not, is void, because it is a violation of a mandatory direction of a statute making it the duty of such commissioners to connect the land of an outside owner with a district whenever such owner connects his ditches with those of the others in the district. *Lake Fork Special Drainage Dist. v. People ex rel. Bodman*, 133 Ill. 87, 27 N. E. 857.

Land within a drainage district not benefited by a system of ditches proposed to be provided therein because the level of the lands is such 60 L. R. A.

that the proposed ditches will not carry off the water therefrom are, nevertheless, subject to assessment for the improvement; the theory of the law being that the public health, convenience, and welfare are promoted by the improvement, —not simply that the lands of particular owners are rendered more valuable. *Oliver v. Monona County (Iowa)* 90 N. W. 510.

The determination of drainage commissioners as to what land will be benefited by the drain so as to be subject to assessment therefor will, in the absence of fraud, be conclusive when called in question for the first time on the application for a judgment on the drainage assessment. *Moore v. People*, 106 Ill. 376.

It is said in *Buckley v. Lorain County*, 1 Ohio C. C. 251, that § 4491 of the Ohio Revised Statutes, providing that the court may correct any gross injustice in the apportionment made by commissioners for the construction of a ditch, was intended to meet and obviate the objection of the conclusiveness of the finding by the commissioners that the lands would be benefited.

The plan upon which drainage districts are organized, under the drainage laws of Illinois, is to have only such lands included within their boundaries as will in fact in some material degree be beneficially affected by the proposed drainage, so that the drainage commissioners, when they fix the boundaries to a drainage district, at the same time pass upon the question as to what lands will be benefited; and it is made their duty to exclude all lands in their judgment not benefited, and include all those benefited; and when their report has been confirmed by the county court, due notice of the application for confirmation being given to all persons interested, who are at liberty to appear and contest the proposed boundaries fixed, such decision, so long as it stands in full force and unreversed, is conclusive; and a jury impaneled to assess damages and benefits for proposed work in a drainage district so organized have nothing to do with the question as to whether or not land included therein would or would not in fact be benefited, but their duty is simply to apportion the entire benefits among the several tracts of land included in the district in the ratio in which benefits will result to the respective tracts from the improvement; and an attempt on their part to determine that only a portion of a particular tract is in fact benefited is extra-judicial and nugatory, and the assessment will be taken as having been made on the entire tract. *Gauen v. Moredock & I. L. Drainage Dist. No. 1*, 131 Ill. 446, 23 N. E. 633.

Certiorari lies to review the action of drainage commissioners in enlarging the boundaries of their district when no statutory means exist for reviewing such proceedings. *Mason & T. Special Drainage Dist. v. Griffin*, 184 Ill. 380, 25 N. E. 995.

Quo warranto is not the proper remedy to question the inclusion of land within a drainage district by order of court, unless it is alleged that the order was procured by fraud. *People ex rel. Harrison v. Mineral Marsh Drainage Dist.* 193 Ill. 428, 62 N. E. 225.

Enlargement of district.

The power of the legislature of a state to change and authorize the alteration of the boundaries of such quasi municipal corporations as drainage districts, and to extend the authority of the commissioners of the district so as to be coextensive with the district as changed, cannot be questioned under a constitutional provision authorizing the formation of drainage districts. *People ex rel. Hardy v. Young America Drainage Dist.* 143 Ill. 417, 32 N. E. 688.

It is within the power of drainage commis-

sioners, under the Illinois drainage laws, to change the boundaries of a drainage district so as to include additional lands. *Doyle v. Baughman*, 24 Ill. App. 614.

Special drainage districts may be enlarged under the provisions of the Illinois drainage laws in the manner prescribed by such laws for the original organization of the district. *Davenport v. Drainage Dist.* 25 Ill. App. 92.

The jurisdiction of drainage commissioners to enlarge a drainage district under a section of the drainage law authorizing them to make such enlargement cannot be questioned on the ground that they are an interested tribunal. *Scott v. People ex rel. Lewis*, 120 Ill. 129, 11 N. E. 408.

The drainage laws of Illinois require the same notice to be given property owners for an enlargement of a drainage district as is required when the district is originally formed. *Mason & T. Special Drainage Dist. v. Giffin*, 28 Ill. App. 561.

But a late case has held that a resolution of drainage commissioners, attempting to change the boundaries of a drainage district as originally organized under the Illinois farm drainage act, is unauthorized and void. *People ex rel. Bollweg v. Union Dist. No. 1 Drainage Comrs.* 165 Ill. 156, 46 N. E. 261.

Drainage commissioners of a drainage district organized under the Illinois farm act have no power, after the original organization, to limit the district or change its boundaries, except under that provision of such act authorizing a dissolution; and a district in whole or in part cannot otherwise be dissolved. *Ibid.*, Affirming 61 Ill. App. 416.

The drainage commissioners of a drainage district have the power, under the drainage laws of Illinois, to annex the lands of owners who have connected the drains on the same with those of the district, even though such lands may be in an adjoining township; and the fact that such commissioners are the highway commissioners of the township in which the district is situate, and that the owners of the annexed land in another township have no voice in their election, makes no difference, since they, having voluntarily applied to be included in the district by availing themselves of its benefits, must bear their fair portion of the burden. *People ex rel. Hardy v. Young America Drainage Dist.* 143 Ill. 417, 32 N. E. 688.

The legality of the action of drainage commissioners in enlarging a drainage district under the drainage law of a state cannot be questioned in a proceeding by such commissioners to collect special assessments upon the land thus added to the district. *People ex rel. Wood v. Jones*, 137 Ill. 35, 27 N. E. 294.

Under a provision in a drainage law of a state making it the duty of drainage commissioners to annex outside lands with a drainage district whenever the owner connects his land with the ditches of the district, it does not matter whether such connection is by joining his own ditches to those of the district or by draining his lands through such district in some other mode. *Lake Fork Special Drainage Dist. v. People ex rel. Bodman*, 138 Ill. 87, 27 N. E. 857.

Although, under the drainage laws of Illinois, the owner of land outside a drainage district may connect ditches draining his own land with the district ditches, by the payment of such amount as the land would have been assessed if originally included in the district, and shall thereafter be considered as included in the district, yet he has no right to construct a ditch which will only serve as a channel through which to convey to said district ditches the drainage of

lands, other than his own, not included in the district and not subject to assessment for the benefits thereby conferred upon them. *Dayton v. Drainage Comrs.* 128 Ill. 271, 21 N. E. 198.

An owner of land who widens and deepens a small ditch on his land which connects with the ditch of a drainage district so as to drain water from his land into the district ditch, which would not flow therein otherwise, will be deemed, under the drainage law of Illinois, to have voluntarily applied to be included within the district. *People ex rel. Baron v. Drainage Dist. No. 3*, 155 Ill. 45, 39 N. E. 613.

Landowners who connect ditches on their lands with a ditch upon the land of another, who has enlarged and deepened the same, so that water is carried from such other lands through such enlarged ditch into that of a drainage district which would not otherwise have flowed into such drainage ditch, will be deemed to have voluntarily applied to be included within the district. *Ibid.*

Landowners outside a drainage district are entitled to keep open, for the benefit of their lands, ditches on the same constructed before the organization of the district, without becoming liable under the law to be included within the district, provided they in no manner connect such ditches with the district ditch. *Ibid.*

Owners of land have the right to have the water that accumulates thereon to flow in its natural direction, and no presumption can arise that they have applied to be included within a drainage district from the fact that such water naturally flows into the district ditch; and this is true although they increased the flow by ditches or drains upon their own land. But they cannot construct ditches from the district ditch over their own land so as to carry off water in that direction which would naturally go in another direction without becoming liable, under the statute, to be connected with the district, and thus contribute to the expense of the improvements. *Ibid.*

A landowner who questions the right of drainage commissioners to annex his land to a drainage district because he has placed himself within the statutory provision authorizing such annexation whenever the owner of land connects a ditch or ditches on his own land with those of a drainage district must proceed by quo warranto, and cannot maintain a bill in equity to enjoin the commissioners from acting as such over his land. *Bodman v. Lake Fork Special Drainage Dist.* 132 Ill. 439, 24 N. E. 630.

In a proceeding to enlarge a drainage district, the decision of the commissioners that the lands so added are involved in the same system of drainage and require for outlet the drains of the district is not, in the absence of fraud, a subject of inquiry in quo warranto proceedings, where such commissioners are invested by law with the discretion of determining that question. *People ex rel. Samuel v. Cooper*, 139 Ill. 461, 29 N. E. 872.

The fact that a section of the drainage law, vesting the drainage commissioners with power to enlarge the boundaries of their district, fails to prescribe the mode of procedure or the notice to be given to the owners of land sought to be annexed, will not be construed as conferring upon such commissioners the power to annex such lands without giving the owners thereof the right to be heard upon the question whether a proper petition has been presented, and whether their lands are involved in the same system of drainage, and require for outlets the drains of the district; but such statute will be construed as requiring the same procedure and notice as are required in the organization of the original drainage district. *Mason & T. Special Drainage*

Dist. v. Griffin, 134 Ill. 330, 25 N. E. 995, Affirming 28 Ill. App. 561.

One who, having due notice of a hearing on a petition to annex his land to a drainage district, suffers default, cannot, on the hearing as to the amount of the assessment, insist that no assessments shall be made against him because his land is not benefited. *Trigger v. Drainage Dist. No. 1*, 193 Ill. 230, 61 N. E. 1114.

8. Procedure; method of assessment.

In laying assessments for the construction of drainage works the report of the engineer or surveyor must state with particularity, as nearly as may be in his opinion, the proportion of benefit to be derived from such drainage by every road and lot or portion of lot, not stating a lump sum for roads generally. *Essex County v. Rochester Twp.* 42 U. C. Q. B. 523.

One not a resident within the limits of any of the municipalities which embrace the area assessable for a sewer is not disqualified to act as assessor by reason of owning a mortgage on some of the land included in the sewer district. *State, King, Prosecutor, v. Reed*, 43 N. J. L. 180, Affirmed in 48 N. J. L. 370, 5 Atl. 178.

The manner of making assessments on lands benefited by the construction of a sewer is left to the discretion of corporate authorities of a municipality, under a statute providing that the estimated cost and assessment shall be made upon the property benefited thereby in such equitable manner as the common council shall deem just. *Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342.

In the absence of any statutory direction as to how a sewer assessment is to be made, a power to make it by ordinance would seem to be incident to a power to charge the cost of construction upon abutting property. *Erie v. Flint*, 8 Pa. Co. Ct. 482.

To be legal and effectual, an act authorizing the construction of a sewer must go beyond a mere direction to assess the cost, or a part of it, upon the lots drained, and establish some constitutional rule for apportioning the burden, designate the property out of which the tax is to be made, and fix some certain standard of assessment. The legislature cannot commit to the discretion of others the fixing of the method; and when, under a statute deficient in these respects, the sewer commissioners return an assessment as in their judgment just and equitable, without showing that it is confined to, or even imposed on, the property drained by the sewer, or alluding even to the benefits conferred, without any intimation that the assessment has any reference to benefits; and the fact is that it was made according to surface area of the proximate lots,—the assessment is invalid. *State, New Brunswick Rubber Co., Prosecutor, v. New Brunswick Street & Sewer Comrs.* 38 N. J. L. 190, 20 Am. Rep. 380.

A charter provision that sewer taxes shall be assessed upon the property specially benefited in an amount equal to the contract price of construction is not inconsistent with a further provision that the premises specially benefited by the improvement shall be assessed according to the benefits, where it is shown that the contract price does not exceed the whole amount of benefits derived by the property assessed. *Adams v. Bay City*, 78 Mich. 211, 44 N. W. 138.

A statutory provision authorizing the apportionment of a drain tax to be made upon the per cent of benefits to accrue, instead of in dollars and cents, is not unjust, where the drain is conducive and necessary to public health. *Brady v. Hayward*, 114 Mich. 326, 72 N. W. 233.

A statute designating a fixed sum per linear foot front as the basis of a sewer assessment to

defray a portion of the cost of its construction is not unconstitutional as a taking of property without due process of law, although it fails to afford the taxpayer a hearing upon the rule or principle of apportionment. *People ex rel. Scott v. Pitt*, 169 N. Y. 521, 58 L. R. A. 372, 62 N. E. 662.

A statute authorizing the assessment of property abutting on a sewer for the cost thereof according to the front-foot rule is constitutional. *Minneapolis & St. L. R. Co. v. Lindquist (Iowa)* 93 N. W. 103.

See further on this question *note to Heffner v. Cass and Morgan Counties*, 58 L. R. A. 353.

A direction by the common council that a sewer assessment be levied upon land within a designated portion of the city is not addressed to the assessors individually, and may be carried out by their successors in office. *Hooker v. Rochester*, 30 N. Y. Supp. 297.

The future improvement of land laid out for lots, but which still remains farming land in appearance, may be considered in assessing the property for a trunk sewer by which it is benefited. *McKee Land & Improv. Co. v. Swilkehard*, 23 Misc. 21, 51 N. Y. Supp. 399; *McKee Land & Improve. Co. v. Williams*, 63 App. Div. 553, 71 N. Y. Supp. 1141.

The correct rule to apply in the assessment of lands for artificial drainage is to assess such lands according to the amount of waterfall that needs artificial drainage so as to render it suitable for the purposes to which it may reasonably be put, and not by simply estimating the amount of its watershed. *Blue v. Wentz*, 54 Ohio St. 247, 43 N. E. 493.

The commissioners of sewers attempted to cut a new channel for a river and assess the expense upon several towns by general tax, so much to each town generally, and it was resolved that none could be taxed towards the reparation of sewers, but those who had prejudice, damage, or disadvantage by the nuisance or default, and who might have benefit and profit by the reformation or removal of them, and that the assessment ought to have these qualities: (1) It ought to be according to the quantity of the lands, tenements, and rents of the respective owners liable therefor, and by the number of acres and perches; (2) according to the rate of every person's portion, tenure, or profit, or the quantity of the common of pasture, of fishing, or other commodity; and therefore it was resolved that the tax generally of a several sum in gross upon the town was not warranted. *Isle of Ely's Case*, 10 Coke, 141.

The assessing of drainage assessments against a whole lot, or part of a lot, owned by one person, when only some of the acreage was benefited, for the value of such benefit, is not erroneous. *Re McLean*, 45 U. C. Q. B. 325.

On certiorari defendant justified distress for an acre tax, and whether this was good or not, and the court conceded this not a fit way, being to put the commissioners to inquire of the value of every acre. *Commissioners of Sewers v. Newburg*, 3 Keble, 827.

A provision of the drainage laws giving an appeal from the drainage commissioners' order confirming special assessments, to the county surveyor, treasurer, and sheriff, who are constituted an appeal board with power to inquire into and pass upon the amount of benefits which will accrue to such tract of land and whether the assessment made by the commissioners is correct, is not unconstitutional, as conferring judicial powers on a nonjudicial body, since such board does not exercise judicial powers within the meaning of the term as used in the clause in the Constitution prohibiting persons in one of the three departments of the state—legislative, executive, and judicial—from exercising

any power belonging to the other departments. *Owners of Lands v. People ex rel. Stookey*, 113 Ill. 296.

Upon the trial of an appeal by the owner of land from an assessment levied thereon by drainage commissioners for benefits thereto by a proposed drainage, the jury may take into consideration the benefit the owner may derive by the drainage of a slough which separates him from other land belonging to him, as enabling him to cross at any point, and obviating the necessity of building and maintaining a bridge over the slough. *Spear v. Drainage Comrs.* 113 Ill. 632.

Under the Constitution and drainage laws of Illinois, the drainage commissioners of a drainage district cannot assess the lands situated therein for the cost of the proposed drainage, for a sum in excess of the benefits which such lands will receive thereby. *Havana Twp. v. Kelsey*, 120 Ill. 482, 11 N. E. 256.

To sustain an assessment for sewer purposes where the assessors are required to be disinterested freeholders, and to levy the assessment on the owners benefited in proportion, as nearly as may be, to the advantage deemed to accrue to each, it is essential that the proceedings show upon their face that the assessors possessed the requisite qualifications, and that their report show, not only that the assessment was made on the owners benefited, but in what proportion. *State, Times, Prosecutor, v. Newark*, 25 N. J. L. 399.

In determining whether or not a railroad right of way is benefited by the drainage in a drainage district, the jury have a right to take into consideration the fact that such drainage has the effect to reduce the volume of water in a natural water course so as to permit the company to maintain a smaller bridge and opening on its right of way across the same. *District No. 3 Drainage Comrs. v. Illinois C. R. Co.* 158 Ill. 353, 41 N. E. 1073.

Where a drainage law provides that a jury shall award and assess damages and benefits in favor of and against each tract of land in a drainage district separately, in the proportion in which such tract will be damaged or benefited, and shall in no case assess land in a greater amount than it will be benefited, or for more than its proportionate share of the estimated cost of the work,—it is indispensable, for the determination of these questions, that every fact materially affecting the extent and character of the work, and a reasonable estimate of the cost thereof, shall be before the jury. *Badger v. Inlet Drainage Dist.* 141 Ill. 540, 31 N. E. 170.

A law authorizing sewer commissioners to levy upon benefited estates a "proportional part of the cost thereof, not exceeding," etc., must be taken to mean proportional to the special benefit received. *Hall v. Boston Street Comrs.* 177 Mass. 434, 59 N. E. 68.

Lots within the city limits, near the compact part of the city, with houses around them, though not in their immediate vicinity, must, for purposes of sewer assessment, be regarded as city lots, and not as agricultural lands. *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

The findings and report of the engineer under the drain statutes should, when adopted by the county board, be accepted as prima facie evidence of the benefits conferred upon each tract of land. *Dodge County v. Acom*, 61 Neb. 376, 85 N. W. 292.

The assessment of lots for the cost of a sewer according to the number of square feet in each lot, under a statute providing for the payment of the cost of sewers according to a front-foot rule, is a harmless error when the lots are all 60 L. R. A.

the same length. *Minneapolis & St. L. R. Co. v. Lindquist (Iowa)* 93 N. W. 103.

An overestimate in the number of square feet in the estate of a person assessed for construction of a sewer does not invalidate the assessment if the estate was assessed no more than its just proportion of the expenses. *Keith v. Boston*, 120 Mass. 108.

In case a sewer constructed along several streets is a unity, the assessment may be made for the whole work under one proceeding. *Grimmell v. Des Moines*, 57 Iowa, 144, 10 N. W. 330.

Under the New York acts for the drainage of swamps, the acquisition of the title to the easement is not essential to the laying and confirmation of an assessment for the damages to be occasioned. *Re Swan*, 33 Hun, 200, Distinguishing *People ex rel. Williams v. Haines*, 49 N. Y. 587, on the ground that the latter case was under a special act which is more restrictive than the general law.

The fact that a portion of a sewer connecting with the main sewer had been constructed across land of defendant without condemning it does not relieve him from liability on the tax bill for the portion legally constructed. *Miller v. Anheuser*, 2 Mo. App. 168.

In a proceeding to assess the cost of a sewer improvement the court will not inquire into the methods which induced the municipality to make the improvement. *Park Ecclesiastical Soc. v. Hartford*, 47 Conn. 89.

Where a statute provides for assessments for sewers made in any "street," that term means public streets, either by lay-out or by dedication and acceptance. *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

Irregularities in the mode of making assessments for drainage purposes, which can be interposed when the commissioners make the confirmation, will be waived by failure to interpose them at that time. *Morrell v. Union Drainage Dist. No. 1*, 118 Ill. 139, 8 N. E. 675.

A municipal corporation cannot assess the value of a sewer upon valuation of abutting property in its improved condition, but the assessment must be made on the basis of the value of the land independent of the buildings, which should be settled at the time the improvement is made. *Boston v. Shaw*, 1 Met. 130.

The invalidity of a provision of a city ordinance exempting persons paying a specified sum into the treasury from future assessments for the expense of constructing a sewer does not render void the assessments made against other property owners, where the amount of such assessments was not increased by such exemptions. *Page v. St. Louis*, 20 Mo. 136.

Other ordinances of a municipal corporation, providing for the construction of lateral branches to an out-fall sewer, may be introduced at the confirmation of assessments for the construction of such out-fall sewer under an ordinance providing for openings on both sides, for the purpose of showing good faith in the city in carrying out its provisions for lateral connections, so as to justify the assessment of property not abutting upon such lateral sewer. *Gray v. Cicero*, 177 Ill. 459, 53 N. E. 91.

In a proceeding under the law to establish a ditch, the opinion of witnesses acquainted with the property affected, as to its value with and without the ditch, is proper evidence, although they may not give an opinion as to the amount of the benefits or damages resulting to the land by the construction of the ditch. *Yost v. Conroy*, 92 Ind. 464, 41 Am. Rep. 156.

It is competent for farmers, being in the immediate neighborhood of low lands which it is proposed to drain, to give their opinions as to what extent, if any, such drainage would in-

crease their value, in the trial of an appeal by the owner of such lands from the assessment levied thereon by the drainage commissioners. *Spear v. Drainage Comrs.* 113 Ill. 632.

In assessing a corner lot which abuts lengthwise on a sewer improvement, but fronts breadthwise on another street and not on the improvement, the lot should be deemed as fronting breadthwise on the improvement, and be assessed for the frontage it would have thereon in such case; and such rule is not affected by a statutory provision that the council may exempt from assessment such portion of the frontage of corner lots as to it may seem equitable. *Cincinnati v. Honnigfort*, 32 Ohio L. J. 32; *Blanchard v. Columbus*, 8 Ohio S. & C. P. Dec. 676.

A court will not interfere with the discretion of a city council, to which the matter has been delegated, in apportioning the assessment upon a corner lot in front and on the side of which sewers are constructed, where it is not shown that the discretion has been wantonly used or has been abused. *Cincinnati v. Wewell*, 9 Ohio Dec. Reprint, 677.

4. Apportionment and equalization.

When part of an assessment for a sewer located in three towns has been properly apportioned to one of them, the fact that such portion has been improperly assessed and distributed among the individual landowners in such town does not affect the validity of the total assessment on the town, provided the town was benefited upon the entire tract within its limits. *State, King, Prosecutor, v. Reed*, 43 N. J. L. 186, Affirmed in 48 N. J. L. 370, 5 Atl. 178.

In determining the relative portions which the several towns for which a system of sewerage is established shall contribute to the cost of its construction, the value of the personal property in them may be taken into consideration. *Re Kingman*, 170 Mass. 111, 48 N. E. 1075.

Where a drainage work initiated in a higher municipality obtains an outlet in a lower municipality, the assessment for "outlet liability," provided for by statute, is limited to the cost of the work at such outlet. *Sutherland-Innes Co. v. Romney Twp.* 30 Can. S. C. 495.

An assessment on lands for the construction of a ditch, under a statute, cannot be enforced where the report of the appraisers of benefits and damages failed to show that they made a division of the costs of the construction of the ditch among the owners of the lands affected, as required by the statute. *Bogart v. Castor*, 87 Ind. 244.

After a sewer assessment apportioned equally between the city and the property benefited has been declared invalid, a second assessment, which imposes two thirds of the cost of improvement upon the property benefited, with a proviso that property owners who have paid the former assessment shall be exempt from further demand, constitutes an unlawful discrimination between the property of persons taxed, and cannot be sustained. *White v. Saginaw*, 67 Mich. 33, 34 N. W. 255.

In the absence of a statutory direction, a sewer assessment need not be apportioned throughout the taxing district by the common council authorizing the improvement; but they may properly devolve the duty upon one or more assessors. *Warren v. Grand Haven*, 30 Mich. 24.

Mere failure to provide for the apportioning of taxes according to the special benefits received, in a statute authorizing a city to provide for the construction of sewers and drains and to tax the cost thereof upon the lots or 60 L. R. A.

ground in the district in which the sewer is situated, does not render it unconstitutional and void, the city under such circumstances having the right to adopt any mode that is fair and legal. *Gilmore v. Hentig*, 33 Kan. 156, 5 Pac. 781.

The omission of the assessors under a drainage act to certify that they made the assessments which they judged to be in proportion to the accruing benefits, will not invalidate the proceedings if such was the principle in fact governing their action. *State, Britton, Prosecutor, v. Blake*, 35 N. J. L. 208.

When the assessors of sewer expenses acted within the scope of their authority in adopting a uniform rule for assessing, the rule cannot be attacked in collateral proceedings, no matter how apparently inequitable the assessment may be in isolated cases. The assessment must stand or fall as a whole. *Ithaca v. Babcock*, 72 App. Div. 260, 76 N. Y. Supp. 49.

A sewer assessment required by charter to be levied upon property, the value of which is increased by the improvement, and which the resolution of the council directs to be assessed against the premises improved thereby, is void where the certificate attached to the assessment roll merely shows that the assessment was made pursuant to the resolution of the council, which may mean no more than in obedience to its command. *Warren v. Grand Haven*, 30 Mich. 24.

The tax roll of a sewer assessment required by charter to be assessed according to the benefits derived from the improvement must show expressly that the assessment was made on that basis; and it should also appear that the benefits to the whole property included in the taxing district will equal the whole cost of the proposed work. *Adams v. Bay City*, 78 Mich. 211, 44 N. W. 138.

A provision in a drainage law requiring the county court, after a drainage district has been formed and the commissioners have found the sum necessary to be raised by special assessment to perform the proposed drainage, to call a jury to apportion the tax according as the property may be severally benefited, does not make such law unconstitutional as violating a constitutional clause requiring the special assessments to be levied by the commissioners, or corporate authorities; since the jury have nothing to do with fixing the aggregate sum to be raised, and therefore cannot be said to levy the assessment. *Huston v. Clark*, 112 Ill. 345.

5. For what may be laid.

Benefited property is only liable for the actual expense of constructing the sewer. *Re Fifth Ave. Sewer*, 3 Pittsb. 278, 4 Brewst. (Pa.) 364.

The cost of an entire system of sewerage including an outlet constructed outside the limits of a town, also a sum of money paid for a right of flowage through another sewer outside the limits, may all be assessed upon land within the town according to benefits received. *Butler v. Montclair*, 67 N. J. L. 426, 51 Atl. 494.

The mere fact that a charter provision authorizing the construction of a district sewer of dimensions larger than necessary for the drainage of the district so that other districts may drain into it, and compelling the district to pay the additional cost of such increased dimensions, is oppressive or unequal in its operation, does not render it void. *Kansas City use of Adkins v. Richards*, 34 Mo. App. 521.

An assessment on land in a reclamation district is not invalid because it includes a sum for the purpose of erecting a pump and maintaining it. *Swamp Land Dist. No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866.

A municipal corporation has no right to charge the cost of constructing flush tanks at the dead ends of a sewer to the fund collected by special assessments for the construction of such sewer, under an ordinance which does not provide for the construction of such flush tanks, although the same are necessarily beneficial for the perfect working of the system. *People ex rel. McCornack v. McWethy*, 177 Ill. 834, 52 N. E. 479.

An act authorizing and directing the trustees of a designated reclamation district to make up a sworn statement in detail of the total cost and incidental expenses of the work of reclamation therein, "based upon the books and vouchers thereof," and to "report" the same to the board of supervisors; whereupon such board must appoint commissioners to value and assess on the lands of the district "the whole amount so reported" in proportion to benefits resulting or to result therefrom,—is unconstitutional as an attempt by the legislature to levy an assessment upon the lands of the district,—the amount being the sum total shown by the books and vouchers, without reference to the nature or character of the charges in the books, calling for and admitting of no question as to the correctness of such books and vouchers or charges, and irrespective of any question as to whether the law authorizing and providing for the work has been complied with. *People v. Houston*, 54 Cal. 538.

Where a street has been paved at the expense of the abutting owner, and the pavement is torn up for the construction of a sewer, it cannot be repaved at the expense of the abutting owner, but must be restored by the city, and the expense must be accounted as part of the work of constructing the sewer. *Burlington v. Palmer*, 67 Iowa, 681, 25 N. W. 877.

An assessment levied by commissioners of a drainage district organized under the drainage laws of Illinois for the purpose of meeting an indebtedness created by such commissioners in advance is unauthorized and void. *Winklemann v. Moredock & J. Landing Drainage Dist.* 170 Ill. 37, 48 N. E. 715.

An assessment levied for the purpose of paying the outstanding liabilities of a drainage district without any definite information as to the amount, nature, and character of such liabilities is void as not coming within the limited purpose specified in the Constitution and drainage laws of Illinois, confining the levy of assessments in such districts to pay for the construction of levees, drains, and ditches, and for the repair of those already constructed. *Ibid.*

Under a power "to assess the cost and expense of constructing a sewer upon benefited property," the expenses of making the assessment cannot be included in the assessment, as the language of the Constitution is too uncertain to warrant an additional burden on private property. *Harrisburg City v. Eby*, 16 Pa. Co. Ct. 124.

But in Michigan it was held that a sewer assessment is not invalid because the warrant attached to the tax roll permits the collector to add 2 per cent for his fees. *Warren v. Grand Haven*, 30 Mich. 24.

The imposition of the cost of maintaining public sewers by special assessment upon property owners who have already been assessed for the cost of their construction, in case they make use of them, does not deprive them of property without due process of law, but is matter of public policy for the legislature, since they receive a special benefit from the construction of the sewer in the privilege of discharging their private sewers into it, even if they are not entitled to the free use of it. *Carson v. Brock*, 60 L. R. A.

ton Sewerage Comrs. 182 U. S. 398, 45 L. ed. 1151, 21 Sup. Ct. Rep. 860.

A municipality empowered to assess only for laying main sewers, not for maintaining or repairing them, the property served or benefited thereby, cannot levy an assessment on property upon the line of a sewer built by private persons and conveyed to it either for the expense of relaying it at a different grade to accommodate an extension, or of constructing the extension. *Boyden v. Brattleboro*, 65 Vt. 504, 27 Atl. 164.

6. Rights of property owner.

A number of the cases dealing with the rights of the property owner have been collected in preceding subdivisions, to which attention is directed. But a summary of the holdings may be made here in immediate connection with the question of the assessment. Curtesy and fair dealing entitle one who is to be charged with the expense of a drain to a voice in the determination of whether or not it shall be constructed. This right, however, is not usually secured by constitutional provisions, and in some instances to give the taxpayer anything like a veto power on the improvement proceeding might work serious injury to the public interests.

Assessments for local purposes, such as a drainage system, charged upon the property benefited in proportion to the benefit received, are not taxes within a county government act providing that no tax shall be levied upon any district until the proposition to levy the same has been submitted to the qualified electors. *Holley v. Orange County*, 106 Cal. 420, 39 Pac. 790.

Upon the question whether or not particular property shall be charged with the improvement, its owner should be entitled to a hearing if there is any doubt about the improvement being for his benefit. There certainly can be no power in the government to charge particular land with the expense of a drain which was entirely for the benefit of the public or of other private property while the taxing power is not subject to many of the constitutional restrictions, yet it must be exercised along well-established lines, so that the cost of an improvement which is for the benefit of the public must be borne by a general tax. The only justification for a local tax is that the particular improvement is for the benefit of a limited territory, and that with respect to such improvement such territory should be regarded as the public, and bear the cost. The taxpayer should also be accorded a hearing as to the validity and amount of the tax. The constitutional guaranty of due process of law has been invoked with reference to such assessments.

But due process of law in the enforcement of a drainage assessment exists if it can be enforced only by legal proceedings in which any defense going either to its validity or amount can be pleaded. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 589, 4 Sup. Ct. Rep. 663.

Whenever by the laws of the state or by state authority a tax, assessment, servitude, or other burden is imposed upon property for public use, such as the drainage of swamp lands, and those laws provide for a method of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person, or such proceedings with regard to the property, as is appropriate to the nature of the case, the judgment of such proceedings cannot be said to deprive the owner of such property without due process of law. *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 618.

The owner of land in a drainage district, which has been officially assessed for benefits conferred thereto by such drainage, cannot be said to have been deprived of his property without due process of law where the drainage law under which such improvement is made affords ample opportunity of being heard upon every question of fact and law, and he fails to urge any just ground of defense, and suffers judgment to go against his land, to satisfy which it is about to be sold. *Owners of Lands v. People ex rel. Stookey*, 113 Ill. 296.

Statutes and ordinances authorizing the improvement usually safeguard the interests of the taxpayer against extravagance and other things which would add to the burdens upon the taxpayer, and he is entitled to the benefit of these safeguards, and the courts will see that he has them.

A statute limiting the amount of an assessment for any improvement to a certain percentage to the value of the lots or land applies to sewers. *Conner v. Cincinnati*, 11 Ohio C. C. 336.

A statutory provision that in no case shall assessments for sewers exceed a specified amount per foot front is general in its nature, and applies whether the assessment be by the foot front or by benefits, or upon duplicate valuations. *Toledo use of Gates v. Lake Shore & M. S. R. Co.* 4 Ohio C. C. 113.

Making a statutory provision limiting assessments for sewers to one fourth the value of the property assessed applicable only in cities of a certain class does not render the statute obnoxious to a constitutional provision requiring all laws of a general nature to have uniform operation throughout the state. *Cincinnati v. Connor*, 55 Ohio St. 92, 44 N. E. 582.

An assessment for drain taxes, imposed under a statute requiring a description of the land benefited by the drains, is void where the lands are described as 10 acres of two government sub-divisions of 40 and 80 acres, without defining the positions of the 10-acre parcels. *Atwell v. Zeluff*, 26 Mich. 118.

The requirement of a statute that, upon the completion of a sewer a tax bill for the assessment against each piece of land be made out in the name of the owner, and that it be a lien upon the land described, is directory merely, and the lien is not invalidated by the fact that a name other than that of the owner is inserted by mistake. *St. Louis use of Rotchford v. De Nove*, 44 Mo. 136.

If a mistake in the description of land intended to be benefited by a drainage ditch is caused by the commissioner, it may be corrected and the assessment enforced where the land sought to be benefited is made clearly to appear. *Luxadder v. State use of Rhine*, 131 Ind. 598, 81 N. E. 453.

An erroneous description of lands upon which a sewer assessment is levied does not invalidate it where, by the city charter, the common council is authorized to correct errors in the description of lands on which an assessment is imposed. *Hooker v. Rochester*, 30 N. Y. Supp. 297.

A drainage assessment is a valid lien on land as against a collateral attack by the owner thereof, although such lands were described in the drainage proceedings as being owned by another party in whose name the land appeared on the tax duplicate, under a statute making it sufficient notice if lands affected are described as belonging to the person who appears to be the owner according to the last tax duplicate, or record of transfers. *Reed v. Kalfsbeck*, 147 Ind. 148, 45 N. E. 476, 46 N. E. 466.

By virtue of the act of February 19, 1895, § 2, when the benefit to property accruing from GO L. R. A.

the construction of a trunk sewer is prospective only, depending upon the construction and connection of another sewer, not yet built, the assessment is to be made at the time of the construction of the trunk sewer; but the lien of such assessment does not come into existence until the connecting sewer is built, and interest thereon does not begin to run until the confirmation of the assessment for the connecting sewer. *Seaman v. Camden*, 66 N. J. L. 516, 49 Atl. 877.

The right of a municipal corporation to levy a special assessment for the construction of a sewer cannot be questioned on the ground that the ordinance providing for its construction was passed before the necessary steps had been taken to acquire the right of way therefor over private property beyond the corporate limits. The necessary steps to condemn or otherwise acquire such right of way may be taken after the assessment of benefits has been made and confirmed. *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

But a municipal corporation authorized to construct sewers and assess the lots where "the work is to be done" cannot first construct the sewer and then collect the assessments. *Harper's Appeal*, 109 Pa. 9, 1 Atl. 791.

The mere passage of a prior ordinance for the construction of other sewers which would effectually drain certain lots does not make such lots "already provided with drainage," within the meaning of a statutory exemption from assessment for sewers of lots so provided, where the prior ordinance was never carried into execution, although still unrepealed. *Cincinnati v. Bickett*, 28 Ohio St. 49.

Where a sewer has been made through an alley in the rear of a lot, on which there is but one improvement, already supplied with drainage by the sewer previously made in the street in front, such lot cannot be assessed for the alley sewer, unless there is actual drainage into it. *Cincinnati v. Wewell*, 9 Ohio Dec. Reprint, 677.

Jury.

It is generally held that the taxpayer is not entitled to have the amount of his assessment fixed by a jury. Such proceedings are not within the class of cases for which the Constitution provides a jury trial.

Sewer assessments, like other assessments for benefits, are a kind of tax, and as such subject to the revision of a court, not of a jury, and a statute providing for such assessments is not unconstitutional under B. I. Const. art. 1, § 15, which declares that the right of trial by jury shall remain inviolate. *Bishop v. Tripp*, 15 E. I. 466, 8 Atl. 692, 16 R. I. 198, 14 Atl. 79.

An act requiring the board of county commissioners to ascertain the aggregate cost of a drainage ditch and apportion the same to land according to benefit received, is not invalid on the ground that it fails to provide for an impartial tribunal to determine the benefits and make the assessments. *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368.

The drainage law authorizing the court to order a special assessment to be made by the commissioners of a drainage district in lieu of a jury does not conflict with any provisions of the Illinois Constitution. The right of a trial by jury, guaranteed by the Constitution, has no bearing on a question of this character. Nor is an assessment of this character a taking or damaging of property within the meaning of that clause of the Constitution prohibiting the taking or damaging of private property for public use without just compensation. *Briggs v. Union Drainage Dist. No. 1*, 140 Ill. 53, 29 N. E. 721.

Even the issues formed in an action to enforce

by foreclosure the lien of an assessment on lands for the construction of a ditch, being in the nature of an equitable suit, are triable by the court, and not by a jury. *Laverty v. State ex rel.* 1111, 109 Ind. 217, 9 N. E. 774.

But the owner of land, on appeal to the county court from an assessment by commissioners of a drainage district under a clause in the drainage act allowing such appeal upon the sole ground that such tax is a greater amount than the benefits to accrue to the land by the proposed drainage, is entitled to a jury if he demands one, such act evidently embracing a jury trial; and the issue, being one of fact as to whether or not the land is benefited, and, if so, the amount, is one properly within the province of a jury. *Mascall v. Drainage Dist.* 122 Ill. 620, 14 N. E. 47.

One not denied a jury, and whose personal property was not distrained, cannot question the constitutionality of a drainage act because it provides for issues of fact to be tried by the court without a jury, and authorizes the commissioners of drainage to sell personal property for the payment of any assessment of benefits for the construction of a ditch, the same as a county treasurer is empowered to do. *Scott v. Brackett*, 89 Ind. 413.

7. Other matters.

An assessment is not invalid because a taxing district or assessing district was not established, where the assessment is for the construction of a trunk sewer, under a statute providing that the construction of main or trunk sewers may be provided for without regard to districts. *Wilson v. Cincinnati*, 5 Ohio N. P. 68.

An assessment for a sewer constructed in parts of two districts is not invalid under the Ohio statutes, providing for the division of municipal corporations into sewer districts, and that where a corporation is so divided the assessment provided for by statute shall be by districts, as such provisions are not jurisdictional in character. *Cincinnati v. Honnigfort*, 32 Ohio L. J. 32.

A tax bill whereby the cost of constructing a district sewer is assessed against the property in the district is not rendered invalid by reason of the fact that the sewer was constructed in the center of a street forming the dividing line between that and another district, thereby placing one half of the width of the pipe in the other district, coupled with the further fact that the surface water of the side of the street located outside the district was drained into it through inlets constructed for that purpose. *St. Joseph ex rel. Danaher v. Dillon*, 61 Mo. App. 317.

The mere fact that water mains of city water-works have not been extended along a street in which a sewer has been constructed will not defeat an assessment on the contiguous property for the cost of the sewer, where the same can be used without the city water for all purposes of drainage except for water-closet purposes. *Walker v. Aurora*, 140 Ill. 402, 29 N. E. 741.

An assessment cannot be made for the construction of drains which are laid across private property without right so that the act constitutes a trespass. *Re Cheesebrough*, 78 N. Y. 232, affirming 17 Hun, 561; *Re Rhinelander*, 68 N. Y. 105.

In case the original assessment of benefits in a drainage proceeding proves inadequate to complete the work, the court may, upon due petition and notice, reassess benefits in order to complete the work or pay a deficit in case it has been completed, under a statute making the power of the court subject to the limitations 60 L. R. A.

that the entire cost of the improvement must fall upon the lands benefited, and that no tract can be assessed in a sum exceeding the amount of benefits resulting to it from the ditch, but otherwise giving it large discretion in respect to modifying, equalizing, and changing assessments. *Rogers v. Voorhees*, 124 Ind. 460, 24 N. E. 374.

But a statute authorizing a reassessment for the expense of constructing a sewer in all cases where, by reason of a defect in the ordinance under which the improvement was made, the special tax bills issued therefor remain unpaid, violates the constitutional provision prohibiting retrospective legislation so far as it applies to assessments for improvements made prior to its adoption, and cannot be defended upon the ground that it constitutes an exercise of the power of the legislature to authorize the levying of taxes to pay pre-existing taxes, as such power is limited to general taxation, and does not include assessments for local purposes. *St. Louis v. Clements*, 52 Mo. 133.

Irregularities in a sewer assessment are cured by the city council's setting the assessment wholly aside, and making a reassessment in accordance with the provisions of the charter. *Townsend v. Manistee*, 88 Mich. 408, 50 N. W. 321.

Every owner of land in a drainage district has an interest in the classification of such land, which interest is recognized by the drainage laws in giving such owners the right to notice of the time when and the place where the commissioners will meet to hear objections thereto, and in giving them the right to appeal from the decision of such commissioners; and, in making assessments, the commissioners must have regard to such classification, and have no power, on the ground that it will not be benefited thereby, to credit certain land with the full amount levied against it, thus in effect releasing it from any assessment; and a levy so made will render the whole assessment void. *People ex rel. Davidson v. Cole*, 128 Ill. 158, 21 N. E. 6.

Drainage commissioners have no power to incur any indebtedness against a drainage district organized under the drainage laws of Illinois of the assessment levied, although such assessment was wholly inadequate to complete the work commenced, and the additional work was necessary to protect the lands of the district, and the commissioners advanced the money for the excess; and a special assessment levied to meet such indebtedness is void. *Ahrens v. Minnie Creek Drainage Dist.* 170 Ill. 262, 48 N. E. 971; *Winkelmann v. Moredock & I. Landing Drainage Dist.* 170 Ill. 37, 48 N. E. 715.

A law making benefited property liable for sewer assessments if made within two years from its completion is no more unreasonable or contrary to any principle of constitutional right than is a statute of limitations. *Hall v. Boston Street Comrs.* 177 Mass. 434, 59 N. E. 68.

Proceedings imposing on land the work of constructing and repairing a ditch create on the land a permanent charge in the nature of a servitude. *McCann v. Hinchinbrocke Twp.* Rap. Jud. Quebec, 8 B. R. 149.

8. Lien.

A lien for the proportional cost of a sewer along a street cannot be filed against owners of abutting property without statutory authorisation. *Meadville v. Dickson*, 129 Pa. 1, 18 Atl. 513; *Mauch Chunk v. Shorts*, 61 Pa. 389.

The right of a municipal corporation to enter liens against lots through or along which a

sewer runs for any part of the cost of construction is a power of special taxation, and must have explicit legislation to support it. *Philadelphia v. Tryon*, 35 Pa. 401.

Under the statutes relating to the construction of sewers in New York city, no assessment can be made which will create a lien or encumbrance upon property of the city. *Dowdney v. New York*, 54 N. Y. 186.

Where a drain assessment shall be and remain a lien on the benefited lands until fully paid, it is a lien encumbrance, due and payable at the time it is made, although the landowner may for his own benefit, as a privilege, pay the same by instalments. *Clapp v. Minnesota Grass Twine Co.* 81 Minn. 511, 84 N. W. 344.

Ditch taxes declared by statute to be a perpetual lien upon the lands assessed until discharged become a lien as soon as they become a charge on the land by the assessment of benefits made by the drain commissioner. A mere delay of the drain commissioner to present the assessment roll to the supervisors, or of the supervisors in extending it upon the tax roll, does not invalidate the lien. *Lindsay v. Eastwood*, 72 Mich. 336, 40 N. W. 455.

Equity will enforce a lien on property liable under a statute authorizing a drainage of swamp lands, and charging the expense thereof on the lands benefited. *Williams v. Allen*, 32 N. J. Eq. 485.

The lien of an assessment on land for the construction of a ditch is lost, and may be set aside as a cloud on the title, by a sale of the land under foreclosure of a mortgage existing prior to the institution of the drainage proceedings, although a deed was not acquired thereunder until after the drainage lien attached, as the latter is subordinate to the lien of the mortgage, and the mortgagee is not estopped to assert his priority by silently standing by and permitting the drain to be constructed, such conduct being entirely consistent with a reliance upon such priority. *Killian v. Andrews*, 130 Ind. 579, 30 N. E. 700.

The provision in the drainage laws of Illinois authorizing the foreclosure of the lien of special assessments levied on lands by drainage commissioners of the drainage district in which such lands lie, and providing a special proceeding for such foreclosure, not conforming to that provided by the general revenue laws for the foreclosure of liens for taxes, is not unconstitutional, as an amendment to the Constitution confers upon the general assembly all necessary power in matters of drainage, both as to the mode of levying and of collecting special assessments upon property benefited and lying within a drainage district; and that amendment, so far as it invades the former limitations of the Constitution, must prevail; and such limitations are not applicable to the subject-matter of special assessments for drainage. *Samuels v. Drainage Comrs.* 125 Ill. 536, 17 N. E. 829.

The statutory lien of an assessment upon the easement of a turnpike company in its roadway for benefits conferred by the construction of a ditch may be enforced by a decree of foreclosure and sale. *Indianapolis & C. Gravel Road Co. v. State ex rel. Flack*, 105 Ind. 37, 4 N. E. 316.

The right of way and track of a railroad company lying within a drainage district may be sold under a decree foreclosing the lien of a special assessment levied thereon by such district for benefits conferred by the proposed drainage. *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.* 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781.

But this cannot be done in the absence of express statutory authority so to do. *Louisville*, 60 L. R. A.

N. A. & C. R. Co. v. State use of Beckman, 122 Ind. 443, 24 N. E. 350.

A township drain tax is by statute made a lien upon the land against which it is assessed, and, if legal, creates a cloud upon the title of the owner, who may maintain a bill in equity to remove it by having the assessment declared void. *Frost v. Leatherman*, 55 Mich. 83, 20 N. W. 705.

A drainage assessment cannot be made a lien on real estate superior to that of an existing mortgage without giving the mortgagee his day in court. *Pierce v. Aetna L. Ins. Co.* 131 Ind. 284, 31 N. E. 48.

The lien of a drainage assessment levied for the construction of a public ditch is junior to the lien of a pre-existing mortgage, where the drainage law simply provides that the assessment shall "be a lien from the date of filing the report of the commissioners," without other provision indicating an intention to make such lien paramount to prior encumbrances. *State ex rel. Ely v. Aetna L. Ins. Co.* 117 Ind. 251, 20 N. E. 144.

The lien of a ditch assessment is not extinguished by the foreclosure of a paramount lien for state taxes, where the ditch assessment was a lien before the foreclosure action was executed, and no effort was made to foreclose as against it, and the parties to the ditch proceedings were not made parties thereto. *McCollum v. Uhl*, 128 Ind. 304, 27 N. E. 152, 725.

A statute which annuls all judgments for the drainage of lands, all liens for assessment for drainage, and excludes certain lands from the limits of the drainage district, and exempts them from all future drainage assessments, is unconstitutional, where vested rights are thereby divested, and the obligation of contracts impaired. *New Orleans Canal & Bkg. Co. v. New Orleans*, 30 La. Ann. 1371.

9. Enforcement.

In ordering works of drainage, the state exercises its sovereign power, and may direct the collection of the assessment therefor before the drainage is completed. *Re First Drainage Dist.* 27 La. Ann. 20.

An assessment on lands for benefits conferred by the construction of a drain in pursuance of a statute is not a contract in which the one constructing the drain has a vested right, but is purely a statutory right or remedy against common right; and its enforcement must be in strict conformity with the requirements of the statute in force at that time. *Bate v. Sheets*, 64 Ind. 209.

Sewer assessments must be collected by proceedings *in rem* against the property, and not by an action of assumpsit. *Philadelphia v. Bradfield*, 159 Pa. 517, 28 Atl. 360.

Where the statutes provide for the collection of sewer assessments by sale in the same manner as is provided for collection of delinquent taxes, an action cannot be maintained against the landowner for the amount. *Roxbury v. Nickerson*, 114 Mass. 544.

An averment in a complaint to enforce a ditch assessment upon lands, that the owner did not appeal from the assessment; that he stood by and saw the work done without objection; that the course of the ditch through his premises was changed at his instance; that a certain amount was expended for his benefit in constructing the ditch through his land; and that he did not question the legality of the assessment until after the work was completed, without alleging that he either requested the work to be done or promised to pay for it,—will not render him liable in assumpsit for the value of the labor done in constructing the ditch through

his premises if the assessment lien to enforce which the action is brought fails because of defective description of the property. *Boatman v. Macy*, 82 Ind. 490.

But a landowner is liable in assumpsit for the value of work and labor performed in constructing a ditch over his land irrespective of whether the proceedings instituted to establish the same, in pursuance of a statute, by which he was assessed for the benefits conferred upon his land, were or were not valid, where he had with others signed a written waiver of all error, informality, or omission in the proceedings, and had stood by from day to day and seen the work being done, encouraged its completion, and promised to pay what the work would be worth. *Flora v. Cline*, 89 Ind. 208.

And when a statute authorizing a sewer improvement provides the municipal corporation with a lien on the benefited property, and does not clearly prohibit a common-law action *in personam*, the debt is not discharged by the expiration of time within which the lien could have been filed, and may be recovered in assumpsit. *Scranton v. Smith*, 6 Lack. Legal News, 185.

To enforce an assessment upon abutting property under a statute permitting the construction of trunk sewers under certain prescribed proceedings, and the assessment of private property therefor, it must be shown that the sewer was in fact a trunk sewer. *Cincinnati use of Deters v. McDuffie*, 1 Ohio N. P. 53.

A sewer assessment upon benefited property cannot be collected as a debt by a common-law action, unless such remedy is given by statute, as it constitutes a tax. *McKeesport v. Fidler*, 147 Pa. 532, 23 Atl. 799.

A ditching association may recover a personal judgment against a landowner for the amount of a lien which it had against his lands for the assessment of benefits conferred by the construction of a drain, but which it did not enforce, but waived the right thereto upon the faith of his promise to pay the same upon demand if suit to enforce the lien was not brought. *Hull v. Brearley Run Draining Asso.* 58 Ind. 520.

A personal judgment may be recovered against a railroad company to enforce the collection of a sewer assessment under a statute making such assessment a lien and authorizing its foreclosure, the right of way and franchises of which is not subject to sale upon execution and decree for the enforcement of such lien. *Lake Erie & W. R. Co. v. Bowker*, 9 Ind. App. 428, 36 N. E. 864.

This is under the power of the courts to provide a remedy for an existing right, since the ordinary method of collecting by sale of the property benefited is prohibited by considerations of public policy. *Louisville, N. A. & C. R. Co. v. State*, 8 Ind. App. 377, 35 N. E. 916.

In a proceeding for judgment against the right of way of a railroad company within a drainage district for an assessment by the drainage commissioners, it is for the jury to say whether the right of way was benefited by the carrying off of water that at times stood thereon in ponds and holes. *District No. 8 Drainage Comrs. v. Illinois C. R. Co.* 158 Ill. 353, 41 N. E. 1073.

In an action by a draining association to recover an assessment for benefit to land by drainage, it is not necessary that the completion of the drain should be averred, as such completion is not a condition precedent to the right to collect assessments. *Rel River Draining Asso. v. Topp*, 16 Ind. 242.

A statutory requirement that assessments imposed upon reclaimed swamp land be collected in gold coin does not impair the obligation of 60 L. R. A.

any contract. *Reclamation Dist. No. 108 v. Hagar*, 6 Sawy. 567, 4 Fed. 366.

Where, under a statute authorizing county commissioners to make contracts for the drainage of land and assess the expense upon the property benefited, contracts are made and the work done, but it proves to be of no benefit to any property, and no assessments can be made, the contractors may recover against the petitioners who instituted the drainage proceedings, but not against the commissioners of the non-petitioning landowners. *Moore v. Barry*, 30 S. C. 530, 4 L. R. A. 294, 9 S. E. 589.

Under the provision of the Michigan drain law of 1885, that drain taxes shall be collected in the same manner as state and other general taxes, land returned delinquent for the drain taxes may be bid off in the name of the state, for the use of the state, county, and town in proportion to the tax due each as specified in the general tax law, although, because drain taxes are neighborhood affairs, neither the state, county, nor town has any interest in the moneys arising from such sales. *Hilton v. Dumphey*, 113 Mich. 241, 71 N. W. 527.

A tender before suit brought of a sewer assessment and interest, without a tender of a penalty prescribed by a statute providing that special assessments shall be payable by the owners of the property assessed, personally, by the time stipulated, in the ordinance, and that, if payment is not made by the time stipulated, the amount assessed, together with interest and the penalty, may be recovered by suit,—is insufficient to bar an action for such assessment with interest and the penalty, as the right thereto accrues on failure to pay at the time stipulated, such penalty not being prescribed as compensation for services in collecting the assessment. *Toledo use of Gates v. Platt*, 2 Ohio N. P. 304.

A purchaser at a sale to collect a drainage assessment, of land which is erroneously described, is subrogated to the rights of the one who did the work, so that the assessment may be enforced against the land benefited in the hands of the original owner, but not in the hands of his assignee without notice. *Klinger v. Lemier*, 135 Ind. 77, 34 N. E. 698.

Payment of a sewer assessment afterwards set aside, but not refunded, operates as satisfaction of a new assessment. *Bayonne v. Morris*, 61 N. J. L. 127, 38 Atl. 819.

An action to collect a drainage assessment levied under a drainage law which provides that the action may be brought in any court of competent jurisdiction must be commenced in the courts of the county in which the real estate assessed is situated, although the owner may reside in another county in which the drainage proceedings were instituted, under the general law requiring actions for the recovery of real estate, or of an estate or interest therein, or to determine such right or interest and for injuries to real property, to be brought in the county where the land is located. *Dowden v. State use of Bull*, 106 Ind. 157, 6 N. E. 136.

Where the route of a sewer as established by ordinance runs through private property which has not been condemned, a contract entered into between the owner and the city officers in charge of the work, by which, in consideration of the grant of the right of way, the owner's time in which to pay his assessment is extended three years, is valid; and the city, having availed itself of the benefit of the contract, will be presumed to have ratified it. *St. Louis use of Lancaster v. Armstrong*, 56 Mo. 298.

And such contract is binding on the contractor, so as to prevent his instituting an action on the tax bill before the expiration of the time agreed upon, as, without such agreement,

the construction of the sewer would have been illegal. *Ibid.*

After a lawful order of assessment of the cost of a sewer has been passed and has taken effect, a warrant for its execution has been committed to the city treasurer, and notice been given to the owners of the estates assessed, it is not within the power of the municipal authorities to rescind the entire order laying the assessment. *Woodbridge v. Cambridge*, 114 Mass. 486.

A judgment recovered for a drainage tax will not be enforced, for the reason that the consideration thereof has failed, where the work which has been abandoned has been a detriment rather than a benefit to the lands, which remain under water,—a place of resort for water fowl, hunting and fishing. *Davidson v. New Orleans*, 84 La. Ann. 170.

c. Collection and distribution of fund.

An owner whose property has been assessed for the construction of a sewer has a right to have the city keep an account showing what moneys have been expended by it for the improvement within the power conferred upon it by law for making the same. *People ex rel. McCornack v. McWethy*, 177 Ill. 334, 52 N. E. 479.

A statute authorizing the construction of a sewer and the assessment of adjoining property is not unconstitutional on the ground that the assessments may bring in more money than is required for the construction of the sewer, as the sewer can be made sufficiently expensive to exhaust the assessments. But it seems that, though such a statute is not unconstitutional, the proceeds of the assessment must either be wholly expended on the sewer, or, if not so expended, the surplus must be held by the city ratable for the abutters, and cannot be diverted to any purpose for which the city had no authority to raise it. *Cleveland v. Tripp*, 13 R. I. 50.

Where, by statute, in case a greater amount is assessed for a sewer than is required for the work, it is to be apportioned and paid to the owners of the property assessed, a property owner must look to the municipal corporation, and cannot bring an action against the sewer commissioners to restrain the payment of the moneys collected. *Lutes v. Briggs*, 64 N. Y. 404.

It is within the power of the court to stay the further collection of an assessment for the construction of a sewer by a municipal corporation by refusing judgment for more than is necessary to meet the final cost thereof, where such cost has been fully and finally determined. *People ex rel. McCornack v. McWethy*, 177 Ill. 334, 52 N. E. 479.

A statute authorizing the expenditure of drainage funds collected on assessments in excess of what was necessary to complete the ditch, for new work on the ditch, does not authorize the collection of that portion of the assessment not needed and never called for to complete the original construction. *Reamer v. Hogg*, 142 Ind. 138, 41 N. E. 353.

In a suit for a municipal sewer assessment, the defendant cannot show that the cost of the improvement was less than the assessments, when the assessments were made in compliance with law. *Philadelphia v. Coates*, 18 Pa. Super. Ct. 418.

In a proceeding by a municipal corporation to reimburse itself for the amount of bonds which it has issued for the construction of a sewer improvement partly through its territory under direction of sewer commissioners, damages due a taxpayer for land taken for the im-

provement cannot be set off, where the only thing that the municipal corporation is permitted by the statute to pay over to the commissioners in liquidation of the assessment against it, which is represented by the bond, is money and improvement certificates issued for construction of the work. *State ex rel. Hoboken Land & Improv. Co. v. Marvin*, 51 N. J. L. 296, 17 Atl. 158.

Under the New York act of 1867, money paid to a county treasurer under a drainage assessment belongs to the drainage commissioners, and not to the county; so that, in case the assessment is set aside, the county will not be liable to refund the money. *Dewey v. Niagara County*, 62 N. Y. 294, Reversing 2 Hun, 392.

A township is not liable for drain taxes legally imposed and paid to its treasurer under protest, where, by statute, they do not form part of the township moneys, but remain a separate fund for the payment of orders specifically drawn upon it. *Dawson v. Aurelius Twp.* 49 Mich. 479, 18 N. W. 824; *Camp v. Algansee Twp.* 50 Mich. 4, 14 N. W. 672.

Drainage commissioners are authorized, under the Illinois drainage laws, to raise money by special assessments on the lands in their district, to be expended, under the direction and approval of the county court, outside the district, where such expenditure is necessary for the protection or the complete drainage of the lands within the district; and a petition to the court for leave to raise the money need not state where the same is to be expended. *Hosmer v. Hunt Drainage Dist.* 134 Ill. 360, 26 N. E. 584.

d. Curing defects.

The legislature has the right to decide that ditches dug in good faith under proceedings which are void because not in compliance with the statute are a public benefit and shall be saved to the public; or the decision may be delegated to the county commissioners. *Curran v. Shelby County*, 56 Minn. 432, 57 N. W. 1070.

The legislature has the power to authorize the payment of expenses incurred in the construction of a drainage ditch, under an act which was declared unconstitutional after such expenditures were made. *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779.

A statute authorizing the levy of sewer assessments for a work already constructed, but not paid for because of a previous authority therefor being declared void, is not an attempt to exercise judicial functions. *Hall v. Boston Street Comrs.* 177 Mass. 434, 50 N. E. 68.

A law may authorize a municipal corporation to levy special assessments for sewers already built, and the point cannot be decided otherwise by the false analogy of executed consideration in contracts, since the benefit and payment both are compulsory, not matters of contract, and a betterment already executed when the law authorizing the tax was passed will sustain the tax, as well as a work executed with express notice that it is under the law, as payment for such improvement must be made. *Ibid.*

Defects in proceedings for the construction of a sewer may be corrected by subsequent legislation, so as to uphold an assessment against property owners, where the defects were, that the ordinance was not introduced as required by the municipal charter, that the records of the proceedings were imperfect, that the map and assessments did not remain on file the required time, and that proper notice of the proceedings was not given; since those formalities might have been dispensed with in the first

instance, and therefore there is nothing to prevent their absence from being cured. *State ex rel. Walter v. Union*, 33 N. J. L. 350.

When drainage commissioners advance funds for an improvement, and thereby acquire a concessionable, if not legal, right to repayment, equity will recognize their right to be subrogated, and will enforce an assessment therefor on the benefited premises. *Allen v. Williams*, 33 N. J. Eq. 584.

Although the statute under which a sewer is built is special and unconstitutional, the reception of the benefits is a sufficient basis for imposition of a corresponding burden, when the legislature provides the proper agency and rule for assessing the same. *Brown v. Union*, 65 N. J. L. 601, 48 Atl. 562.

The legislature may provide for the completion of a partly finished drain, and point out a way for the correction of errors so as to make it possible to complete it, although the expense is increased thereby. This increased expense, although due to the mistakes of the commissioner, must be paid by those benefited by the drain as a part of its cost. *Antekell v. Hayward*, 119 Mich. 525, 78 N. W. 557.

Where an ordinance adopted under a statute providing that sewers shall be of such dimensions as may be prescribed by ordinance, and may be changed, enlarged, or extended, is invalid by reason of the fact that it delegated to a city officer the duty of determining the dimensions of the sewer, the adoption of a proper ordinance during the progress of the work commenced under the original ordinance cures the defect, and an assessment for the expense of the improvement is valid. *St. Louis use of Fox v. Schoenemann*, 52 Mo. 348.

Where a tax bill issued for the cost of constructing a sewer was declared invalid because the cost had not been apportioned by the board of public works, the board may subsequently apportion the cost, and the new tax bill is not rendered invalid by such delay. *Dollar Sav. Bank v. Ridge*, 79 Mo. App. 26.

Where a statute authorizes the construction of sewers only in public streets, an assessment made for a sewer constructed in a private way cannot be validated by the subsequent lay-out of the street as a public street, although the assessment was made after such lay-out. *Bishop v. Tripp*, 15 R. I. 466, 8 Atl. 692.

A statute providing for sewer assessments for a whole city, passed after the sewer has been constructed, is not unconstitutional under R. I. Const., which does not inhibit retrospective legislation simply because it is retrospective. *Cleveland v. Tripp*, 13 R. I. 50.

In a proceeding by a drainage commissioner in a court of general jurisdiction to enforce a drainage assessment of which the property owner is entitled to notice and an opportunity to litigate all proper questions, the court may reform a description of the property assessed so as to make the lien effectual, since the property actually benefited should bear its proportion of the expense of constructing a drain, and the court should reform mistakes so that the assessment can be enforced. *State ex rel. Ely v. Smith*, 124 Ind. 302, 24 N. E. 331.

A re-classification of the lands in a drainage district correcting the errors of a former classification, and making land assessable that before was not assessed for benefits conferred, renders such land liable, not only for future assessments, but for the payment of bonds and interest issued on the strength of an assessment levied before such land was assessed, and the statute authorizing such re-classification and levy is not unconstitutional as impairing the obligation of any contract, since the owner of the land acquired no rights under the first assess-

ment of benefits,—he simply enjoyed the benefit of a mistake, which such statute afforded the means of correcting. *Boul v. People ex rel. Baker*, 127 Ill. 240, 20 N. E. 1.

Under statutory provisions empowering a city to cause estimates of the expense of constructing sewers to be made, and to levy assessments therefor upon the property benefited, and, in case the cost of the proposed work exceeds the assessment, authorizing a further levy, the sewer assessment is valid although made for the first time after the building of the work, where the subsequent section provides that, if the city deems it necessary for the more speedy execution of its ordinances, it may cause necessary works to be executed at its own expense on account of the person assessable therefor. *Wetmore v. Campbell*, 2 Sandf. 341; *Lainbeer v. New York*, 4 Sandf. 109.

An injunction restraining the collection of a tax for a drainage ditch because the commissioners had not obtained title to the easement will not prevent new proceedings to condemn such easement under curative acts of the legislature. *Curran v. Sibley County*, 56 Minn. 432, 57 N. W. 1070.

X. Contesting assessment.

a. Who may contest.

A bill to set aside an illegal drain tax may be maintained by one upon whose land it is a lien, and upon whose title it casts a cloud. *Alger v. Slaght*, 64 Mich. 589, 31 N. W. 581.

One owning a large section of land to be assessed for a drainage improvement is sufficiently interested, even before the assessment is made, to enable him to maintain an action to prevent unnecessary expense. *Woodruff v. Fisher*, 17 Barb. 224.

A taxpayer of a municipal corporation who has no property taken, injured, or destroyed by the construction of a sewer, cannot file exceptions to the report of viewers appointed to assess damages and benefits resulting therefrom. *Olyphant Borough Sewer*, 198 Pa. 534, 48 Atl. 487.

Record title to land is not necessary to entitle parties having an actual interest therein to come in and defend in a proceeding to establish a drain affecting such land. *Beil v. Cox*, 122 Ind. 153, 23 N. E. 705.

None but owners of the property assessed are entitled to maintain a proceeding to vacate a sewer assessment under the New York statutes. *Williamson v. New York*, 3 Hun. 65.

The husband of the owner of land in a drainage district is not made a party to the record of the proceeding of drainage commissioners of such district, or shown to be the owner of or interested in such land, so as to entitle him to maintain a writ of certiorari against such commissioners, from the mere fact that at one time the commissioners attempted to settle with him the damages to such land by the location of a district ditch thereon. *Scheiwe v. Holz*, 168 Ill. 432, 48 N. E. 65.

A property owner whose lands are not traversed by a proposed drain, but who is within the assessment district, is not entitled to be heard upon the question of the public necessity for the drain, where by statute the determination of the drain commissioner is conclusive except in condemnation proceedings. *Roberts v. Smith*, 115 Mich. 5, 72 N. W. 1001.

A property owner whose land will be injured by the construction of a ditch has the right to appear in the proceedings to establish it and file a remonstrance, although his land is not described in the petition, and no damages are assessed in his favor or benefits against his land, where the statute provides that "any owner of

lands affected by the work proposed" may remonstrate, although, in enumerating the causes for a remonstrance, the question of benefits and damages appears to be restricted to persons affected. *Reasoner v. Creek*, 101 Ind. 482.

Different landowners may join in objections to a tax where their objections are identical, and there is nothing to show that confusion or embarrassment will be produced thereby. *People ex rel. Funk v. Keener*, 194 Ill. 16, 61 N. E. 1060.

Owners of property may join in a suit to enjoin the collection of an assessment for the construction of a sewer on the ground of an arbitrary levy thereof and failure of the charter to provide for notice, although their interests are distinct and affected to a different extent, as the cause of injury is common to all, and gives them sufficient community of interests for that purpose; but owners claiming that no benefits result to their lands from the improvement cannot join, as in such case the assessment and attempted enforcement are several in their nature as respects each owner. *Paulson v. Portland*, 16 Or. 450, 1 L. R. A. 673, 19 Pac. 450.

But in *Jones v. Cardwell*, 98 Ind. 331, it was held that a joint action cannot be maintained by separate property owners to enjoin the collection of a drainage assessment against their property, since the rights respect separate and definite parcels of land, and the causes of action are, therefore, separate and distinct and held in separate rights.

A court of equity will not enjoin the collection of an assessment on lands for the construction of a sewer and the diversion of a natural water course therein, in a joint action by several landowners, on the ground that the assessment is void because the statute conferring upon the city the power to regulate or change within its limits the course of natural streams, to construct sewers and assess the cost upon the parties specially benefited, is unconstitutional in so far as it undertakes to give the power of taking private property without providing any mode of ascertaining the amount of compensation to be paid the owners; also because certain conditions precedent, prescribed by city ordinances, which must be observed to make the assessment legal, were not complied with; since such an assessment is void by reason of its inherent defects, and creates no lawful lien, and casts no cloud upon titles, so that an adequate remedy is afforded at law, nor will equity interpose merely to afford a consolidation of actions, or to save the expense of separate actions, as a multiplicity does not mean a multitude of suits. *Murphy v. Wilmington*, 6 Houst. (Del.) 108.

A landowner who neither pays a drain tax under protest, nor seeks to avoid it by timely application to appellate proceedings, must make out very strong equities of a substantial character where he waits until the drain taxes have become a charge and offered for sale against his lands before filing his bill to set them aside. *Barker v. Vernon Twp.* 63 Mich. 516, 30 N. W. 175.

b. Method of contesting.

When a method of contesting a sewer assessment is provided by the statute by means of a review in the proceeding itself, that method should always be followed, because the defect must be very serious which will induce a court to entertain it on a collateral attack.

Resort to an independent action to set aside a drainage award is not proper where the statute provides for appeal to a statutory administrative board of the state, which has full authority in the matter so long as such appeal has

not been taken. *People v. Wasson*, 64 N. Y. 167.

Where a statute providing for drainage assessments provides an adequate remedy in case of an erroneous assessment, that remedy is exclusive, and parties who neglect to pursue it will be conclusively presumed to be contented with the assessment. *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.* 134 Ill. 384, 10 L. R. A. 285, 25 N. E. 781.

The remedy for a sewer assessment objected to on the ground of no benefit received is not by injunction to restrain its collection, but by appeal to the district court. *Minneapolis & St. L. R. Co. v. Lindquist* (Iowa) 93 N. W. 108.

The rule that persons affected by a drainage assessment must seek relief therefrom by some direct proceeding, or by an appeal, and cannot attack the same collaterally, applies to infants. *Harris v. Ross*, 112 Ind. 314, 13 N. E. 873.

When a sewer assessment levied by lawful authority is sought to be attacked collaterally, every proper presumption must prevail in support of a judicial determination. *Ithaca v. Babcock*, 72 App. Div. 260, 76 N. Y. Supp. 49.

One who did not avail himself of the statutory steps to contest the legality of a drain by which he is not damaged, and for which his assessment is small, is not entitled, upon the application of the auditor general for the sale of his lands for nonpayment of the taxes, and when the drain is about completed, to attack the validity of the proceedings. *Auditor General v. Meize*, 124 Mich. 285, 82 N. W. 886.

An adjudication by a board of supervisors that a petition for the draining, leveeling, and reclaiming of land conforms with the statute governing the same, may not be inquired into in a collateral proceeding. *Oliver v. Monona County* (Iowa) 80 N. W. 510.

A property owner notified of a sewer-tax levy, and given opportunity to appear before the proper authorities on grievance day, but who neglected to do so, and failed to take any steps to contest the validity of the assessment, will not be permitted, in an action to enforce the assessment, and in the absence of any serious jurisdictional defect, to attack the sewer proceedings collaterally. *Ithaca v. Babcock*, 36 Misc. 49, 72 N. Y. Supp. 519.

The validity of a judgment for delinquent assessments for the construction of a sewer cannot be collaterally attacked on the ground that there was an insufficient description of the premises or of the improvement. *Jebb v. Sexton*, 84 Ill. App. 45.

A corporation organized under the provision of the California Political Code for the purpose of reclaiming swamp and overflowed land is quasi public in character, the legality and regularity of the proceedings leading up to whose final creation cannot be collaterally attacked in an action to enforce an assessment levied on land in the district. *Reclamation Dist. No. 342 v. Turner*, 104 Cal. 334, 37 Pac. 1088.

One standing silently by, not objecting and seeing a public ditch constructed over his land in good faith under a proceeding of which he had due notice, cannot defeat an assessment for the benefits thereof to his land on a collateral attack in an action to quiet title, on the ground that the law under which the ditch was constructed was invalid for lack of details. *Cass County v. Plotner*, 149 Ind. 116, 48 N. E. 635.

That the lands in a reclamation district were swamp and overflowed, and that lands assessed for reclamation purposes would be benefited thereby, being jurisdictional facts, which the board of supervisors necessarily determine in approving the petition for the formation of the district, its judgment on those questions where all the parties were brought before it by proper

notice is conclusive, and cannot be collaterally attacked. *People v. Hagar*, 52 Cal. 171.

But in England an assessment by a commissioner of sewers is not conclusive, but the person assessed may, in an action brought against a person for taking his goods to satisfy the assessment, prove that he acquired no benefit from the sewer. *Stafford v. Hamston*, 2 Brod. & B. 691, 5 J. B. Moore, 608.

Injunction.

There are some defects, however, which will warrant a resort to equity and the issuance of an injunction.

An injunction will lie against drainage proceedings which are void, but not if they are merely erroneous or irregular. *Sunier v. Miller*, 105 Ind. 393, 4 N. E. 867.

An action to enjoin a city from assessing plaintiff's property for construction of a sewer is premature if brought before any apportionment or levy of tax has been made. *Kansas City v. Smiley*, 62 Kan. 718, 64 Pac. 613.

But not when it appears that the amount of such assessment has been ascertained and notice thereof given to the property owners. *Andrews v. Love*, 50 Kan. 701, 31 Pac. 1094.

Equity will entertain jurisdiction of a suit to cancel special tax bills issued for the construction of a sewer, even though they be void, as they constitute a cloud on the title. *Bayha v. Taylor*, 36 Mo. App. 427.

An action is not maintainable in equity to enjoin the collection of a special assessment for the construction of a sewer or the transmission to the county auditor of a statement of the amount claimed to be due for such sewer assessments for the purpose of collection, as there is an ample remedy at law under the statute for illegal assessments. *Fajder v. Aitkin* (Minn.) 92 N. W. 332.

Injunction will not lie to restrain the construction of a drain or ditch for errors or defects in the proceedings establishing the same, where the proceedings may be reviewed by petition in error. *Haff v. Fuller*, 45 Ohio St. 495, 15 N. E. 479.

The construction of a drain or sewer will not be enjoined at the suit of a property owner liable to be assessed therefor, where he has an adequate remedy at law. *Schulz v. Albany*, 27 Misc. 51, 57 N. Y. Supp. 963.

An action in equity to restrain the sale of land for an unpaid sewer assessment will not lie when the assessment on the face of the proceedings to impose it is a valid lien upon the land, and extrinsic evidence is required to show its invalidity. *Longley v. Hudson*, 4 Thomp. & C. 353.

Where an assessment, in proceedings to open a drain from a highway, of private property, has been made by appraisers as provided by statute, and objections have been filed by the landowner in the county court as authorized by the statute, which gives such court power to hear the case with the aid of a jury, the landowner cannot abandon the proceedings and enjoin the construction of the ditch on the ground that no court has declared that the land should be taken, and that the same has never been condemned, nor compensation paid, as required by statute. *Shoppert v. Martin*, 137 Mo. 455, 38 S. W. 967.

Landowners cannot enjoin the proceedings for the construction of a drain on the ground that the proposed new ditch will so increase the flow of water in an old ditch as to exceed its capacity and overflow such owner's land, where the proceedings are in pursuance of a statute providing ample legal remedy by an appeal from the assessment of benefits and dam-

ages, and by a suit for damages for the overflow of all lands subject to assessment. *Ploughe v. Boyer*, 38 Ind. 113.

A suit to enjoin the collection of a portion of an additional ditch assessment which has been adjudged void is a collateral attack, and cannot be sustained on the ground that the original assessment should have been deducted therefrom. *Duncan v. Lankford*, 145 Ind. 145, 44 N. E. 12.

A landowner cannot enjoin the collection of an assessment for the construction of a public ditch on the ground that the ditch was not constructed according to the plans and specifications, thereby resulting in no benefit to his land, where the proceedings establishing the ditch and levying the assessment were in conformity with the law, and that law makes it the duty of the officers having the work in charge to have the same done according to the plans and specifications, and affords landowners an opportunity to be heard in respect to the final completion of the ditch. *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933.

The construction of a sewer will not be enjoined by a suit of property owners in front of whose premises the sewer is being built, on the ground that the proceedings authorizing it are illegal and void, where the real estate of such owners is not invaded, and they are not injured by the work complained of, but simply seek to avoid an illegal assessment, since ample remedies at law exist therefor. *Shulz v. Albany*, 42 App. Div. 437, 59 N. Y. Supp. 233.

Bill to quiet title.

The owner and occupant of land cannot compel the city to prosecute at law its claim under an invalid sale of the property to satisfy a special sewer assessment whereby his title is clouded, but he may maintain a bill under the statute to clear his title. *Chaffee v. Detroit*, 53 Mich. 573, 19 N. W. 191.

Quo warranto.

An owner of land cannot resist the payment of a special assessment levied on his land by the commissioners of a drainage district by a bill in equity, on the ground that the enlargement of the district, by which action the land in question was included, was illegally made. Whether the commissioners proceeded in all respects as required by the drainage laws is a question which cannot be raised by a bill to enjoin the collection of the assessments thereof, but must be by quo warranto proceedings. *Evans v. Lewis*, 121 Ill. 478, 18 N. E. 246.

The owner of land in a drainage district, organized under the drainage law of a state, has ample remedy at law against the district for the improper exercise by the drainage commissioners of their authority, by attempting to levy an assessment on his land in excess of benefits, also by appropriating certain drains and filling up others on his land without making just compensation therefor; and such acts constitute no ground for interference by quo warranto. *People ex rel. Samuel v. Cooper*, 139 Ill. 461, 29 N. E. 872.

Where the various steps for the organization of a drainage district are taken in conformity with the statute, the finding of the court in favor of the petitioners and organizing the district binds all who might have objected thereto, and quo warranto will not lie to test its validity,—especially where the interests involved are mainly of a private character. *People v. Wild Cat Special Drainage Dist.* 31 Ill. App. 219.

c. Grounds of contesting.

In general it may be said that any departure

from the constitutional or statutory procedure for the perfecting of an assessment against private property is a ground for resisting the assessment in some form. Therefore, the decisions upon what is or is not essential to the assessment as set out above should be consulted. The decisions collected in this subdivision deal with actual objections which have been made.

Amount of assessment.

The question whether a lot was benefited by the construction of a sewer cannot be raised in an action to collect an assessment against the lot. *Wray v. Fry* (Ind.) 62 N. E. 1004.

That particular property within a sewer district is not in fact benefited by construction of the sewer will not prevent the collection of the assessment made upon it. *Chicago, M. & St. P. R. Co. v. Phillips*, 111 Iowa, 377, 82 N. W. 787.

The objection that the objector's land has no access to the sewer, or that the sewer is no benefit as the land has access to other sewers, cannot be raised on an application for judgment and order of sale of land under a special assessment for a sewer, but should be raised on the confirmation of the assessment. *Vanderseyde v. People ex rel. Raymond*, 195 Ill. 200, 61 N. E. 1050, 62 N. E. 806.

The question as to whether an owner's property was assessed in excess of benefits, or more or less than its proposed share of the cost of a sewer, cannot be raised on the application for judgment against such land for such assessment. The proper place to raise those questions is on the application to confirm the assessment. *Walker v. People ex rel. Kochersperger*, 170 Ill. 410, 48 N. E. 1010.

The fact that an assessment on an owner's land to aid in the construction of a drain is too high, although otherwise valid, will not defeat an action thereon, but only goes to reduce the amount of recovery. *New Eel River Draining Assn. v. Durbin*, 30 Ind. 173.

But the report of appraisers as to lands benefited by drainage by a draining association and assessing the same is only prima facie evidence, in a suit to enforce the lien of such assessment, where the statute authorizing assessments for such purposes by such association permits land-owners to deny that the work is of public utility, that their lands are benefited thereby to the amount of the assessment, or that for any other reason they should be compelled to pay the assessment or any part of it. *Eel River Draining Assn. v. Topp*, 16 Ind. 242.

But the defense that land was not benefited, and that it was arbitrarily and excessively assessed without regard to proportionate benefits, may be raised in an action to enforce an assessment for reclamation district purposes, where no hearing on the question of benefits is provided except by way of defense to suits for the collection of assessments, so that the charge on the land does not become final until the determination of such a suit. *Lower Kings River Reclamation Dist. No. 531 v. Phillips*, 108 Cal. 806, 39 Pac. 630, 41 Pac. 335.

And this view was adopted in *Reclamation Dist. No. 551 v. Runyon*, 117 Cal. 184, 49 Pac. 131, which was an action by the district seeking a determination of the validity of an assessment, in which the trial court had excluded evidence on behalf of a landowner showing that his land was wholly reclaimed, and had been provided at his own expense with a suitable pumping plant and drainage facilities, as well as evidence that the land in question was more heavily assessed than land similarly situated.

A dedication of a part of an abutting lot for street purposes, subsequent to a sewer assessment, is not ground for a reduction of the assessment. 60 L. R. A.

assessment, where no claim for personal judgment against the owner is made, but it is only sought to enforce the assessment against the property originally liable. *Wilson v. Cincinnati*, 5 Ohio N. P. 68.

The amount of an assessment on lots abutting on a sewer improvement which does not exceed the statutory limit cannot be reduced by showing that in reality the sewer is of no benefit to the lots in question. *Conner v. Cincinnati*, 11 Ohio C. C. 336.

The fact that the proposed drain will be an open ditch from 10 to 15 feet wide does not necessarily imply that such drain will be an injury to the land, which will warrant the court in setting aside an assessment on it for benefits resulting thereto, levied by the commissioners of the drainage district without awarding damages for injuries, but who reported that no lands would be injured by the drainage or the construction thereof,—especially as the county court confirmed their report, and it does not appear that anyone claimed any damages for the construction of such drains over his land. *Huston v. Clark*, 112 Ill. 344.

Evidence that the construction of a drain does not benefit an owner's land, but injures it, is inadmissible in an action by a ditching association to collect an assessment of benefits thereon for the construction of the drain, where the statute under which the proceedings are had provides a remedy by appeal to review the question of benefits. *Moffit v. Medaker Draining Assn.* 48 Ind. 107.

An assessment for a completed work in draining lands will not be set aside as excessive upon objections supported only by general opinions, previous lower estimates, a proved offer to do at a lower price a certain item of work which cost more, nor by testimony that the lands assessed are, in the opinion of witnesses, not worth as much as the improvement cost, in the absence of particulars of a proper expenditure by exact measurements, and accurate calculations by competent engineers, and of explicit denials of services charged for and disbursements made. *Rc Pequest River*, 42 N. J. L. 553.

The judgment of a state court rendered on the appeal of a railroad company from the action of drainage commissioners is conclusive upon the question of benefits and damages accruing to the railroad from the improvement of a navigable stream passing under the track; and, although the judgment assesses benefits but no damages, the improvement will not be enjoined on the ground that the railroad will be put to great expense in rebuilding its bridge, and its interstate commerce and mail service will be interrupted. *Lake Erie & W. R. Co. v. Smith*, 61 Fed. 885.

An owner of property abutting on an alley cannot collaterally attack the validity of an assessment thereon for the construction of a small collateral drain therein in connection with a local sewer in a parallel street, on the ground that his property was already provided with adequate drainage by a sewer in the street upon which his property fronts, where the right to make the assessment was within the letter of the statute under which the sewer was constructed and the assessment levied, and he had failed to avail himself of his right to remonstrate against the assessment at the proper time. *Byram v. Foley*, 17 Ind. App. 629, 47 N. E. 351.

Noncompletion of improvement.

The fact that a drain was not completed according to the terms of the contract is not ground for injunction against the collection of an assessment, as a legal remedy exists for any

damages sustained therefrom. *Barber v. Rankin*, 154 Ind. 236, 56 N. E. 225.

The collection of an assessment for a county ditch, the contractors for which had been paid, will not be enjoined on the ground that, owing to the negligence of the engineer having charge thereof and fault of the contractors, therefore, the ditch was defectively constructed and inadequate to drain plaintiffs' lands, if plaintiffs had a remedy on the bonds of the engineers and contractors, and knowingly allowed such ditch to be so constructed without complaining thereof. *Putnam County v. Krauss*, 53 Ohio St. 628, 42 N. E. 831.

Proceeding void.

It is not necessary, in order to obtain equitable relief, to show that taxes for the construction of a sewer were not only invalid but inequitable, where the provision of a city charter under which they were assessed was unconstitutional and void. *Diets v. Neenah*, 91 Wis. 422, 64 N. W. 299.

The owner of land across which a ditch is constructed under an unconstitutional statute is, subsequent to the completion of the work, entitled to an injunction restraining the collection of an assessment therefor, when he had no actual notice that the improvement was being made, had not stood by and permitted the work to be done for his benefit, and he was not guilty of any want of diligence in failing to assert his right before the work was completed. *Teegarden v. Davis*, 36 Ohio St. 601.

Irregularities and inequalities.

By the New York act of 1874, substantial error is made a ground for vacating a drainage assessment. *Re Van Buren*, 17 Hun, 527.

It is no defense to an action to enforce the payment of an assessment on lands for the construction of a drain, that more land of another person is assessed than is mentioned in the petition for the application of appraisers as being affected by the drain. *Bate v. Sheets*, 50 Ind. 329.

The erroneous assessment of a water tax against premises does not invalidate the entire assessment on the roll, or excuse the taxpayer from the payment of a sewer assessment. *Hooker v. Rochester*, 30 N. Y. Supp. 297.

That inequality exists in the assessment of the cost of reclaiming swamp land will not defeat the assessment if there is no direct and invidious discrimination in favor of certain persons to the prejudice of others. *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

Authority of officers.

The authority of drainage commissioners to act in the matter of opening the ditch cannot be attacked for the first time on motion for new trial after a decree establishing the ditch and laying assessment for benefits. *Goodwine v. Leak*, 127 Ind. 569, 27 N. E. 181.

Persons upon whom is imposed a drainage assessment cannot question the existence of the corporation and the authority of the officers imposing the assessment, since such matters can only be questioned by proceeding by quo warranto, where there was a *de facto* corporation assuming to exercise powers with reference to the drainage. *Blake v. People use of Caldwell*, 109 Ill. 504.

Upon an appeal from an assessment of benefits made against lands for the construction of a drain under the provisions of a ditching law authorizing such appeal, but failing to provide 60 L. R. A.

as to the manner of taking it or how the appeal is to be disposed of in the appellate court, the legality of the organization of the ditching company cannot be questioned. *Foster's Branch Ditching Co. v. Makepeace*, 45 Ind. 226.

Misdescription.

Misdescription of benefited land in the viewers' report or on the tax duplicate will not enable a landowner to defeat liability for a drainage assessment or the lien of a ditch certificate. *Baker v. Clem*, 102 Ind. 109, 26 N. E. 215.

A landowner may have an assessment on his land for the construction of a ditch set aside where the petition for its establishment and the notice properly described the land, but erroneously gave the name of the owner as the grantor of the present owner, contrary to an express provision of the statute requiring that the petition "give the names of owners thereof if known, and, when unknown, shall so state." *Troyer v. Dyar*, 102 Ind. 896, 1 N. E. 728.

Counterclaim.

Proceedings upon a municipal claim for the construction of a sewer being exclusively *in rem*, there can be no certificate for a balance claimed by way of set-off. *Philadelphia use of Jones v. O'Connor*, 9 Pa. Dist. R. 230.

Upon application for judgment against lands to pay a special assessment ordered by a drainage district, the owner is not entitled to a set-off or credit for the value of old ditches on his land used by the drainage district. Under the drainage law such allowance should have been made at the time the assessment was levied, and comes too late after the assessment has been confirmed. *People ex rel. Barber v. Chapman*, 128 Ill. 496, 21 N. E. 507.

Fund already raised.

It is no defense to the payment of a special assessment levied upon land in a drainage district for benefits thereto by the drainage system established, that the work has been completed and paid for by other landowners who did not refuse to pay their assessments. *Hammond v. People*, 169 Ill. 545, 48 N. E. 573.

That the construction of a drainage ditch was paid for out of general funds of the county contrary to law will not relieve the owners of property benefited from liability to pay their assessments, since the money received by the assessment may be substituted for that paid out. *Patterson v. Baumer*, 43 Iowa, 477.

No right of way.

The fact that the right of way for a drain over an owner's land had not been procured will not bar a suit to compel the payment of an assessment for benefits to his land by the construction of the proposed drain. *Large v. Keen's Creek Draining Co.* 30 Ind. 263, 95 Am. Dec. 696.

That decision is not in accord with *Re Rhineland*, 68 N. Y. 105, and *Re Cheesebrough*, 78 N. Y. 232.

But the owner of land upon one side of a street, having the fee to the center, cannot defeat an assessment for a sewer placed in the street on the ground that the municipal corporation did not obtain title to the street where he does not show that the sewer was not located on the portion of the street to which he did not have title by authority of its owners. *Re Ingraham*, 64 N. Y. 311, Affirming 4 Hun, 495, where it was held that there had been a dedication of the street to the public.

d. Benefit must be paid.

One who seeks to restrain by injunction the execution of deeds for property sold to satisfy a special assessment upon it for a drain must do equity by paying the amount which his property has been benefited by the improvement. *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819.

The collection of a sewerage tax will not be restrained on the ground of irregularities in the proceedings to collect the tax, in the absence of payment or tender of the amount conceded to be due. *Gillette v. Denver*, 21 Fed. 822.

An assessment on land for the construction by a municipal corporation of a sewer will not be set aside on a collateral attack in an action to quiet title, on the ground that the assessment exceeds 10 per cent of the assessed value of the property taxed prohibited by law, unless that part of the assessment except the excess is paid or tendered by the landowner, since the assessment is void only as to the excess. *Elkhart v. Wickwire*, 121 Ind. 331, 22 N. E. 342.

A landowner is estopped from attacking the validity of a ditch proceeding by a suit to quiet title after sale of his land for an assessment, unless he first pay or tender the benefits resulting to his land thereby, represented by the assessment levied thereon, where he stands by without objecting until after the ditch beneficial to his land has been constructed in good faith under color of statutory proceeding, and the rights of others have intervened. *Prezinger v. Harness*, 114 Ind. 491, 16 N. E. 495; *Presinger v. Fording*, 114 Ind. 599, 16 N. E. 499.

e. Laches.

The assessment and collection of a drain tax will not be enjoined on the ground that the complainant will not derive any benefit, where he had knowledge of the improvement, and did not commence his suit until the expense of constructing the drain had been incurred and orders had been issued for the work. *Walker Twp. v. Thomas*, 123 Mich. 290, 82 N. W. 48.

A person who sees a drain under construction which will be calculated to benefit his property cannot wait until it has been completed, the expenditure has been made, and his property has received the benefit, before proceeding to avoid the tax. *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819.

A party who objects to the construction of a ditch upon the ground of want of jurisdiction of the board of commissioners to order it should proceed with reasonable promptness in asserting his objections, and not wait until the ditch is completed, and thus be enabled to receive all the benefits to be derived from it before asserting the want of authority. *Dakota County v. Cheney*, 22 Neb. 437, 35 N. W. 211.

Certiorari to review proceedings to lay out a ditch or drain under the statute will not be allowed to one who suffered its construction and use for over a year without objection; but he will be relegated to *de novo* proceedings to have it altered or abolished. *Haines v. Camplin*, 18 N. J. L. 49.

One seeking a review by certiorari of the proceedings to assess lands for the cost of draining under a drainage act must move promptly. Delay until a large portion of the assessment has been collected and applied will constrain the court to refuse relief. *State, Britton, Prosecutor, v. Blake*, 35 N. J. L. 208.

A delay of ten months by inhabitants and taxpayers of a town before bringing their bill to restrain payment of money for expense already incurred in draining a pond under authority of the town is such laches as will preclude
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a right to equitable relief. *Fuller v. Melrose*, 1 Allen, 166.

But in one case it was held that the right of a citizen, as against the municipal corporation, to have a lien for an unlawful sewer assessment stricken off cannot be lost by laches. "Assessments of this nature are a species of taxation, and, in laying and collecting them, the city exercises the delegated power of the state. It is manifestly unjust for the state to take advantage of the oversight or omission of a citizen, and to exact from him a tax that cannot constitutionally be imposed." *Harrisburg v. Hoak*, 9 Pa. Dist. R. 51.

f. Waiver.

Taxpayers are usually held to waive objections to mere irregularities when they do not urge them at the proper time. Even when the effect of their silence is not such as to raise an estoppel, they should not be permitted to bring forward objections which are in fact comparatively immaterial, and which, if seasonably made, would have enabled a correction of the irregularities. The entire assessment should not be set aside in favor of one who was not sufficiently interested to assist in keeping the proceedings within the proper channels.

The objections to drainage assessments which could have been urged at the time of the confirmation of the assessment roll will be waived by neglect to urge them at that time. *Blake v. People use of Caldwell*, 109 Ill. 504.

One benefited by the construction of a drain will not be relieved from the payment of the assessment made against him, but will be held to have waived all irregularities, where he was notified of, and took part in, the proceedings without making objection. *Hall v. Slaybaugh*, 69 Mich. 484, 37 N. W. 545.

But the failure of a landowner present at the proceedings taken before a drain commissioner for the establishment of a ditch to object thereto is not a waiver of defects in the proceedings amounting to more than an irregularity. *Walters v. Chamberlin*, 65 Mich. 333, 32 N. W. 440.

Although in *Houston v. Wheeler*, 52 N. Y. 641, it was held that the assent of a landowner to acts under a drainage act is a waiver of the right to question its constitutionality.

A petitioner for a drain, who released the right of way and consented to all the proceedings, but objected to those taken for the purpose of raising the tax to pay for its construction, cannot be heard to complain of irregularities in the proceedings for the purpose of evading payment of the tax assessed upon his lands. *Cook v. Covert*, 71 Mich. 249, 39 N. W. 47.

A resident of a municipal corporation will not be permitted to set aside proceedings for the construction of a sewer which has resulted in an assessment against his property because of defects in the proceedings, where, with knowledge of the facts, he permitted the sewer, which would be a great benefit to his property, to be completed without any objection from him. *State ex rel. Schlntgen v. La Crosse*, 101 Wis. 208, 77 N. W. 167.

A landowner, duly notified of the proceedings at the time of the establishment of a ditch, cannot, after the final judgment of the court establishing it and confirming the assessment of benefits and damages, to which he filed no remonstrance, and after the construction of the ditch, file an intervening petition asking for an allowance of damages to his land on the ground that at the time of its establishment he was unable to discover that the proposed drain would not benefit his land, but would be an injury

thereto. *Hoefgen v. Harness*, 148 Ind. 224, 47 N. E. 470.

Where the owner of lands knew of the proposed construction of a drain across his land, having been present at a meeting of drainage commissioners, but having given them no notice that he was the owner of the land, he has no standing in court to object, in a subsequent proceeding, to the construction of the drain. *Hackett v. Brown*, 128 Mich. 141, 87 N. W. 102.

An injunction will not be granted at the suit of a property owner to restrain the collection of an assessment for the construction of a sewer on the ground of fraud by the placing therein, by the contractor, of rings instead of other connection, where no serious damage has been done thereby; and such owner stood by and permitted the work to be completed, instead of enjoining its completion. *Blanchard v. Columbus*, 8 Ohio S. & C. P. Dec. 676.

g. Estoppel.

Where the taxpayer has not only failed to urge his objections at the proper time, but has permitted the work to go forward and money to be expended on the faith of his conduct, the principle of estoppel will prevent him from denying liability for the assessment.

Courts are not inclined to set aside sewer assessments when the improvement was solicited by the parties attacking the assessment, who have seen the improvement made and permitted the city to incur large expense without objection, and thereafter seek to be relieved from assessment for the benefits received by them. *Loomis v. Little Falls*, 66 App. Div. 299, 72 N. Y. Supp. 774.

But one who petitions for the establishment of a ditch is not thereby estopped from complaining of illegal proceedings to his prejudice, since he is supposed to have petitioned for legal, and not illegal, action on the part of the commissioner. *Taylor v. Burnap Drain Comrs.* 39 Mich. 739.

Property owners who stand by and, without objecting, receive the benefit of a sewer, are estopped to attack collaterally the legality of the proceedings for mere irregularity. *New Albany Gaslight & Coke Co. v. Crumbo*, 10 Ind. App. 360, 37 N. E. 1082.

An injunction will not be granted restraining the collection of an assessment for the construction of a ditch, even if the proceedings are void for nonconformity to the statute, where the objecting party, on whose land the ditch has been in part or in whole constructed, has stood by and failed to resort to any remedy, legal or equitable, until after the ditch was made. *Kellogg v. Ely*, 15 Ohio St. 66.

The collection of drainage assessments will not be restrained on the ground of their invalidity, at the instance of property owners who signed the petition for the construction of the drain, and remained silent during its construction, of which they knew, and did not object until after the completion of the drain. *Turnquist v. Cass County Drain Comrs.* (N. D.) 92 N. W. 852; *Erickson v. Cass County* (N. D.) 92 N. W. 841.

A landowner who remains silent until a drain is partially constructed under statutory authority, knowing that the only method of compensating those who performed the labor is by an assessment for the benefits, cannot, after the benefits have been reaped, maintain a bill in equity to set aside the proceedings for alleged irregularities. *Moore v. McIntyre*, 110 Mich. 237, 68 N. W. 130.

Property owners who petition for the laying of water, surface, and sewer pipes, and thereafter permit the city to do the work and reap

the benefit of it, cannot question the validity of the assessment therefor on the ground that the city had power to make the improvements and assess the property benefited only in case of the refusal or neglect of the property owners to make such improvements. *Loomis v. Little Falls*, 66 App. Div. 299, 72 N. Y. Supp. 774.

A bill to set aside proceedings to establish a drain and to enjoin collection of the tax will be dismissed where the complainant joined with others in releasing the right of way, bid off the work for two sections, and deferred filing the bill until the tax, with a single other exception, had been paid. *Harwood v. Huntoon*, 51 Mich. 639, 17 N. W. 216.

The owner of private property will be estopped from making any claim to compensation for the construction of a sewer over his land by a municipal corporation in pursuance of an ordinance providing for the same, where the construction was made with his knowledge, and he made no objections thereto, and took no steps to prevent it. *Hyde Park v. Borden*, 94 Ill. 26.

An owner of abutting property who, by reason of living in the vicinity of a sewer improvement, knew, or should have known, that the same was being constructed partly on her property, and stood by and said nothing, is estopped from relating the validity of an assessment for such work, in an action brought to restrain the enforcement thereof, as her remedy is by an action against the municipality for the appropriation to its use of such property or the imposition of an additional servitude thereon. *Wilson v. Cincinnati*, 5 Ohio N. P. 68.

A landowner who stands by and sees the construction of a ditch without objecting until after its completion is estopped from afterwards suing out an injunction on the ground that the statutory requirement as to the giving of notice of the letting of the contract was not complied with, and the contract was let at a higher price than it should have been. *Muncey v. Joest*, 74 Ind. 409.

A landowner is estopped from denying the validity of an assessment levied against his land for the construction of a drain on the ground that a previous assessment had been made but was set aside, where the first assessment was invalid, and was set aside, and a new one was made at the request and with the consent of such owner, and he expressed himself satisfied therewith, and stood by and allowed the ditching company to expend money on the faith of it. *Nevins & O. C. Twp. Draining Co. v. Alkire*, 36 Ind. 189.

A landowner in a drainage district having recognized the validity of an assessment levied therein, and consented to a compromise of difference between the landowners and bondholders of the district, whereby the latter gave up substantial rights, is estopped from disputing the validity of such assessment. *People v. Weber*, 164 Ill. 412, 45 N. E. 723.

Not all conduct, however, will work an estoppel, and there are some defects which cannot be cured by estoppel.

The failure of a property owner to object to the construction of a sewer does not estop him from subsequently contesting the validity of the special tax bill issued therefor, where he at the time had no knowledge of the invalidity of the proceedings. *St. Joseph ex rel. Danaher v. Dillon*, 61 Mo. App. 317.

A landowner who appears before the jury in a drain proceeding, accepts the award made him, and enters into a contract to construct a portion of the drain, is not thereby estopped from contesting, on the ground of irregularity, an assessment for the drain imposed upon land owned by him, where he had no notice of the assessment

until the roll was completed and it was too late for him to appeal from the action of the drain commissioner. *Tinsman v. Monroe County*, 90 Mich. 382, 51 N. W. 460.

A landowner is not estopped from denying the validity of an assessment on his land for the construction of a ditch on the ground that he had no notice, by silently standing by without objecting and allowing the work to be done on the ditch and money expended in its construction knowing that the same was being done on the faith of the validity of the proceedings, in the absence of proof as to the value of the work done and the amount of money expended, as estoppels cannot be created by bare intendments so as to cut one off from availing himself of the right to notice secured to him by the organic law. *Scudder v. Jones*, 134 Ind. 547, 32 N. E. 221.

A member of the common council which authorized a sewer improvement and directed the levying of an assessment therefor is not estopped from taking exception to the assessment made against him, where he has not in any manner recognized the roll as valid, or taken action upon it. *Warren v. Grand Haven*, 30 Mich. 24.

A property owner is not estopped from denying his liability on a tax bill for the construction of a sewer on the ground that the contract was invalid by reason of the fact that he knew of the existence of the proceedings and of work being done thereunder, and failed to attempt to stop it. *Keane v. Klausman*, 21 Mo. App. 485.

Landowners are not estopped from enjoining an assessment for sewerage and other improvements because in excess of the positive prohibitive provision of statute, by having joined in the petition for the improvements, and, with knowledge of the progress of the work, having raised no objection thereto in regard to the proceedings under which it was constructed; since they could have no knowledge of the amount of the assessment until made, and until they had such knowledge, it was their right to assume that it would be in conformity with the law. *Birdseye v. Clyde*, 61 Ohio St. 27, 55 N. E. 169.

A landowner is not estopped from attacking, by direct proceedings, the validity of a sewer assessment which is void because not levied according to benefits, but solely according to location, contrary to statute, by silently standing by and allowing the improvement to proceed and accepting the benefits thereof after knowledge of the manner in which it was to be made, as he had a right to assume that the assessment would be levied at least under color of statute. *Crawfordsville Music Hall Asso. v. Clements*, 12 Ind. App. 464, 39 N. E. 540, 40 N. E. 752.

Landowners against whose lands assessments have been levied by a city for the cost of a sewer are not estopped from denying the validity of the assessments because they allowed the work to progress to completion without objection, where the city was without authority to construct the sewer, and therefore the objection to the assessment is jurisdictional. *Keese v. Denver*, 10 Colo. 112, 15 Pac. 825.

A landowner is not estopped from enjoining the collection of an assessment for the construction of a drain, on the ground that he had stood by without giving notice of his dissatisfaction, and permitted the ditching company to expend a large sum of money in constructing the drain by which his land was benefited, where, by reason of fatal defects in the articles of association, such company was not legally incorporated, and, therefore, all the subsequent proceedings were invalid. *Newton County Draining Co. v. Nofsinger*, 43 Ind. 566.

The facts that an owner did not appeal from an assessment upon his lands for the construc-

tion of a ditch, but stood by and saw the work done without objecting; that the course of the ditch through his premises was changed at his instance; that \$100 was expended for his benefit in constructing the ditch through his land; and that he did not question the legality of the assessment until after the work was completed,—do not estop him, in an action to enforce the assessment, from insisting upon its illegality because of defective description of the land. *Boatman v. Macy*, 82 Ind. 490.

A landowner who stood by without objection until the improvement was made is not thereby estopped from objecting to the proceeding which would lead to a decree directing a sale of his land to pay an assessment a part of which is clearly not upon his land. *Hunt v. State use of Downey*, 26 Ind. App. 518, 58 N. W. 557.

Connecting with sewer.

A landowner is not estopped from contesting a void sewer assessment by connecting with the sewer. *State, New Brunswick Rubber Co., Prosecutor, v. New Brunswick Street & Sewer Comrs.* 38 N. J. L. 190, 20 Am. Rep. 380.

An abutter on a street in a town through which a sewer is constructed, who enters the sewer with his private drain by license from the municipal authorities by which he agrees to make no claim for damages on account of the work, is not estopped to contest the validity of the order laying out the sewer under which an assessment is levied on him. *Sheehan v. Fitchburg*, 131 Mass. 523.

Connecting property with a sewer will not estop its owner from contesting the right of a municipality to assess the expenses of the sewer upon abutting property on the ground that it had no legislative authority to do so. *Watertown v. Fairbanks*, 65 N. Y. 588.

A property owner is not made liable on a void special tax bill issued for the construction of a sewer by the fact that he connected his property with and used the sewer. *Neill v. Trans-Atlantic Mortg. Trust Co.* 89 Mo. App. 644. The court said: Defendant had no lot or part in employing the contractor to build the sewer. The street is his property subject to the easement of the public. He, therefore, finds on his property an underground drain called a sewer. Why may he not use it without paying for it when it has been put there without his request, and, it may be, against his consent? We have the highest authority for saying that when one finds a structure upon his property which has been placed there without his request, or direction, or consent, he cannot be made liable for its cost by using it.

But when one proceeds to avail himself of sewer privileges by making his own connections, though through the pipe of an obliging neighbor, he waives any mere irregularity in constructing the sewer and by implication promises to pay the reasonable amount fixed by the regulations. *Fergus Falls v. Boen*, 78 Minn. 156, 80 N. W. 961.

And in one case it was held that when a property owner applies for, and is granted a connection with a proposed sewer none of the proceedings of the municipal corporation in contracting for the sewer require his ratification to make him liable for the charge therefor. *Fitzgerald v. Philadelphia*, 3 Walk. (Pa.) 17.

h. Suit to recover back money paid.

In an action to recover drain taxes paid under protest, the plaintiff is not entitled to show that his land was so remote that it was not benefited by the drain. *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22.

A drain tax paid under protest in reliance upon § 42, act No. 153, Mich. Laws 1885, cannot

be recovered, since such act applies only to the general taxes authorized to be assessed thereby, and not to a special tax for drainage purposes. *Taylor v. Avon Twp.* 73 Mich. 604, 41 N. W. 703.

Assumpsit will not lie to recover drain taxes paid under protest on the ground that the statute under which they were imposed is unconstitutional, where the statute is valid in part, and the unobjectionable provisions confer full power to assess the tax. *Mathias v. Cramer*, 73 Mich. 5, 40 N. W. 926.

A landowner who has stood by and permitted a drain to be constructed without attempting to impeach the validity of the proceeding will not be permitted to do so in an action to recover drain taxes paid under protest. *Smith v. Carlow*, 114 Mich. 67, 72 N. W. 22.

A city cannot be compelled to reimburse drainage taxes voluntarily paid and actually expended for drainage purposes. *New Orleans Canal & Bkg. Co. v. New Orleans*, 30 La. Ann. 1371.

A drainage tax paid by a landowner will not be refunded, although by statute his property is subsequently excluded from the drainage district, where it appears that, when the canals in process of construction are completed, his land will be drained. *New Orleans Canal & Bkg. Co. v. New Orleans*, 27 La. Ann. 505.

But one who pays an illegal drain tax under protest to one who is about to levy on his property is entitled to recover back the amount, although the protest was not specific as to reasons of illegality. A specific protest is only required by statute in case of the payment of a tax in advance of the time the tax can be enforced. *Cox v. Welcher*, 68 Mich. 263, 36 N. W. 69.

1. Other matters.

A proceeding, under a statute, to establish a ditch and assess the cost thereof on the lands specially benefited, is not a civil action so as to fall within a provision of the Code concerning civil cases, authorizing the court, in its discretion, to relieve the party from its judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect on complaint or motion filed within two years, so as to relieve a landowner from a judgment assessing his lands, to which he was prevented from filing remonstrances by sickness. *Hays v. Tippy*, 91 Ind. 102.

A mortgagee of land is not estopped by a judgment against the mortgagor in an action to which he was not a party, establishing a ditch assessment to be a lien upon the land, from questioning the validity of the ditching proceedings and the judgment, where his mortgage was duly recorded prior to the commencement of any of such proceedings, and the judgment creditor is seeking to enforce his lien as superior

and prior to that of the mortgage. *Debaner v. Simpson*, 72 Ind. 435.

A contestant of a sewer assessment who fails to obtain a reduction thereof in an action brought to enforce the same must pay the penalty prescribed by a statute, providing that, if special assessments payable by the owner of the property assessed, personally, by the time stipulated in the ordinance, are not paid by the time so stipulated, the amount assessed with interest and the prescribed penalty may be recovered by suit, as such penalty becomes due on failure to pay at the stipulated time the amount rightfully owing; but, against a contestant securing a reduction because the assessment was more than that allowed by law, no such penalty can be recovered, as at no time was the amount claimed from him owing. *Cincinnati use of Wilson v. Fugman*, 5 Ohio N. P. 14; *Cincinnati v. Jung*, 7 Ohio N. P. 665.

XI. Abandonment of drain.

When an artificial drain has become necessary to the drainage of adjoining lands, it is to be considered and treated as a natural water course so far as proceedings looking to its abandonment are concerned, and it comprises such a property right as will be protected by injunction. *Tussing v. King*, 65 Ohio St. 10, 60 N. E. 986.

A municipal corporation, such as a reclamation district, cannot be deprived of its existence by nonuser of its powers or a failure on the part of its officers to act as a corporation, but only by act of the legislature or a judicial sentence based upon legislative provision and sufficient facts. *Swamp Land Dist. No. 150 v. Silver*, 98 Cal. 51, 32 Pac. 866.

But the dissolution of a drainage district, under the provision of an act of the legislature, cannot be prevented by a single landowner who will be damaged by such dissolution, in the absence of any statutory provision authorizing such action. *Hollenbeck v. Detrick*, 162 Ill. 388, 44 N. E. 732.

In the exercise of the right of drainage districts to take land by condemnation to be used for a ditch, there are none of the elements of a contract which would be impaired by a subsequent dissolution of the district. The damages awarded an owner for land taken for such use include, in contemplation of law, all loss or injury resulting to him thereby. *Ibid.*

An act of the legislature for the dissolution of drainage districts is not in conflict with a constitutional provision authorizing the general assembly to pass laws permitting owners or occupants of lands to construct drains across lands of others. A drainage district created for such purpose by a public act is a corporation of a public character, and the law providing for its organization is subject to be modified or repealed. *Ibid.*

H. P. F.

MISSOURI SUPREME COURT.

Thomas CALLAHAN, *Resp.*,
v.

ST. LOUIS MERCHANTS' BRIDGE TERMINAL RAILWAY COMPANY, *App.*

(.....Mo.....)

1. A member of a section gang engaged in repairing the track to

enable trains to run safely over it, who is stationed beneath a track running over a public street into which discarded ties are being thrown, to warn travelers on the street and remove the ties, is, while attempting to remove beyond danger a child which has appeared in the street, within the protection of a statute making railroad companies liable for injuries sustained by any

NOTE.—For another case in this series as to constitutionality of statute making railroad companies liable for injuries to servants through 60 L. R. A.

the negligence of fellow servants, see *Indianapolis Union R. Co. v. Houlihan* (Ind.) 64 L. R. A. 737.

servant or agent thereof while engaged in the work of operating such railroad, by reason of the negligence of any other servant or agent thereof.

2. A statute making a railroad company liable for injuries to servants through the negligence of fellow servants does not violate the equality clause of the Federal Constitution, although it does not confine such liability to acts performed in the operation of trains, but extends it to risks similar to those incurred by the employees of persons or corporations engaged in other lines of work.

(*Robinson, J., dissents.*)

(December 10, 1902.)

APPEAL by defendant from a judgment of the Circuit Court for the City of St. Louis in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by negligence for which defendant was responsible. *Affirmed.*

The facts are stated in the division opinion which was delivered by MARSHALL, J., and was as follows:

This is an action predicated upon § 2873, Rev. Stat. 1899, for damages for personal injuries, by the plaintiff, an employee of the defendant, alleged to have been received in consequence of the negligence of the plaintiff's fellow servants, employees of the defendant. The plaintiff recovered a judgment for \$6,500 in the circuit court, and the defendant appealed.

The pertinent allegations of the petition are as follows: "That the defendant was a corporation, and operated a railroad in the state of Missouri. That on the 15th day of November, 1898, the plaintiff was in the service of the defendant, aiding in operating its railroad at or near the bridge approach over Ferry street, in the city of St. Louis. That it was the duty of the plaintiff at said time to watch that people or vehicles were not injured by the fall of ties which were being removed by defendant's employees from its roadbed, and thrown down about 50 feet to the surface of Ferry street; and also to remove such ties from the street. That the rule and custom for doing the work was for the men above, before throwing a tie down to the street, to give notice to the man below that a tie was to be thrown, and then wait for a signal from him, before throwing the tie, that it was right and safe to throw the tie, thus enabling plaintiff to warn passers-by out of danger and to keep out of danger himself. That on the day in question, whilst the plaintiff, in the due discharge of his said duty, was warning off and removing a chid from said street, where it was in peril of a falling tie, should one be thrown, the defendant's servants above carelessly, and without giving any warning of their intention to throw down a tie, and, without receiving any signal from plaintiff that it was safe to do so, threw down a tie, which struck and injured the plaintiff."

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There was a further assignment of negligence, in that defendant's acting foreman negligently directed the tie to be so thrown without the usual signals. The answer is a general denial, coupled with the following special pleas: "Further answering plaintiff's petition, defendant states: That the injuries complained of by plaintiff in said petition were produced by the negligence of plaintiff contributing to the cause thereof. That plaintiff's fellow servants gave warning of their intention to lower the tie mentioned in plaintiff's petition, and plaintiff failed to heed the same. That it was usual and customary, in the lowering of the ties mentioned in plaintiff's petition, for plaintiff to notify his co-employees of the approach of pedestrians or vehicles, so that such ties might be held by said co-employees until such pedestrians or vehicles had passed; and plaintiff failed to give such notice in this instance, and by reason of the failure of plaintiff to so warn the employees of defendant of the approach of the pedestrian mentioned in plaintiff's petition, as was his duty, such tie was lowered and thrown down, whereby plaintiff was injured. That plaintiff failed and neglected to take reasonable and ordinary precautions to observe his surroundings, or to avoid the obvious dangers of his said situation, and thereby said injury was directly occasioned by his own omission to use ordinary care at and immediately before the time of his said injury. Further answering, defendant says that the injury complained of by plaintiff was occasioned by a danger incident to his said employment, and which plaintiff assumed in entering upon said employment. Further answering, defendant says that, if the injury complained of by plaintiff was occasioned by the negligence of defendant's servants, as alleged in plaintiff's petition, the said servants were fellow servants of plaintiff, and plaintiff and said fellow servants were not, at the time mentioned in plaintiff's petition, engaged in the work of operating defendant's railroad, and therefore defendant is not liable therefor." The reply is a general denial.

The trial disclosed the following facts: The defendant's railroad crosses Ferry street, in the city of St. Louis, by an overhead bridge, which is some 50 feet above the level of the street. The plaintiff was a member of a section gang that was engaged in repairing the railroad by taking out old ties and putting in new ones. When the old ties were taken out, they were thrown down onto Ferry street, instead of being carried away. The plaintiff was stationed on Ferry street to warn passers-by of the danger, and to remove the ties that were thus thrown upon the street. When the gang on the bridge were about to throw down a tie, they notified the plaintiff of their intention, and he signified to them whether or not the "coast was clear," and they did not throw the tie unless he so signified. While so engaged in such work, a small child appeared on Ferry street, and was in a place of peril. The plaintiff went

to her, and, while engaged in removing her, the gang on the bridge threw a tie down on the street, which struck the plaintiff on the leg, and injured it so that it had to be amputated. The gang on the bridge gave the plaintiff no notice of their intention to throw the tie, and the plaintiff did not signify to the gang on the bridge that it was unsafe to do so, nor that the child was in peril, nor that he was going to or had gone to the child to remove it from its perilous position.

Two legal propositions present themselves upon this record: First, Who are embraced in the provisions of § 2873, Rev. Stat. 1899? and, second, Does the plaintiff come within such classes? and of these in their order.

1. Who are embraced in the provisions of § 2873, Rev. Stat. 1899? That section is as follows: "That every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant thereof: Provided, that it may be shown in defense that the person injured was guilty of negligence contributing as a proximate cause to produce the injury." The defendant contends that this law does not embrace every employee of a railroad, but that it applies only to such employees of a railroad as are subjected, by the character of the work they are employed to do, to the hazards incident to the running of a train. And, furthermore, the defendant contends that, if the law is construed to cover railroad employees who are not subjected to such hazards, but are only subject to such risks as would be incurred by the employees of any other person or corporation when engaged in similar work, then the law violates the equality clause of the Federal Constitution, in that it subjects the defendant to a liability to its employees that is not imposed upon any other person or company under similar conditions. On the other hand, the plaintiff contends that the law embraces, not only the employees who are actually employed in moving a train, but also all those whose work is directly essential to enable the trains to move; and, as applied to this case, that it embraces a section gang engaged in repairing the track to enable the trains to safely run over it, and that the plaintiff was a member of such section gang, and that his duty was as directly connected with such work as was the work of any of the other members of the gang that were working upon the bridge. This case is one of first impression in this court. The only case bearing on this question that has heretofore been adjudicated in this state is *Stubbs v. Omaha, K. C. & E. R. Co.* 85 Mo. App. 192. In that case the Kansas City court of appeals, speaking through Ellison, J., held that the law embraced members of a section gang that was engaged in removing old rails and putting in new ones, and there one of the gang was permitted to recover for injuries received by the negligence of another member of the gang in suddenly dropping

ping one end of a rail which he and the plaintiff were carrying. It is all-important to keep in mind the language of the statute. It is that the railroad shall be liable for all damages sustained by any agent or servant thereof "while engaged in the work of operating such railroad" by reason of the negligence of any other agent or servant thereof. Defendant contends that this statute was taken from the laws of Iowa, and that the interpretation of the courts of that state construing their law must be borrowed from that state along with the law itself, and that the courts of Iowa hold that the law only embraces such employees as are injured by the actual moving of trains, and therefore the same construction should be placed upon our statute. The chief difficulty encountered in such a line of reasoning is that there is nothing to show that our law was borrowed from or modeled after the Iowa law. The language of our law is quite different from the Iowa statute. The first statute upon this subject that was adopted in Iowa was the act of 1862, which was as follows: "Every railroad company shall be liable for all damages sustained by any person, including employees of the company, in consequence of any neglect of the agents, or any mismanagement of the engineer or other employee of the corporation to any person sustaining such damages." Acts 9th Gen. Assem. p. 198. The courts of that state held that this act was limited to such employees as were injured by the negligence of fellow servants while engaged in moving trains, and that any other construction of the act would constitute class legislation, and would violate the equality clause of the Federal Constitution. *Deppe v. Chicago, R. I. & P. R. Co.* 36 Iowa, 52. Afterwards, in 1873, the legislature of that state amended the law so as to make it read as follows: "Every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed." Code 1873, § 1307. In *Foley v. Chicago, R. I. & P. R. Co.* 64 Iowa, 644, 21 N. W. 124, it was argued that this amendment did not change the act of 1862 as to liability for mere acts of negligence, but that it simply superadded a liability for wilful wrongs. But the supreme court held otherwise, and said that it could not have been the intention of the legislature to create one liability for negligent wrongs and a different liability for wilful wrongs, and then adhered to the rule laid down in the *Deppe Case*. And the same rule had obtained in that state ever since. *Malone v. Burlington, C. R. & N. R. Co.* 65 Iowa, 417, 54 Am. Rep. 11, 21 N. W. 756; *Reddington v. Chicago, M. & St. P. R. Co.* 108 Iowa, 96,

78 N. W. 800. It will be observed that in both of the Iowa acts the railroad was made liable for damages sustained by any person, including employees, "in consequence of any neglect of the agents, or any mismanagement of the engineer or other employee of the corporation to the person sustaining such damages." Our statute is quite different, for it makes the railroad liable to any employee for damages sustained by him, "while engaged in the work of operating such railroad, by reason of the negligence of any other agent or servant." Under the Iowa cases, any employee who is injured by another employee's negligence while moving a train can recover. It matters not what work the injured employee is doing. The test is, Was he injured in consequence of the negligence of another employee or engineer in moving a train? Under our statute, to entitle the injured servant to recover, it must be shown that he sustained his injuries, "while engaged in the work of operating such railroad," "by reason of the negligence of any other agent or servant." This is very different from the Iowa statute. Here the injured person must be injured "while engaged in the work of operating such railroad;" injured, not necessarily by the negligence of another employee or engineer while actually moving a train, but injured by the negligence of any other employee of the railroad. In Iowa the injury must have been inflicted by the moving of a train. In Missouri the person injured must have been actually engaged in the work of operating such railroad, not necessarily in operating the train. The two statutes, therefore, are almost the antitheses of each other, and our law cannot properly be said to have been taken from or modeled after the Iowa law. The major premise of the defendant's syllogism therefore fails, and hence the conclusion falls with it.

The fellow-servant laws of other states and the judicial interpretations thereof afford interesting and legitimate subjects of reference in construing our law on that subject. The statute of Kansas (Gen. Stat. 1901, § 5858) is almost identical with the statute of Iowa of 1862. It is as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." The Kansas courts, however, place a very different construction upon their statute from that placed upon the Iowa statute by the courts of that state. The rule in Kansas is that, to entitle an injured employee to recover, it is necessary for him to show that he was injured when performing a service for the railroad that was necessary to the use and operation of the road, and it is not essential that he show that the injury was caused by a fellow servant while moving a train. *Atchison, T. & S. F. R. Co. v. Vincent*, 56 Kan. 344, 43 Pac. 251. This case is similar in all essential respects to the case of *Stubbs v. 60 L. R. A.*

Omaha, K. C. & E. R. Co. 85 Mo. App. 192. See also *Union Trust Co. v. Thomason*, 25 Kan. 2, where one section hand's negligence caused injury to another section hand while both were on a hand car; *Union P. R. Co. v. Harris*, 33 Kan. 421, 6 Pac. 571, where one section hand's negligence injured another section hand while the two were taking out old rails and putting in new ones; *Atchison, T. & S. F. R. Co. v. Koehler*, 37 Kan. 463, 15 Pac. 567, where the negligence of one employee while unloading a car caused a rail to fall on another employee similarly employed; *Atchison, T. & S. F. R. Co. v. Brassfield*, 51 Kan. 167, 32 Pac. 814, where a section gang was unloading ties from a car for the purpose of repairing the track, and one negligently let a tie fall on another employee, and injured him; *Chicago, K. & W. R. Co. v. Pontius*, 52 Kan. 264, 34 Pac. 739, where one bridge carpenter negligently injured another while loading timbers on a car to be carried to another part of the road to be used in a bridge. The case last cited went to the Supreme Court of the United States, and is reported in 157 U. S. 211, 39 L. ed. 675, 15 Sup. Ct. Rep. 585. In that case the Supreme Court of the United States, speaking through Chief Justice Fuller, after setting out the Kansas statute, said: "In *Missouri P. R. Co. v. Mackey*, 33 Kan. 298, 6 Pac. 291, the validity of this law was drawn in question on the ground of repugnancy to the Constitution of the United States, and its validity sustained. The case was brought here on error, and the judgment of the state court affirmed. 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161. As to the objection that the law deprived railroad companies of the equal protection of the laws, and so infringed the 14th Amendment, this court held that legislation which was special in its character was not necessarily within the constitutional inhibition if the same rule was applied under the same circumstances and conditions; that the hazardous character of the business of operating a railroad seemed to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public; that the business of other corporations was not subject to similar dangers to their employees; and that such legislation could not be objected to on the ground of making an unjust discrimination, since it met a particular necessity, and all railroad corporations were, without distinction, made subject to the same liabilities. It is now contended that the plaintiff was a bridge builder; that the legislation only applied to employees exposed to the peculiar hazards incident to the use and operation of railroads; that the railroad company could not be subjected to any greater liability to its employees who were engaged in building its bridges than any other private individual or corporation engaged in the same business; and that the statute has been so construed in this case as to make the company liable to its employees when engaged in building its bridges, notwithstanding bridge building

was not accompanied, and had not been treated by legislation as accompanied, by peculiar perils, thus discriminating against the particular corporation irrespective of the character of the employment, in contravention of the 14th Amendment. But the difficulty with this argument is that the state supreme court found upon the facts that, although the plaintiff's general employment was that of a bridge carpenter, he was engaged at the time the accident occurred, not in building a bridge, but in loading timbers on a car for transportation over the line of defendant's road; and *Missouri P. R. Co. v. Haley*, 25 Kan. 35; *Union P. R. Co. v. Harris*, 33 Kan. 416, 6 Pac. 571, and *Atchison, T. & S. F. R. Co. v. Koehler*, 37 Kan. 463, 15 Pac. 567, were cited, in which cases it was held that a person employed upon a construction train to carry water for the men working with the train, and to gather up tools and put them in the caboose or tool car; a section man employed by a railroad company to repair its roadbed, and to take up old rails out of its track and put in new ones; and a person injured while loading rails on a car to be taken to other portions of the company's road,—were all within the provisions of the act in question; and the court said: 'In this case the plaintiff was injured while on a car, assisting in loading timbers to be transported over the defendant's road to some other point. The mere fact that the plaintiff's regular employment was as a bridge carpenter does not affect the case, nor does it matter that the road was newly constructed, nor whether it was in regular operation or not. The injury happened to the plaintiff while he was engaged in labor directly connected with the operation of the road, and the statute applies even though it should be given the construction counsel places on it.' And see *Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363."

In *Chicago, R. I. & P. R. Co. v. Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363, a railroad employee was injured by the negligence of his fellow employees in letting drop one end of a heavy iron driving rod that they were carrying to attach to a new locomotive that was standing in a roundhouse at Horton, Kansas, and which they were putting in order for use on the road. Mr. Justice Brewer tried the case on the circuit, and held that, notwithstanding the Kansas fellow-servant law was taken from the Iowa statute, the Federal courts would follow the interpretation put on the Kansas statute by the courts of that state. Accordingly, a judgment for the plaintiff was allowed to stand, notwithstanding the injury was not inflicted by the negligence of a fellow-servant while moving a train. The fellow-servant statute of Georgia (Civ. Code, § 2321) is as follows: "A railroad company shall be liable for any damage done to persons, stock, or other property by the running of the locomotives or cars or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the com-

pany shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." The court of that state held that an injured employee may recover for injuries sustained by reason of the negligence of a fellow servant if they were engaged in a work that was necessary to be done to enable the railroad company to operate the railroad, and that the right to recover was not limited to cases where the injury was caused by the running of a train. *Thompson v. Central R. & Bkg. Co.* 54 Ga. 509; *Baker v. Western & A. R. Co.* 68 Ga. 702; *Georgia R. Co. v. Ivcy*, 73 Ga. 504. In the case last cited one bridge builder was killed by the negligence of another bridge builder, while they were building a bridge across the Oconee river, at Athens, to enable the trains of the railroad to cross the river and land passengers and freight at a new depot in the town.

The supreme court of Wisconsin had the fellow-servant law of that state before it in the case of *Ditberner v. Chicago, M. & St. P. R. Co.* 47 Wis. 138, 2 N. W. 60, and, speaking through Lyon, J., said: "The learned counsel for the defendant maintains that the statute under which this action was brought (Laws 1875, chap. 173) is unconstitutional and void. The statute is as follows: 'Every railroad company operating any railroad or railway, the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained within this state by any employee, servant, or agent of such company, while in the line of his duty as such, and which shall have been caused by the carelessness or negligence of any other agent, employee, or servant of such company, in the discharge of, or for failing to discharge, their proper duties as such; but this act shall not be construed so as to permit a recovery where the negligence of the person so claiming to recover materially contributed to the result complained of.' It is claimed that this statute violates that principle of constitutional law which prohibits unequal and partial legislation on general subjects, and is therefore void. It is conceded that the act would be a valid exercise of legislative power were its provisions restricted to cases of injury caused by the negligent operation of railways. But it is assumed that the statute is not so restricted; that by its terms it seeks to make a railway company liable for an injury to an employee caused by the negligence of another employee, although the negligent act may have no connection with the operation of the railway of the company. The argument is that, because the same liability is not imposed upon other corporations, the statute is void, within the rule or *Durkee v. Janesville*, 28 Wis. 464, 9 Am. Rep. 500. Iowa cases have been cited which seem to assert the doctrine contended for. The statute of that state under which those cases were decided, corresponding with our chapter 173 of 1875, limits a recovery to cases where the injuries were caused by the negligent operation of railways. In view of that

limitation, the assertion of the above doctrine in those cases seems to be *obiter*. It was unnecessary that the court should determine what its ruling would be were a different statute under consideration, or to rule upon a hypothetical statute. We entertain the highest respect for that learned and very able court, and can usually approve its judgments, but are unable to agree with it on this subject. Yet we concur in the judgments of that court in these very cases. We only reject the views stated *arguendo*, and which did not influence or affect the judgments."

The statute of Minnesota (Gen. Stat. 1894, § 2701) is as follows: "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof, by reason of the negligence of any other agent or servant thereof without contributory negligence on his part, when sustained within this state, and no contract, rule, or regulation between such corporation and any agent or servant shall impair or diminish such liability: Provided, that nothing in this act shall be so construed as to render any railroad company liable for damages sustained by any employee, agent, or servant while engaged in the construction of a new road or any part thereof not open to public travel or use." The supreme court of that state adopts the same rule as that laid down in Iowa, to wit, that the injuries must have been inflicted by the movement of a train, and holds that the statute so construed is not class legislation, or violative of the Federal Constitution, but says that, if the construction is extended beyond this, it would be subject to those objections. *Johnson v. St. Paul & D. R. Co.* 43 Minn. 222, 8 L. R. A. 419, 45 N. W. 156.

The fellow-servant law of Indiana is the most sweeping and comprehensive of any. It is as follows: (1) That "every railroad or other corporation, except municipal, operating in this state, shall be liable in damages for personal injury suffered by any employee while in its service, the employee so injured being in the exercise of due care and diligence, in the following cases: First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools, and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person intrusted by it with the duty of keeping such way, works, plant, tools, or machinery in proper condition. Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employee at the time of the injury was bound to conform, and did conform. Third. Where such injury resulted from the act or omission of any person, done or made in obedience to any rule, regulation, or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf. Fourth. Where such injury

was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine, or train upon a railway, or where such injury was caused by the negligence of any person, coemployee, or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployee, or fellow servant, at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws." [Horner's Rev. Stat. (Ind.) 1901, § 5206a]. This statute came before the Supreme Court of the United States in *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136, and the opinion of Mr. Chief Justice Fuller is so pertinent to the case at bar that it is deemed proper to reproduce it in full. It is as follows:

"The contention is that the act referred to is in conflict with the 14th Amendment because it denies the equal protection of the laws to the corporations to which it is applicable. In *Pittsburgh, C. C. & St. L. R. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, the statute in question was held valid as to railroad companies, and it was also held that objection to its validity could not be made by such companies on the ground that it embraced all corporations except municipal, and that there were some corporations whose business would not bring them within the reason of the classification. In announcing the latter conclusion the court ruled, in effect, that the act was capable of severance; that its relation to railroad corporations was not essentially and inseparably connected in substance with its relation to other corporations; and that, therefore, whether it was constitutional or not as to other corporations, it might be sustained as to railroad corporations. In *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75, and *St. Louis, I. M. & S. R. Co. v. Paul*, 64 Ark. 83, 37 L. R. A. 504, 40 S. W. 705, an act of Arkansas of March 25, 1889, was held unconstitutional by the supreme court of that state so far as affecting natural persons, and sustained in respect of corporations; and in *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, that view of the act was accepted by this court because that court had so decided. Considering this statute as applying to railroad corporations only, we think it cannot be regarded as in conflict with the 14th Amendment. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Chicago, K. & W. R. Co. v. Pontius*, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585; *Pearce v. Va. Dusen*, 24 C. C. A. 280, 47 U. S. App. 339,"

Fed. 693; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281. In *Missouri P. R. Co. v. Mackey* the validity of a statute of Kansas of 1874 providing that 'every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents or by any mismanagement of its engineers or other employees to any person sustaining such damage,' was involved, and it was held that it did not deny to railroad companies the equal protection of the laws. Mr. Justice Field said: 'The hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employees as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employees, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liability shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories.' In *Minneapolis & St. L. R. Co. v. Herrick* the same conclusion was reached in respect of a law of the state of Iowa, that 'every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employees of the corporation, and in consequence of the wilful wrongs, whether of commission or omission, of such agents, engineers, or other employees, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.' In *Chicago, K. & W. R. Co. v. Pontius* a bridge carpenter employed by a railroad company, who was injured through the negligence of employees of the company while assisting in loading timber taken from the false work used in constructing a bridge on a car for transportation to another point on the company's road, was held to be an employee of the company within the meaning of the statute of Kansas, and the validity of that act was again affirmed. In *Peirce v. Van Dusen* a similar statute of the state of Ohio applying to railroad companies was upheld by the circuit court of appeals for the sixth circuit, Mr. Justice Harlan delivering the opinion of the court. In *Orient Ins. Co. v. Daggs*, in which an act of the state of Missouri in respect of policies of insurance against loss or damage by fire was drawn in question, the objection that the statute discriminated between fire insurance companies and companies engaged in other kinds of insurance was overruled, and it was said that the power of

the state to distinguish, select, and classify objects of legislation necessarily had a wide range of discretion; that it was sufficient to satisfy the demands of the Constitution, if the classification were practical, and not palpably arbitrary, and that the classification of the Missouri statute was not objectionable in view of the differences between fire insurance and other insurance. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161, and *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207, were cited and approved. And see *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 12 Sup. Ct. Rep. 250; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

"By reason of the particular phraseology of the act under consideration, it is earnestly contended that the decisions sustaining the validity of the statutes of Kansas, Iowa, and Ohio are not in point, and that this statute of Indiana classified railroad companies arbitrarily by name, and not with regard to the nature of the business in which they were engaged; but the supreme court of the state in the case cited has held otherwise as to the proper interpretation of the act, and has treated it as practically the same as the statutes of the states referred to. Indeed, the Iowa statute is quoted from, and the *Case of Beckwith*, as well as that of *Mackey*, relied on as decisive in the premises. As remarked in *Missouri, K. & T. R. Co. v. McCann*, 174 U. S. 580, 586, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755, the contention calls on this court to disregard the interpretation given to a state statute by the court of last resort of the state, and, by an adverse construction, to decide that the state law is repugnant to the Constitution of the United States. 'But the elementary rule is that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof.' This being an action brought by Tullis to recover damages for an injury suffered while in the employment of the railroad company, caused by the negligent act of a fellow servant, for which the company was alleged to be responsible by force of the act, we answer the question propounded that the statute, as construed and applied by the supreme court of Indiana, is not invalid, and does not violate the 14th Amendment to the Constitution of the United States."

It thus appears that everywhere, except in Iowa and Minnesota, the adjudications agree that it is not essential that the injury should have been inflicted by reason of the negligence of a fellow servant while actually engaged in running a car, but that the injured employee may recover if injured by the negligence of a fellow servant while they are engaged in doing any work for the railroad which was directly necessary for the operation of the railroad, and that even so sweeping a statute as that of Indiana was held by the Supreme Court of the United States not to be repugnant to, or violative

of, the Federal Constitution. Under the language of our statute it is necessary for the injured employee to show that he was injured "while engaged in the work of operating such railroad." Construed either by its own terms or in the light of the cases cited from other jurisdictions, it results in holding that the right to recover is not limited to cases where the injury is inflicted by reason of the negligence of a fellow servant while actually moving a train or engine, but that the law embraces all cases where the injury is inflicted upon an employee while engaged in the work of operating a railroad, by reason of the negligence of any fellow servant who is likewise engaged in the work of operating a railroad, and that the term "operating such railroad" includes all work that is directly necessary for running trains over a track, and that it includes section hands who are engaged in working upon, repairing, or putting in shape the track, roadbed, bridges, etc., over which the trains must run.

2. The next question is whether the plaintiff falls within the class embraced in the act. Section gangs are included. The plaintiff was a member of the section gang that was doing the work. The work being done was directly necessary for the operation of the road. The particular work the plaintiff was doing was to warn passers-by of the danger incident to the negligent manner in which this work was being done, and to remove the ties from the street after the other members of the section gang had thrown them from the bridge to the street. Therefore, the work the plaintiff was doing was a part of the work being done by the section gang of which he was a member. It was negligence for the gang to throw the ties from the bridge down onto the street without first learning from the plaintiff that it was safe to do so. The practice before the accident was for them to first ascertain that fact from the plaintiff. In this instance they did not do so. They were negligent. The child was in a place of peril. The plaintiff went to it to remove it. He had a right to rely upon it that no ties would be thrown down until he notified the gang that it was safe to do so. He was, therefore, in the discharge of his duty. He was engaged in the work of operating the railroad. He was within the protection of the law. He was not guilty of contributory negligence. He is therefore entitled to recover, and therefore the verdict and judgment of the trial court are right.

The objection that the first portion of the plaintiff's instruction leaves it to the jury to determine as a question of fact whether the plaintiff was engaged in operating the railroad, while such was the question of law, is not tenable. Whether the plaintiff was engaged in operating the railroad at the time he was injured was a mixed question of law and fact. The instruction required the jury to find the fact to be that the defendant was "a section hand laborer, aiding in the work of operating defendant's road," and then declared that, if such was the fact, 60 L. R. A.

he was entitled to recover. Properly construed, this instruction only means that the jury must not only find the plaintiff to be a section hand laborer, but that he was at the time of the injury actually engaged in working upon the railroad as such. The instruction, though perhaps not as clearly worded as it might have been, was not erroneous.

Finding no error in the record, the judgment of the circuit court is affirmed.

Mr. John H. Overall for appellant.

Mr. A. B. Taylor for respondent.

Marshall, J.:

The foregoing opinion heretofore rendered by division No. 1 is hereby adopted as the opinion of the court in banc.

Burgess, Ch. J., and Sherwood, Brace, Valliant, and Gantt, JJ., concur.

Robinson, J., dissents.

NEW ENGLAND NATIONAL BANK of
Kansas City, Missouri, *Respts.,*

v.

NORTHWESTERN NATIONAL BANK of
Chicago, Illinois *et al., Appts.,*
And

THIRD NATIONAL BANK of Springfield,
Massachusetts, *et al., Respts.*

(.....Mo.....)

1. A mortgage by the holder of a bill of sale of chattels which the seller did not at the time possess is not notice to one who takes a mortgage from the seller upon chattels which he has purchased to fill the requirements of the bill of sale, since it is outside of the chain of the latter's title.
2. A mortgage executed in the name of a third person, on chattels not yet acquired by the mortgagor, which does not purport to cover after-acquired property, does not bind such property as against a mortgage to another person, executed by the mortgagor in his own name, after the property has come into his possession.
3. A mortgage of chattels to be acquired is not valid against one who takes actual possession of them under another mortgage executed by the mortgagor after they are acquired by him.

(November 26, 1902.)

A PPEAL by defendants Northwestern National Bank of Chicago, Illinois, *et al.*, from a judgment of the Circuit Court for Jackson County in a proceeding to determine title to a fund arising from the sale of certain cattle which were claimed by the re-

NOTE.—As to validity of mortgage on chattels to be manufactured, see, in this series, *Deeley v. Dwight* (N. Y.) 18 L. R. A. 298, and *note.*

As to conveyance recorded before grantor obtained title as notice to subsequent purchaser, see *Ford v. Unity Church Soc. (Mo.)* 23 L. R. A. 561.

spective defendants under chattel mortgages. *Reversed.*

The facts are stated in the opinion.

Messrs. Haff & Michaels, Isaac E. Congdon, John W. Parish, Beardsley, Gregory, & Kirshner, and Robert F. Walker, for appellants:

This is a bill of interpleader. It is strictly a proceeding in equity.

Freeland v. Wilson, 18 Mo. 382; *Miller v. Metropolitan L. Ins. Co.* 68 Mo. App. 22; *Atchison Bd. of Edu. v. Scoville*, 13 Kan. 26.

The evidence shows conclusively that there was no intention on the part of either Gillett or Baumbaugh that the transaction of October 4, 1898, should constitute a sale of the cattle and corn by Gillett to Baumbaugh. For this reason Baumbaugh's mortgage of that date is void, independent of the provisions of the statute of frauds.

Ober v. Carson, 62 Mo. 214; *Pennock v. Coe*, 23 How. 117, 16 L. ed. 436; *Cameron v. Marvin*, 26 Kan. 628; *Long v. Hines*, 40 Kan. 220, 19 Pac. 796.

The pretended sale was in any event void under the statute of frauds.

Kan. Gen. Stat. 1897, chap. 112, § 3.

It was not accompanied by a change of possession, and this threw the burden of proof as to good faith and sufficient consideration upon the respondents.

Ibid.; Mo. Rev. Stat. 1899, § 3410; *Phillips v. Reitz*, 16 Kan. 399; *Brown v. Cloud County Bank*, 2 Kan. App. 352, 42 Pac. 593; *Tulis v. McCall*, 2 Kan. App. 545, 43 Pac. 980; *Locke v. Hedrick*, 24 Kan. 765.

But respondents made no proof of good faith, or of sufficient consideration.

Gillett had exclusive control, management, and use of, and interest in, the property.

Donovan v. Dunning, 69 Mo. 436; *Rock Island Nat. Bank v. Powers*, 134 Mo. 444, 34 S. W. 869, 35 S. W. 1132; *Pattison v. Letton*, 56 Mo. App. 330; *Ely & W. Dry Goods Co. v. McLaughlin*, 78 Mo. App. 585; *First Nat. Bank v. Kansas City Lime Co.* 43 Mo. App. 564; *Molaska Mfg. Co. v. Steele*, 36 Mo. App. 503; *Lukins v. Aird*, 6 Wall. 78, 18 L. ed. 750; *Dent v. Ferguson*, 132 U. S. 50, 33 L. ed. 242, 10 Sup. Ct. Rep. 13; *Newman v. Kirk*, 45 N. J. Eq. 677, 18 Atl. 224; *Newell v. Wagness*, 1 N. D. 62, 44 N. W. 1014.

The bill of sale is, under the circumstances in this case, a badge of fraud.

Kurtz v. Miller, 26 Kan. 314; *Houts v. Shepherd*, 79 Mo. 147; *Hoge v. Hubb*, 94 Mo. 503, 7 S. W. 443; *Baldwin v. Whitcomb*, 71 Mo. 659.

The relationship of the parties is a suspicious circumstance, which, when taken in connection with the other facts and circumstances in the case, becomes itself an evidence of fraud.

Robinson v. Dryden, 118 Mo. 539, 24 S. W. 448; *John V. Farwell & Co. v. Meyer*, 67 Mo. App. 574; *Martin v. Duncan*, 156 Ill. 281, 41 N. E. 43; *Lehman v. Greenhut*, 88 Ala. 478, 7 So. 299; *Johnston v. Dick*, 27 Miss. 277; *Second Nat. Bank v. Gilbert*, 174 Ill. 491, 51 N. E. 584.
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The mortgage was made by Baumbaugh in order that Gillett's name should not appear on the records as mortgagor. This is, in itself, proof of fraud.

Central Nat. Bank v. Doran, 109 Mo. 40, 18 S. W. 836; *State Bank v. Frame*, 112 Mo. 515, 20 S. W. 620; *State Sav. Bank v. Buck*, 123 Mo. 141, 27 S. W. 341.

The consideration of the pretended sale was "insufficient."

Dodson v. Cooper, 50 Kan. 683, 32 Pac. 370; *Potter v. Stevens*, 40 Mo. 229; *Potter v. McDowell*, 31 Mo. 62.

Baumbaugh did not acquire actual or constructive possession of any of the cattle on or before October 14, 1898. He never personally at any time had possession.

Claffin v. Rosenberg, 42 Mo. 449, 97 Am. Dec. 336; *Swigggett v. Dodson*, 38 Kan. 707, 17 Pac. 594; *Harris v. Pence*, 93 Iowa, 481, 61 N. W. 927.

Nor did Baumbaugh ever have any constructive possession of the cattle.

Doak v. Brubaker, 1 Nev. 218; *Brunswick v. McClay*, 7 Neb. 137; *Hurlburt v. Bogardus*, 10 Cal. 519; *Flanagan v. Wood*, 33 Vt. 332; *Second Nat. Bank v. Gilbert*, 174 Ill. 491, 51 N. E. 584; *Sutton v. Ballou*, 46 Iowa, 517; *Claffin v. Rosenberg*, 42 Mo. 449, 97 Am. Dec. 336; *How v. Taylor*, 52 Mo. 598; *Worley ex rel. Standley v. Watson*, 22 Mo. App. 552.

A mortgage on real or personal property, made by one not the owner and placed on record, is not constructive notice to one dealing with the owner.

Maier v. Davis, 57 Wis. 212, 15 N. W. 187; *Mackey v. Cole*, 79 Wis. 426, 48 N. W. 520; *Single v. Phelps*, 20 Wis. 399; *Lewis v. Buttrick*, 102 Mass. 412; *Devlin, Deeds*, § 712; *Tydings v. Pitcher*, 82 Mo. 379; *Todd v. v. Eighth*, 4 App. Div. 9, 38 N. Y. Supp. 304; *Wade, Notice*, §§ 157, 159, 167, 205, 213, 215, 223; *Cobbey, Chat. Mortg.* § 781.

This court must assume that the law of Kansas is the same as the law of Missouri so far as this agreement of sale between Gillett and Clark is concerned. The transaction between Clark and Gillett under the Missouri law amounts to nothing more than an option or an executory contract of sale.

Flato v. Mulhall, 72 Mo. 525; *Bain v. Arnold*, 33 Mo. App. 634; *McClain v. Abshire*, 63 Mo. App. 341; *Waite v. Bartlett*, 53 Mo. App. 378; *Barhydt v. Alexander*, 59 Mo. App. 194; *Wyeth Hardware & Mfg. Co. v. Lang*, 54 Mo. App. 147; *Lau v. Crawford*, 67 Mo. App. 154; *Sloan v. Torry*, 78 Mo. 625; Mo. Rev. Stat. 1899, § 3419.

Messrs. Charles H. Dummer and Dehson & McCune, also for appellants:

The T and C cattle described in the bill of sale from Gillett to Baumbaugh, and the mortgage from Baumbaugh to the A. J. Gillespie Company, both dated October 4, 1898, were not only not owned by the grantors, but were not in existence in contemplation of law. The property mortgaged not being in existence at that time, the mortgage was absolutely void.

Jones, Chat. Mortg. § 138; 5 Am. & Eng. Enc. Law, 2d ed. p. 979; *Jones v. Richard-*

son, 10 Met. 488; *Looker v. Peckwell*, 38 N. J. L. 253; *Hutchinson v. Ford*, 9 Bush, 318, 15 Am. Rep. 711; *Long v. Hines*, 40 Kan. 216, 16 Pac. 339; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632; *Anchor Breuving Co. v. Burns*, 32 App. Div. 274, 52 N. Y. Supp. 1005.

The bill of sale from Gillett to Baumbaugh, of October 4, 1898, was also a nullity and absolutely void, for the same reason. i. e., the nonownership and nonexistence of the property.

Tiffany, Sales, ed. 1895, p. 24; 20 Am. & Eng. Enc. Law, 2d ed. p. 916; *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357; *Lunn v. Thornton*, 1 C. B. 379; *Robinson v. Hirschfelder*, 59 Ala. 503; *Head v. Goodwin*, 37 Me. 181.

The mortgage of Baumbaugh to the A. J. Gillespie Commission Company is void as to the T and C cattle for the further reason that it does not by its terms attempt to convey future acquired property.

Jones, Chat. Mortg. 2d ed. § 173 A: *Tapfield v. Hillman*, 6 Mann. & G. 245; *Montgomery v. Chase*, 30 Minn. 132, 14 N. W. 586; *Farmers' Loan & T. Co. v. Commercial Bank*, 15 Wis. 425; *Phillips v. Both*, 58 Iowa, 499, 12 N. W. 481; *Iowa State Nat. Bank v. Taylor*, 98 Iowa, 631, 67 N. W. 677; *Pennock v. Cor*, 23 How. 117, 127, 16 L. ed. 436, 440.

As the Gillespie Commission Company, the mortgagee, and its assignee, the Springfield bank, never at any time got possession of the T and C cattle prior to the time our lien attached, or in fact at any time, the Springfield bank has no right, in law or equity, to said cattle or the proceeds of the sale thereof, as against the Northwestern National Bank, which did obtain actual possession thereof under its chattel mortgage.

Single v. Phelps, 20 Wis. 399; *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 395; *Lamson v. Moffat*, 61 Wis. 153, 21 N. W. 62; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632; *Chase v. Denny*, 130 Mass. 566; *Cameron v. Marvin*, 26 Kan. 612; 5 Am. & Eng. Enc. Law, 2d ed. p. 981, note 1; *Long v. Hines*, 40 Kan. 216, 16 Pac. 339; *George R. Barse Live Stock & Commission Co. v. Guthrie*, 50 Kan. 467, 31 Pac. 1071.

The T and C cattle were not owned by Gillett. They were to be procured, and hence no title could pass until they were procured and delivered by Gillett and accepted by Baumbaugh, neither of which things was done.

Tiffany, Sales, p. 48; *Benjamin, Sales*, § 310; *Winslow v. Leonard*, 24 Pa. 14, 62 Am. Dec. 354; *Bailey v. Long*, 24 Kan. 90; *Kingman v. Holmquist*, 36 Kan. 735, 59 Am. Rep. 604, 14 Pac. 168; *Mobile Sav. Bank v. Fry*, 69 Ala. 348.

The lien of the Northwestern National Bank mortgage attached upon the T and C cattle before the pretended delivery to Baumbaugh.

Iowa State Nat. Bank v. Taylor, 98 Iowa, 631, 67 N. W. 677.

As neither Gillett nor Baumbaugh owned or had possession of the T and C cattle, de-

scribed in the mortgage under which we claim, on October 4, 1898, the time of the execution of the mortgage by Baumbaugh to the A. J. Gillespie Commission Company, and possession was not delivered to the mortgagee at the time, said mortgage last named was absolutely void as against all subsequent purchasers and creditors, under the statutes and decisions of Kansas.

Kan. Gen. Stat. 1897, chap. 120, § 1, chap. 112, § 3; *Swiggett v. Dodson*, 38 Kan. 702, 17 Pac. 594; *Frankhouser v. Fisher*, 54 Kan. 738, 39 Pac. 705; *Cameron v. Marvin*, 26 Kan. 612; *Smith v. Epley*, 55 Kan. 71, 39 Pac. 1016; *Phillips v. Reitz*, 16 Kan. 396; *Kansas P. R. Co. v. Couse*, 17 Kan. 571; *Long v. Hines*, 40 Kan. 216, 16 Pac. 339; *George R. Barse Live Stock & Commission Co. v. Guthrie*, 50 Kan. 467, 31 Pac. 1071.

Messrs. Stewart Taylor and C. O. Tichenor, for respondent Third National Bank of Springfield:

If Baumbaugh did not own the cattle when he made the mortgage, even he could not say when he got the title that he did not own them at the date of the mortgage, for the title so acquired would relate back.

United States v. Loughrey, 172 U. S. 225, 43 L. ed. 427, 19 Sup. Ct. Rep. 153.

Granting that the facts raised a suspicion that Gillett at the time intended to execute the mortgages of appellants and thereby defraud them, yet that is not evidence of fraud.

United States v. Hancock, 133 U. S. 197, 33 L. ed. 604, 10 Sup. Ct. Rep. 264; *Farmers' Bank v. Worthington*, 145 Mo. 91, 46 S. W. 745.

If there was a purpose to defraud others by Gillett executing chattel mortgages as he did, it would be irrelevant here.

Dickerman v. Northern Trust Co. 176 U. S. 181, 44 L. ed. 423, 20 Sup. Ct. Rep. 311.

Under the Kansas statute there can be no recording of the bill of sale, and there need be no actual change of possession; but, if there is not, then it devolves upon the purchaser to show that "the sale was made in good faith, and upon a sufficient consideration."

Briggs v. United States, 143 U. S. 354, 36 L. ed. 184, 12 Sup. Ct. Rep. 391; *Kansas P. R. Co. v. Couse*, 17 Kan. 571; *Crawford v. Spencer*, 92 Mo. 505, 4 S. W. 713.

If a sale of cattle which Gillett did not then own, and which were paid for by Baumbaugh, is valid, and if he did buy these cattle to comply with his agreement, and did get the actual and physical possession of them, this gave no power to Gillett to mortgage or sell them, because they did not belong to him; he did not even have a lien on them for the purchase money.

Lamar Water & Electric Light Co. v. Lamar, 140 Mo. 157, 39 S. W. 768.

If Gillett got the actual and physical possession of these cattle, the title then vested in Baumbaugh; and if Baumbaugh had put a mortgage on the same at the time the Gillett agreement was made, the title would have related back to the date of the mortgage.

If this mortgage was upon record it would have been notice that Baumbaugh was owner.

Shaffer v. Pickrell, 22 Kan. 619; *Brown v. James H. Campbell Co.* 44 Kan. 237, 24 Pac. 492; *Howard v. First Nat. Bank*, 44 Kan. 549, 10 L. R. A. 537, 24 Pac. 983; *Bates v. Wiggins*, 37 Kan. 44, 14 Pac. 442; *Kansas P. R. Co. v. Couse*, 17 Kan. 571; *Hamilton v. Miller*, 46 Kan. 490, 26 Pac. 1030; *John S. Brittain Dry Goods Co. v. Blanchard*, 60 Kan. 263, 56 Pac. 474; *Weeks v. Medler*, 20 Kan. 57; *Cameron v. Marvin*, 26 Kan. 612; *Dolan v. Van Demark*, 35 Kan. 308, 10 Pac. 848; *Dayton v. People's Sav. Bank*, 23 Kan. 421; *Iowa State Nat. Bank, v. Taylor*, 98 Iowa, 631, 87 N. W. 677; *Northwestern Bank v. Freeman*, 171 U. S. 629, 43 L. ed. 312, 19 Sup. Ct. Rep. 36.

Gillett never was in the actual and physical possession of one of these cattle. When the time came for the original owners to part with their possession, Baumbaugh had become entitled to it. Gillett under such circumstances manifestly could not have sold or encumbered these cattle, even in this state; nor could they have been seized for his debts.

Love v. Jones, 4 Watts, 470; *Carroll Exch. Bank v. First Nat. Bank*, 50 Mo. App. 95; *Cameron v. Marvin*, 26 Kan. 612; *Walker v. Vaughn*, 33 Conn. 584; *Rutherford v. Stewart*, 79 Mo. 216; *France v. Thomas*, 86 Mo. 80; *King v. Greaves*, 51 Mo. App. 544; *Stewart v. Smith*, 36 Minn. 83, 30 N. W. 430; *Martin v. Nizon*, 92 Mo. 34, 4 S. W. 503; *Re Clarke*, L. R. 36 Ch. Div. 356; *Tailby v. Official Receiver*, L. R. 13 App. Cas. 550.

The question of transfer to and vesting title in the purchaser always involves an inquiry into the intention of the contracting parties.

Ober v. Carson, 62 Mo. 210.

In order to pass the title to the vendee, it is not necessary that the vendor should be in possession.

Erwin v. Arthur, 61 Mo. 387; *Dolan v. Van Demark*, 35 Kan. 308, 10 Pac. 848; *Dayton v. People's Sav. Bank*, 23 Kan. 421; *Greenaway v. Fuller*, 47 Mich. 557, 11 N. W. 384.

Even if Baumbaugh did not own these cattle; if the mortgage and note were executed merely for the accommodation of Gillett, who got the proceeds,—such an allegation affirms the validity of the note and mortgage.

Maffat v. Greene, 149 Mo. 54, 50 S. W. 809; *Alexander Bros. v. Graves*, 25 Neb. 453, 41 N. W. 290.

If a bill of sale is regular on its face, and one is in possession under it, the burden is on him who assails it.

Albert v. Besel, 88 Mo. 150; *Leser v. Glaser*, 32 Kan. 554, 4 Pac. 1026.

On motion for rehearing.

Under the common law, which in Kansas is the statutory law, this contract is more than an option; it is a sale, binding on the vendor and the vendee.

Benjamin, Sales, chap. 1, § 3; *Newmark*, 60 L. R. A.

Sales, chap. 1, §§ 3, 4; *Bickford v. Champ- lin*, 3 Kan. App. 683, 44 Pac. 901.

The cattle, which the opinion styles "after-acquired," and for that reason holds our mortgage to be invalid, had been acquired before the execution of the Baumbaugh mortgage. They would not have been acquired had it not been for the Baumbaugh mortgage.

The effect of the decision is to take the property of one party and give it to another, or, at least, to decree a forfeiture of the property of another.

This court takes these cattle, paid for by us, and gives them to persons to whom mortgages were given some time afterward.

It is a maxim that equity looks to the intent, and not to form. It always looks at the substance of things, and attempts to reach that and to enforce the rights and duties which spring from that and the real intent of the parties.

Varnier v. Rice, 44 Ark. 252.

If the Clark note and mortgage were taken up, as the transaction shows it to have been, and held until the company could get a new valid mortgage, why is not the Clark mortgage valid if the Baumbaugh mortgage on the same cattle is invalid? And why is not the Springfield bank subrogated to the rights of the Gillespie company, the indorser of the Baumbaugh notes?


Hackett v. Watts, 138 Mo. 502, 40 S. W. 113; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 594, 28 L. ed. 531, 4 Sup. Ct. Rep. 566.

Messrs. Cook & Gossett and J. D. Bowersock for other respondents.

Marshall, J., delivered the opinion of the court:


This is a bill in equity by the plaintiff, as a stakeholder, to require the defendants to interplead for the sum of \$14,971.03, in its hands, resulting from the sale of 403 head of cattle, which were consigned to it by the defendants, to be sold by it to the best advantage, and the proceeds to be held by it pending an amicable settlement among the defendants of their respective claims. They were unable to agree, and therefore the plaintiff filed this bill of interpleader to have the claimants litigate their rights. The defendants interpleaded for the fund. Pending the determination of the case the parties agreed that, instead of paying the money into court, the plaintiff might retain the fund, paying interest thereon. The trial court adjudged the fund to the Third National Bank of Springfield, Massachusetts, and the other defendant banks, and Elmore & Cooper appealed. The abstract of the record embraces 525 printed pages. The briefs of counsel aggregate 217 pages. It is manifestly impossible, therefore, within the limits proper to be observed in any opinion, to give even an outline of the testimony, documentary evidence, and circumstances adduced upon the trial. Time and space admit only of a short, clear statement of the ultimate facts disclosed by the record, to serve as a basis for the principles of law to be discussed and decided.

Ultimate facts.

Prior to October 3, 1898, Grant G. Gillett, living at Woodbine, Dickinson county, Kansas, was a large stock dealer. Charles H. Baumbaugh, of the same place, was his brother-in-law, and for some time had been employed by him as a clerk at a salary of \$50 per month. The A. J. Gillespie Commission Company was a corporation located at Kansas City, Kansas, and engaged in the business of dealing in cattle and buying and selling notes secured by chattel mortgages on cattle. Gillett was a stockholder, but not an officer, in the company. On October 3, 1898, E. R. Clark, of Marion county, Kansas, was the owner of, and had on pasturage in Chase county, 416 head of cattle four years old, called "westerns," and weighing 1,100 pounds, and branded J. M. or , the latter mark being called "circle dot." Clark had mortgaged these cattle to Elmore & Cooper for about \$15,000. On October 3, 1898, the Gillespie Commission Company, at the request of Gillett, bought from Elmore & Cooper the Clark mortgage on said cattle, and carried it as "Bills receivable" until October 5th, when it was paid by the proceeds of the Baumbaugh mortgage, hereinafter described. On October 4, 1898, Gillett and Baumbaugh went to the office of the Gillespie Commission Company in Kansas City, Kansas, for the purpose of executing a mortgage on the cattle covered by the Clark mortgage. Gillett did not want to make the mortgage himself, for fear, he said, of injuring his credit. So he arranged with Baumbaugh that he (Gillett) would give Baumbaugh a bill of sale for the 416 head of cattle owned by Clark, and Baumbaugh, should execute a mortgage on them to the Gillespie Commission Company, and that Gillett should get the proceeds of the mortgage and manage the whole matter, and Baumbaugh should have a half interest in the profits realized. Instead of making the mortgage on the 416 Clark cattle alone, it was agreed that the mortgage should be made to cover 600 head of cattle, and that Gillett should go out and buy 184 more cattle, and add them to the Clark 416 cattle, thus filling the complement of 600. Thereupon Gillett executed to Baumbaugh the following bill of sale:


Kansas City, Oct. 4, 1898.
Bill of Sale.

State of Kansas, }
County of Dickinson } ss.:

This certifies that I have this day sold, assigned, and agreed to deliver to Charles H. Baumbaugh eighty-four (84) native four-year-old steers branded T— on left loin, one hundred (100) native four-year-old steers branded C on left hip, and four hundred and sixteen (416) western four-year-old steers branded J. M. or  on left side. The above cattle are all free, clear, and unencumbered. Also 20,000 bushels of corn, now in crib at Lebanon, Kansas. The consideration paid for the above-named cattle and corn is \$24,795.99, which includes \$300 commission and \$495.99 interest.

G. G. Gillett.



60 L. R. A.

Thereupon, on the same day, Baumbaugh executed a chattel mortgage to the Gillespie Commission Company to secure the notes aggregating \$24,795.99, payable at ninety days. The description of the property in the mortgage is as follows: "The following steers: Eighty-four natives branded T— on left loin, four years old, and weight 1,150 pounds; also one hundred natives branded C on left hip, four years old, and weight 1,200 pounds; also four hundred and sixteen westerns, branded  or J. M. four years old, and weight 1,100 pounds; also twenty thousand bushels of corn. Said cattle are to be fed on the owner's farm, about 1 mile north of Herrington, Kansas. Said corn is now in crib at Lebanon, Kansas, and is to be shipped to Herrington, Kansas. When said stock is marketed, to be consigned for sale to A. J. Gillespie Com. Co., Kansas City Stock Yards, and proceeds applied on notes." At the time of the execution of the bill of sale and of the mortgage neither Gillett nor Baumbaugh owned any of the cattle described in those documents. Gillett had an option to buy the Clark 416 head of cattle for \$40 a head, but he had not purchased them, or paid a farthing thereon. Neither Gillett nor Baumbaugh then owned or had in mind any cattle marked T & C nor were there any cattle answering such a description anywhere in existence. Upon the execution of the notes and mortgage by Baumbaugh they were turned over to Gillett, and by him turned over to the Gillespie Commission Company, and that company on the same day sold the notes and mortgage to the Hocker, Arnold, Woodson Brokerage Company, and, after taking out \$495.99 for interest and \$300 for commissions, passed the balance of the proceeds, amounting to \$24,000 to the credit of Gillett upon the books of the company. This credit was wiped out by a draft on the company by Gillett on October 5, 1898, for \$16,000 (which was evidently intended to cover what the company had paid Elmore & Cooper for the Clark mortgage on October 3d), and by \$8,000 cash paid to Gillett on October 10, 1898. Baumbaugh paid Gillett nothing for the cattle, and received nothing out of the proceeds of the notes and mortgages. He acted in the matter solely to oblige Gillett, and upon his promise that he should share in the profits. The bill of sale recites that Gillett "agreed to deliver" the cattle to Baumbaugh, but they were never intended to be delivered, and in fact never were delivered at any time to Baumbaugh, but the agreement was that Gillett should have the possession of them, should have his men care for them, should feed them, should market them, and should receive the proceeds of their sale.

At the time the mortgage was assigned to the Gillespie Commission Company that company knew that neither Gillett nor Baumbaugh owned or had in their possession any of the cattle described in the mortgage, but the company understood that cattle were to be bought to fill the description in the mortgage. On October 5, 1898, the Gillespie Commission Company sold

and assigned the notes and mortgage to the Hocker, Arnold, Woodson Brokerage Company, and informed that company at the time of the fact that neither Gillett nor Baumbaugh owned the cattle therein described, but they expected to buy cattle to fill the description in the mortgage. On October 15, 1898, the Hocker, Arnold, Woodson Brokerage Company sold and assigned the notes to the Third National Bank of Springfield, Massachusetts, and that company knew nothing of the above-recited facts concerning the notes and mortgage, but was an innocent purchaser for value, and without notice. On October 7th Gillett sent his agent, Thomas Kirihaan, to Marion county, to get the J. M. and circle dot cattle from Clark, and he did get the 416 head from Clark, and drove them from the place where they were on pasture, 2 miles north of Clements, in Chase county, Kansas, which was about 30 miles from Herrington, Dickinson county; and with Clark's assistance and that of his men the cattle were driven to the Mosier farm, which was about a mile south of Herrington, arriving there on Sunday, October 9, 1898, where they were turned over to David Naill. The Mosier farm was owned by Gillett, and was leased by him to Naill, and Naill was employed by Gillett to care for and feed the cattle. About a week after such delivery to Naill, Gillett paid Clark the difference between the price of the cattle at \$40 a head and the amount of the Clark mortgage to Elmore & Cooper that the Gillespie Commission Company had bought at the request of Gillett, and which that company had charged against Gillett's account on the 5th of October. On October 7th Gillett purchased 63 head of cattle from J. L. Thompson. They were delivered to Naill, as agent for Gillett, on October 8th, and were put in what is called the "schoolhouse pasture," which was owned by Naill, and was located about three-quarters of a mile northeast of the Mosier farm. On October 11th Gillett purchased 37 cattle from St. Amand, of Herrington, Kansas, and they were on that day delivered to Naill, for Gillett, and were placed in the said schoolhouse pasture. On October 13th Gillett purchased 100 cattle from Gangwer, of Delavan, Kansas, and they were also delivered on that day to Naill, for Gillett, and were placed in the said schoolhouse pasture. When these three lots of cattle were placed in the schoolhouse pasture, the parties have agreed that they were massed as one herd, and all branded T & C. On October 13th these T & C cattle were taken out of the schoolhouse pasture and placed in pens which lay partly in and partly outside of Herrington, and were known as "Gillett's stock yards," "Gillett's feed pens," or "Gillett's corral." Gillett had owned the land and had built the feed pens. He put the paper title in Baumbaugh; but whether Gillett or Baumbaugh was the real owner is not clear, nor is it material, for Gillett used the land and feed pens as he pleased, and put cattle in the pens and took them out again without consulting Baumbaugh. At the same time, to wit, October 13th, Gillett

moved the J. M. and circle dot cattle (the Clark cattle) from the Mosier farm, and put them also in the said stock yards. Thus, on October 14th, Gillett had in his possession in his feed pens at Herrington, Kansas, 600 head of cattle. On October 14, 1898, Gillett executed to Elmore & Cooper three notes secured by three separate chattel mortgages, as follows:

First. A note for \$7,000, due in one hundred fifty days. The mortgage securing this note described the property as follows: "The following described property in said county [Dickinson county]: 200 head four-year-old western dehorned steers, branded  and  heart on left side. These cattle were wintered in Kansas last winter, and weighed 1,000 pounds. These cattle are in my feed lot in the town of Herrington, and will not be removed therefrom until shipped to Elmore & Cooper, Stock Yards, Kansas City, Missouri. These cattle were bought from E. R. Clark, of Marion, Kansas. I also include in this mortgage 8,000 bushels of corn, together with all increase thereof." This note and mortgage was sold by Elmore & Cooper to the State Bank of St. Louis, before maturity, for value, and without notice, and that bank is the innocent holder thereof, and this is the claim asserted in its interplea.

Second. A note for \$7,490, due in one hundred fifty days. The mortgage securing this note described the property as follows: "The following described property in said county [Dickinson county]: 214 head four-year-old western dehorned steers, branded J M on left side. These cattle were wintered in Kansas last winter, and weighed 1,000 pounds. These cattle are in my feed lot in the town of Herrington, and will not be removed therefrom until shipped to Elmore & Cooper, Stock Yards, Kansas City, Missouri. These cattle were bought from E. R. Clark, of Marion, Kansas. I also include in this mortgage 8,000 bushels of corn, together with all increase thereof." This note and mortgage was sold by Elmore & Cooper to the First National Bank of Omaha, before maturity, for value and without notice, and that bank is the innocent holder thereof, and this is the claim asserted in its interplea.

Third. A note for \$8,000, due February 11, 1899. The mortgage securing this note describes the property as follows: "The following described property in said county [Dickinson]: 200 native steers, branded 100 T on left hip and 100 C on left hip. 63 of these cattle were bought from J. L. Thompson, of Herrington, Kansas, weight 1,200 pounds; 37 were bought from L. St. Amand, of Herrington, Kansas, weight 1,050 pounds; 100 were bought from Gangwer, of Delavan, Kansas, and weight 1,050 pounds. These cattle are on full feed in my lot at Herrington, and will not be removed from there until shipped to Elmore & Cooper, Stock Yards, Kansas City, Missouri. I also include 8,000 bushels of corn in this mortgage, together with all increase thereof." This note and mortgage was sold by Elmore & Cooper to

the Northwestern National Bank of Chicago, before maturity, for value, and without notice, and that bank is the innocent holder thereof, and this is the claim asserted in its interplea.

All three of these mortgages contained a provision that, if the mortgagees deemed themselves insecure at any time, then the indebtedness should become due immediately, at the option of the mortgagees, and they might take possession of the cattle, and sell them. These three mortgages were duly recorded on October 18, 1898. Thereafter Gillett sent Kinihan with an order to Naill to deliver him 216 of the cattle covered by these mortgages, and Naill delivered them to Kinihan, and he shipped them to St. Joseph, Missouri, where they were sold, and Gillett got the proceeds of the sale, and appropriated them to his own use. On November 1, 1898, Gillett left the country, and went to Mexico, leaving obligations amounting to over \$1,000,000. The holders of the three mortgages of October 14th, deeming themselves insecure by reason of the absconding of Gillett, elected to declare their debts due, and took possession of the cattle, or rather of all the cattle covered by their mortgages except such as Gillett had sent to St. Joseph and sold. Thereupon it developed that the Third National Bank of Springfield, Massachusetts, held the Baumbaugh mortgage of October 4th, which purported to cover all the cattle, and that the State Bank of St. Louis, the First National Bank of Omaha, and the Northwestern National Bank of Chicago held the three separate mortgages executed on October 14th by Gillett to Elmore & Cooper. The parties therefore agreed to consign all the cattle to the plaintiff, and have it sell them, and hold the proceeds until the claimants could settle their conflicting claims. Failing so to do, the plaintiff filed this bill of interpleader as hereinbefore set out.

It is proper to say further that the Baumbaugh mortgage contained no express provision making the mortgage apply to after-acquired cattle, but purported to operate instantly upon the cattle described in the mortgage.

This is a case wherein one of two innocent parties must suffer. The four banks claiming the fund are innocent holders, for value, and without notice. The Springfield bank claims under the Baumbaugh mortgage, while the St. Louis, Chicago, and Omaha banks claim under the Gillett mortgage. The Baumbaugh mortgage was executed on October 4, 1898, and recorded on October 6th. The Gillett mortgage was executed October 14th and recorded October 18th. Both mortgages purport to cover the same cattle. The Springfield bank acquired the Baumbaugh mortgage from the Hocker, Arnold, Woodson Brokerage Company on October 15th. The Chicago bank acquired the Gillett mortgage held by it on October 20, 1898. The St. Louis bank acquired the Gillett mortgage held by it on October 19, 1898. The Omaha bank acquired the Gillett mortgage held by it on a date not definitely stated. The claim of the Springfield bank 60 L. R. A.

is, therefore, prior in point of time to the claims of the St. Louis, Chicago, and Omaha banks. But the decisive question in the case is, Which is prior in right? The Baumbaugh mortgage was executed on October 4th. The effectiveness of that mortgage to bind the property mortgaged is the first question in the case. When this mortgage was made, Baumbaugh did not own a single head of cattle in all the world, so far as the record shows, and had no title whatever to any of the cattle described in the mortgage. Indeed, as far as the 184 head marked T & C are concerned, there were at that time no such cattle in existence. Baumbaugh's title to the cattle described in his mortgage depends entirely upon the bill of sale from Gillett to him. At that time Gillett had no title to a single head of the cattle described in the bill of sale. The 416 head described in the bill of sale as marked J M and circle dot belonged at that time to Clark, and the A. J. Gillespie Commission Company held the mortgage on them for over \$15,000, which Clark had given to Elmore & Cooper, and which the Gillespie Company purchased from Elmore & Cooper on October 3d. But Gillett had no title to them whatever. He had an option on them, which required him to pay off the mortgage on them, and to pay the balance of the agreed purchase price of \$40 a head to Clark; but at the time he made bill of sale to Baumbaugh Gillett had not paid one cent on account thereof. At his request the Gillespie Company bought the mortgage on October 3d, but that was not Gillett's purchase. No money of his was used for that purchase, and that company carried the note and mortgage as "bills receivable" due that company. The legal title to the property and the possession of the property was in Clark at that time. The bill of sale recites on its face, not an intent to presently deliver possession of the cattle to Baumbaugh, but instead an agreement to deliver such possession thereafter, at a time not specified. At that time the 184 head of T & C cattle were not even in existence, and neither Gillett, when he made the bill of sale, nor Baumbaugh, when he made the mortgage, had any particular cattle in mind as filling this description, but Gillett intended to buy cattle somewhere, and brand them T & C, to fill the call of the bill of sale and mortgage. It is to be noted, however, that no such intention is even hinted at in either the bill of sale or in the mortgage, but, on the contrary, both of those instruments purport to operate instantly upon a subject-matter then assumed to exist. After the note and mortgage were made, Baumbaugh turned them over to Gillett, and Gillett turned them over to the Gillespie company, and on the next day—October 5th—the Gillespie company sold them to the Hocker, Arnold, Woodson Brokerage Company. Then, on October 5th, the Gillespie company used part of the proceeds of this sale to pay off the Clark mortgage which it had acquired from Elmore & Cooper, and on the 10th of October it turned over the balance of such proceeds to Gillett, and out of such balance Gil-

lett paid Clark what remained due to him, and then, with the amount remaining of such proceeds, he purchased the 184 head from Thompson, Gangwer, and St. Amand, and marked them T & C. Thus, it will be seen that neither Gillett nor Baumbaugh ever put a cent of their own money in any of these cattle. On the contrary, all of the money that went to pay for the cattle was raised by the Baumbaugh mortgage, and the proceeds of that mortgage arising from a sale thereof to the Hocker, Arnold, Woodson Brokerage Company paid for all the cattle. It must be observed that when the brokerage company took the Baumbaugh mortgage it was informed by the Gillespie company that the mortgagor did not have any such cattle as he was attempting to mortgage. The Springfield bank, however, had no knowledge of this state of affairs.

The sum of the matter therefore, is this: Gillett gave Baumbaugh a bill of sale for cattle he did not own, never paid a cent for, and did not have possession of, and a part of which had no existence, but which he agreed to deliver, and for which Baumbaugh never paid or agreed to pay him a cent. Baumbaugh executed a mortgage on cattle he never paid a cent for, never owned, and never had possession of. Neither the bill of sale nor the mortgage attempts in any way to affect or cover after-acquired property. The question, then, is, What title to the cattle was conveyed by the Baumbaugh mortgage? It is a fundamental rule of the common law that nothing could be mortgaged that was not in existence at the time of the mortgage, and did not at the time belong to the mortgagor. And this rule obtains in nearly all of the states of the Union. 5 Am. & Eng. Enc. Law, 2d ed. p. 979, and cases cited in notes. This is the rule in Kansas, where the mortgages in question in this case were made. *Long v. Hines*, 40 Kan. 220, 19 Pac. 796. In this case the supreme court of Kansas quotes the language of Chief Justice Shaw in *Barnard v. Eaton*, 2 Cush. 294, who said: "A mortgage is an executed contract; a present transfer of title, although conditional and defeasible. It can, therefore, only bind and affect property existing and capable of being identified at the time it is made; and, whatever may be the agreement of the parties, it cannot bind property afterwards to be acquired by the mortgagor." The supreme court of Kansas, however, pointed out that in *Cameron v. Marvin*, 26 Kan. 612, it was said: "The next question is with reference to the rights of the parties to the property acquired by Patterson after the execution of all the mortgages. Of course, this property was not included in the mortgages at the time of their execution. In fact, it could not have been included in the mortgages at that time, for it is not within the power of any person to mortgage property which does not exist, or which does not belong to him. He cannot mortgage property which is afterwards to be created, or purchased, or procured. He can only mortgage property which at the time is in existence, and to 60 L. R. A.

which he has a title. Parties may make contracts with reference to future-acquired property, and contracts which will be legal and valid and will be upheld; but such contracts do not constitute chattel mortgages. They are simply executory contracts, to be performed in the future; and, while they are binding upon the parties making them, they are void as to third persons who have no notice respecting them. They can never be treated as chattel mortgages affecting third persons. Such contracts, however, are always held valid, as though they were chattel mortgages, as against third persons who have not in the meantime obtained any specific interest in the property when the mortgagee has obtained the possession of the property under the contracts. . . . When a mortgagee takes possession of the future-acquired property under such a stipulation in the mortgage, he then holds the property by way of pledge, but in the same manner as though the mortgage had been executed at the time he takes the possession of the property, and in the same manner as though he had taken the property under and by virtue of a chattel mortgage covering the property." The rule in Kansas is that, to affect the after-acquired property, the mortgage must contain an express provision binding such after-acquired property; and, even where there is such an express provision in the mortgage, the rights of third persons are not affected thereby unless the mortgagee takes actual possession of the after-acquired property before it is purchased by third persons, or seized by creditors, and that, if such third persons purchase it, or such creditors seize it, before the mortgagee takes such actual possession thereof, the third persons or creditors obtain the better right thereto. *Dayton v. People's Sav. Bank*, 23 Kan. 421; *Cameron v. Marvin*, 26 Kan. 612; *George R. Barse Live Stock & Commission Co. v. Guthrie*, 50 Kan., loc. cit. 474, 475, 31 Pac. 1071.

The case of *John S. Brittain Dry Goods Co. v. Blanchard*, 60 Kan. 263, 56 Pac. 474, is relied on by the Springfield bank as an analogous case to the case at bar, but this is a misapprehension. In that case it appeared that one Foltz was indebted to the plaintiff, the Brittain Dry Goods Company. The debt was unsecured. Foltz desired to buy a herd of cattle. He obtained the money so to do from the defendants, Blanchard *et al.*, agreeing to buy the cattle, take them to his farm, and to secure Blanchard by giving a bill of sale of the cattle to a man in his (Foltz's) employ, and have the man execute the notes and mortgage. This scheme was resorted to because Foltz was president of a bank, and it was feared it would injure the credit of the bank if Foltz executed the mortgage. The arrangement was carried out literally, except Foltz did not give the bill of sale to his employee, who executed the note and mortgage to Blanchard. The plaintiff attached the cattle, and claimed that the mortgage was fraudulent. It was held to be a good mortgage. But it is readily seen that that case is wholly unlike the case at bar. The following essential differences ex-

ist between that case and the case at bar: First. There Foltz owned the cattle and was in possession of the cattle at the time the mortgage was executed, whereas here Baumbaugh never owned the cattle and never was in possession of the cattle at any time; and, even if the mortgage here be regarded as the mortgage of Gillett, and not of Baumbaugh, still this case is unlike that case, because Gillett did not own the cattle when the mortgage was given, nor was he in possession of any such cattle at that time, and as to 184 of them they were not even in existence at the time the mortgage was executed. Second. There Foltz had title to the property, which he could convey by the bill of sale or by the mortgage executed by him in the name of and through his employee, whereas here Gillett had no such title. Third. There the property was all the time in Foltz's possession, whereas here the property was not in Gillett's possession until several days after the Baumbaugh mortgage was executed. Fourth. There there was no question as to after-acquired property, but the property was in existence when the mortgage was executed, and could attach at once, whereas no such conditions exist here. Fifth. There the mortgage was attacked as fraudulent, whereas here the question is one of the effectiveness of the Baumbaugh mortgage and the priority of the several mortgages. In addition to this, the supreme court of Kansas gave no intimation in that case of intention to overrule the doctrine that had been established in the cases cited from that jurisdiction which bear upon the questions here involved. In fact, the *Brittain-Blanchard Case* was treated as being so different from the other cases cited herein that those cases were not even referred to.

The case of *Alexander Bros. v. Graves*, 25 Neb. 453, 41 N. W. 290, is also strongly relied on by the Springfield bank. In that case A purchased a team of horses from B, and executed a chattel mortgage on the team to secure the purchase price. The parties to the transaction were unacquainted, and B supposed that A had given his true name. Subsequently, A sold the team in his real name to C, who examined the records, and found no mortgage on the team executed in A's name. B replevied the team from C, and recovered judgment. But it will be observed that this case is not like the case at bar in this important particular, to wit, at the time A executed the mortgage he was the owner and in possession of the property mortgaged, and such property was then *in esse*, whereas such is not the case here either as to Baumbaugh or Gillett. It is, of course, conceded that an owner in possession of personal property may execute a valid mortgage in a fictitious name, or may procure a valid mortgage to be executed thereon by some one acting in the name of the other, but in reality for the true owner, and such a mortgage is perfectly good as between the mortgagor and the mortgagee. But it is not so clear, notwithstanding the decision cited, that such a mortgage will prevail over a mortgage executed in the real name of the owner in favor

of another third person, who examined the records, and found no mortgage recorded by the true owner on the property. It is stated in the opinion cited that no precedent had been found for it. The weight of authority is that a mortgage on personal property made by one who is not the owner of the property, or by the owner in a fictitious name, and placed on record, is not constructive notice to any one dealing with the owner in his true name. The reason of the rule is that such conveyances in fictitious names or in the name of an agent lie outside of the chain of title, and therefore impart no notice. This is the rule always as to real property. *Crockett v. Maguire*, 10 Mo. 34; *Digman v. McCollum*, 47 Mo. 372; *Tydings v. Pitcher*, 82 Mo. loc. cit. 384. And, so far as mortgages are concerned, the same rule must obtain as to chattels, if any efficacy is to be given to our registry acts. This is the doctrine that prevails elsewhere. *Maier v. Davis*, 57 Wis. 212, 15 N. W. 187; *Mackey v. Cole*, 79 Wis. 426, 48 N. W. 520 (directly in point); *Lewis v. Buttrick*, 102 Mass. 412; Wade, Notice, §§ 205, 223. Devlin, Deeds, 2d ed. § 712, quotes approvingly the language of Duncan, J., in *Keller v. Nutz*, 5 Serg. & R. 246, who said: "If conveyances from one stranger to another would be notice to all the world, miserable would be the situation of the purchaser. The registering act would afford him no protection, because it would give him no notice." And in § 713 the same author points out that the record is notice only to purchasers under the same grantor. 2 Cobby, Chat. Mortg. § 781, discusses the cases of *Mackey v. Cole*, 79 Wis. 426, 48 N. W. 520, and *Alexander Bros. v. Graves*, 25 Neb. 453, 41 N. W. 290, hereinbefore referred to, and says the Wisconsin case rests upon the better reason, and the author lays down the rule that a mortgage under a fictitious name is void as to third parties dealing with the mortgagor by his true name. Id. § 781. In the case of *The Mary*, 1 Paine, 671, Fed. Cas. No. 9,187, it was held that, if the owner of a vessel, after having given a bill of sale in the nature of a mortgage, be allowed to remain in possession, and act as absolute owner, without any change of her register, and he afterwards sells or mortgages the vessel or gives a bottomry bond to one who has no notice of the mortgage, the lien of the latter will prevail over the first mortgage.

In this case, therefore, the result is the same whether the mortgage under which the Springfield bank claims be treated as the mortgage of Baumbaugh or that of Gillett acting in the name of Baumbaugh. In either aspect of the case that mortgage was outside of the chain of title under which the St. Louis, Chicago, and Omaha banks claim title; and, the Springfield mortgage not being made in the name of Gillett, it imparted no notice to Elmore & Cooper when they took the other three mortgages from Gillett. They found Gillett in possession of the cattle. They were not obliged to look for mortgages on Gillett's interest in the cattle in any fictitious name, nor in the

name of any one for Gillett. No mortgages on the cattle appeared in Gillett's name. Elmore & Cooper were required to inquire no further.

It has already been pointed out that at the time Baumbaugh executed the mortgage now held by the Springfield bank neither Baumbaugh nor Gillett owned the cattle or was in possession thereof, and that the bill of sale and mortgage dealt with the cattle as in *presenti* and as in *esse*, and did not attempt to expressly bind any after-acquired cattle. As between the mortgagor and the mortgagee, or Gillett and the mortgagee, the mortgage was sufficient to convey any title they then had, and also such as they might afterwards acquire. But as between the mortgagee and subsequent mortgagees, purchasers, or attaching creditors, that mortgage was not sufficient to cover after-acquired cattle, and, as the cattle in this case were all after-acquired cattle by Gillett (never at any time by Baumbaugh), the mortgage executed by Baumbaugh was not sufficient to bind the cattle as against the claims of the St. Louis, Chicago, and Omaha banks under the mortgage executed by Gillett to Elmore & Cooper on October 14, 1898. And, even if the Baumbaugh mortgage had contained an express provision making it apply to after-acquired property, it would not avail the Springfield bank anything in this case, because that bank did not take actual possession of the cattle before they were seized and taken into possession by the holders of the Gillett mortgage of October 14th, now and at that time held by the Chicago, St. Louis, and Omaha banks. *Cameron v. Marvin*, 26 Kan. 612; *Long v. Hines*, 40 Kan. 220, 19 Pac. 796; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 37 N. E. 632; *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357; *Tapfield v. Hillman*, 6 Mann. & G. 245; *Head v. Goodwin*, 37 Me. 181; *Montgomery v. Chase*, 30 Minn. 132, 14 N. W. 586; *Penock v. Coe*, 23 How. 117, 16 L. ed. 436; *Tiffany, Sales*, ed. 1895, 24; 20 Am. & Eng. Enc. Law, 2d ed. p. 916. Jones, Chat. Mortg. 2d ed. § 138, says: "At common law a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor, or potentially belonging to him as an incident of other property then in existence, and belonging to him. A mortgage of goods which the mortgagor does not own at the time of making the mortgage, though he may afterwards acquire them, is void, in respect to such goods as against subsequent purchasers or attaching creditors." And in 60 L. R. A.

speaking of a right to mortgage a potential interest, the author, in § 140, says: "Thus, to use illustrations familiar since the time of Chief Justice Hobart: 'Land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. A person may grant all the tithe wool that he may have in such a year, yet perhaps he shall have none; but a man cannot grant all the wool that he shall grow upon his sheep that he shall buy hereafter, for there he hath it neither actually nor potentially.'"

It follows that the Baumbaugh mortgage was void as to third persons, subsequent purchasers, mortgagees, and creditors, because neither Baumbaugh nor Gillett owned any of the cattle covered by it when it was executed, nor were they apparent owners in possession, nor had they any potential interest therein. It also follows that, while such mortgage was sufficient as between them and the mortgagee to cover after-acquired cattle, it was not sufficient to bind such after-acquired property as against the subsequent mortgagees, the St. Louis, Chicago, and Omaha banks. And this is true both because the Baumbaugh mortgage did not in express terms apply to after-acquired property, and because the mortgagee therein did not take actual possession of such after-acquired property before the liens and rights of the subsequent mortgage attached.

This conclusion makes it unnecessary to consider the other questions raised. *The judgment of the Circuit Court is reversed*, and the cause remanded, with directions to enter judgment in favor of the interpleaders the Northwestern National Bank of Chicago, the State Bank of St. Louis, and the First National Bank of Omaha, each for the portion of the fund arising from the sale of the part of the cattle covered by its mortgage, if such proceeds can be followed into the fund and be distinguishable from the balance of the fund, and, if this cannot be done, then to enter a decree dividing the fund among these three banks in the proportion that their respective claims bear to the total fund; and to enter a decree against Charles H. Baumbaugh for all costs, with a proviso that, if they cannot be made out of him, then against each interpleader for the costs incurred by each.

All concur.

Petition for rehearing denied December 24, 1902.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

George H. EARLE, Jr., Receiver of Chestnut Street National Bank, *Plff. in Err.*,

v.

Susan CARSON.

(46 C. C. A. 498, 107 Fed. 639.)

A holder of stock in a national bank who, without knowledge or suspicion that the bank is either then insolvent or is likely to prove so, sells the stock, and who does everything reasonably possible to procure a transfer of the shares on the books of the bank, cannot be held liable as a stockholder, although the bank is declared insolvent before the transfer is effected, and both the bank and the purchaser were insolvent when the sale was made.

(March 12, 1901.)

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of defendant in an action brought to enforce the double liability of an alleged shareholder in an insolvent national bank. *Affirmed.*

The facts are stated in the opinion.

Argued before *Gray*, Circuit Judge, and *McPherson* and *Bradford*, District Judges.

Messrs. Asa W. Waters and *Charles Biddle*, for plaintiff in error:

The liability of the stockholder is a contractual one, made with the creditor at the time that his debt is contracted with the bank, and the obligation of the stockholder to pay, or to make good the debt to the creditor, attaches when the bank becomes insolvent.

U. S. Rev. Stat. § 5151, U. S. Comp. Stat. 1901, p. 3465; *Irons v. Manufacturers' Nat. Bank*, 21 Fed. 197; 2 *Morawetz*, Priv. Corp. § 870; *Hobart v. Johnson*, 19 Blatchf. 359, 8 Fed. 495; *Hawthorne v. Calef*, 2 Wall. 10, 17 L. ed. 776; *Lantry v. Wallace*, 38 C. C. A. 510, 97 Fed. 865; *Stuart v. Hayden*, 169 U. S. 8, 42 L. ed. 642, 18 Sup. Ct. Rep. 274; *Upton v. Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800.

A stockholder does not escape his liability by an assignment made to an insolvent person after the bank has become insolvent.

Stuart v. Hayden, 169 U. S. 9, 42 L. ed. 642, 18 Sup. Ct. Rep. 274; 1 *Morawetz*, Priv. Corp. § 166; *Germania Nat. Bank v. Case*, 99 U. S. 628, 25 L. ed. 448; *Brown v. Hitchcock*, 36 Ohio St. 607; *Wheeler v. Faurot*, 37 Ohio St. 26; *Mason v. Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Harpold v. Stobart*, 46 Ohio St. 397, 21 N. E. 637; *Boice v. Hodge*, 51 Ohio St. 236, 37 N. E. 265; *Herrick v. Wardwell*, 58 Ohio St. 294, 50 N. E. 903; *Wick Nat. Bank v. Union Nat. Bank*, 62 Ohio St. 446, 57 N. E. 320; *Rider v. Fritchey*, 49 Ohio St. 295, 15 L. R. A. 513, 30 N. E. 692; *Peter v. Union Mfg. Co.* 56 Ohio St. 181, 46 N. E. 894; *Norris v. Wrenschall*, 34 Md. 492; *Moss v. Oakley*, 2 Hill, 265; *Judson v. Rossie Galena Co.* 9 Paige, 598, 38

Am. Dec. 569; *McCullough v. Moss*, 5 Denio, 567; *Jackson v. Meek*, 87 Tenn. 69, 9 S. W. 225; *Voight v. Dregge*, 97 Mich. 322, 56 N. W. 557; *Cutting Packing Co. v. Packer's Exchange*, 86 Cal. 574, 10 L. R. A. 369, 25 Pac. 52; *Billings v. Robinson*, 28 Hun, 140.

It is the happening of the contingency against which the stockholders contracted to protect the creditor that makes the liability, not the knowledge of it.

Schalucky v. Field, 124 Ill. 617, 16 N. E. 904; *Aultman's Appeal*, 98 Pa. 505; *Stuart v. Hayden*, 18 C. C. A. 618, 36 U. S. App. 402, 72 Fed. 402; *Baker v. Reeves*, 85 Fed. 837; *Sauyer v. Hoag*, 17 Wall. 610, 21 L. ed. 731.

The burden of proof is upon the defendant to show that everything was done by her, "in such manner as may be prescribed in the by-laws or articles of association" (U. S. Rev. Stat. § 5139, U. S. Comp. Stat. 1901, p. 3461), that careful, prudent business men could reasonably do, in order to effect a transfer of her shares upon the books of the bank; and, to this end, the burden was upon her to either offer in evidence at the trial the by-laws or articles of association of the bank, or to show by competent evidence that the bank had neither by-laws nor articles of association upon the subject.

Morawetz, Priv. Corp. §§ 109, 174, 189; *Boisot*, By-laws, ed. 1892, chap. 3, ¶¶ 42, 43; *Matteson v. Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419; *Richmond v. Irons*, 121 U. S. 27, 58, 30 L. ed. 864, 874, 7 Sup. Ct. Rep. 788; *Webster v. Upton*, 91 U. S. 65, 71, 23 L. ed. 384, 388; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Moore v. Citizens' Nat. Bank*, 111 U. S. 156, 28 L. ed. 385, 4 Sup. Ct. Rep. 345; *Whitney v. Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61; *Earle v. Coyle*, 38 C. C. A. 226, 97 Fed. 410.

Mr. Richard C. Dale, for defendant in error:

When the certificate was delivered with a power of attorney, properly signed in blank, the seller had done everything in his power to do, except that he did not insist upon seeing the actual entries made in the transfer books of the bank.

Earle v. Coyle, 95 Fed. 99, 38 C. C. A. 226, 97 Fed. 410; *Whitney v. Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61; *Matteson v. Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419; *Snyder v. Foster*, 19 C. C. A. 406, 41 U. S. App. 95, 73 Fed. 136; *Hayes v. Shoemaker*, 39 Fed. 319; *Young v. McKay*, 50 Fed. 394.

The general knowledge, which every intelligent shareholder has, that the law imposes upon the national bank stockholders a double liability, will not render a sale of his shares fraudulent as to creditors when made in good faith, the seller having no knowledge or suspicion that the bank of which he is a shareholder is embarrassed or likely to become insolvent.

NOTE.—As to a corporation treating registered shareholders as actual owners of stock, see, in this series, *Campbell v. American Zylonite Co.* (N. Y.) 11 L. R. A. 596, 60 L. R. A.

Germania Nat. Bank v. Case, 99 U. S. 628, 25 L. ed. 448; *Bowden v. Johnson*, 107 U. S. 251, *sub nom. Adams v. Johnson*, 27 L. ed. 386, 2 Sup. Ct. Rep. 296; *Anderson v. Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525; *Johnston v. Laffin*, 103 U. S. 800, 26 L. ed. 532.

J. B. McPherson, District Judge, delivered the opinion of the court:

This suit is brought by the receiver of an insolvent national bank to enforce the double liability of a shareholder. The bank was closed and the receiver was appointed on December 23, 1897, and upon that day the name of the defendant appeared upon the official list of shareholders as the owner of 10 shares of the capital stock. *Prima facie*, therefore, she was liable for the assessment that was afterwards levied by the comptroller of the currency; but she met this apparent liability (successfully, as the verdict shows) by offering evidence at the trial to prove that on December 2d she had sold her shares in good faith, without knowledge or suspicion that the bank was either then insolvent, or was likely to prove insolvent, and that she had done everything that was reasonably possible to procure a transfer of the shares on the books of the bank to the purchaser. Under several decisions of the Federal courts, if the evidence established these facts, a complete defense was presented to the receiver's claim. *Whitney v. Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61; *Richmond v. Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788; *Earle v. Coyle*, 38 C. C. A. 226, 97 Fed. 410; *Matteson v. Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419. Recognizing the probability that the defense would be successful, the receiver attempted to reply to it by offering to prove in rebuttal that the bank was insolvent on December 2d as well as on December 23d, and that the purchaser of the shares was also insolvent at the time the sale was made to him. This evidence was objected to as immaterial, unless the receiver should offer to follow it by proof that the defendant had knowledge of the insolvency of the bank and of the insolvency of the purchaser; and, as the receiver was unable thus to follow the offer, the learned judge excluded the testimony. It should be noted that neither in the court below nor in this court was it contended that the evidence was offered upon the question of the defendant's good faith. Her ignorance of the insolvency and her good faith were conceded, and the receiver's purpose was merely to raise the question that is immediately to be stated and considered. Manifestly, if the evidence had been offered to affect the defendant's good faith, it would have been insufficient, without other evidence from which her knowledge of the bank's insolvency might fairly be inferred.

It is the exclusion of this rebuttal testimony that is complained of under the only assignments of error that need be discussed. The question presented is this: In what

sense does the double liability of a shareholder in a national bank become fixed when the bank becomes insolvent in fact? Is it either fixed absolutely, so that no transfer, in good faith or otherwise, to any purchaser whatever, can afterwards be made that will relieve the shareholder? Or is it so far fixed that no valid transfer can be made, even in good faith, if the purchaser be insolvent? The plaintiff in error has referred us to cases decided in several states under their respective constitutions and statutes that seem to support his contention concerning the nature and time of maturity of a shareholder's liability. These decisions hold that the liability is fixed, either absolutely or *sub modo*, by the fact of insolvency; but we do not discuss them, because the national banking act and the decisions of the Supreme Court of the United States have established a different rule in respect to shares in a national banking association. Section 5139, Rev. Stat., provides that such shares shall be transferred on the books of the bank as the by-laws may prescribe, and that "every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares." This provision has been so enlarged by the decisions already cited that a shareholder is enabled to rid himself of his rights and liabilities by less than a transfer in fact. He will satisfy this section if he is able to prove that he sold in good faith, and that he did everything that was reasonably possible to procure the proper formal transfer on the books of the association. There is no restriction in the banking act forbidding transfer after the bank has become insolvent, or forbidding transfer to an insolvent person at any time; and, if these restrictions on the right to sell are to be enforced, it is because they are imposed by the courts in obedience to considerations of public policy, or in accordance with the general principles of justice and fair dealing that are applied to test any given transaction, although no statute may have enacted these principles as rules of decision.

What answer, then, do the principles of justice and fair dealing lead us to give to the question now before the court? We think the answer should be this: As Congress has imposed no restriction on the right to sell, and as the duty to transfer has been held to be fulfilled by a proper, even if an unsuccessful, effort to transfer, the seller is bound simply to diligence, fairness, and good faith in the transaction. He is not bound at his peril to know that the bank is insolvent, or that the proposed purchaser of his shares is insolvent. He is bound to take notice of any fact that may reasonably put him on inquiry concerning the insolvency of the bank or of the purchaser, and to use diligently the means of knowledge at his disposal. If he knows, or has reasonable ground to believe, that the bank is insolvent, it would be a fraud if, with intent to evade his own liability, he should sell his shares, even to a solvent person; and both the re-

ceiver of the bank and the purchaser would find a court of equity ready to afford them proper redress. So, also, if with similar knowledge of the bank's insolvency, or with reasonable ground for belief, a shareholder should sell to a person whom he knew to be insolvent, this would be presumably misconduct of the same nature. Such a sale could rarely withstand attack by, or on behalf of, the persons injured; for the apparent inference of intent to evade the statutory liability would almost inevitably be drawn. But why should the unknown fact that the bank is insolvent destroy the statutory right of transfer, if the transfer is made in good faith? In our opinion, no principle of justice or fair dealing forbids such transfer, for by the very assumption the transfer is bona fide, and in ignorance of the bank's insolvency; and the seller is therefore seeking no unfair personal advantage, but is merely exercising innocently an apparent statutory right.

Neither, as we think, is the transfer under such circumstances forbidden by public policy. In the case of a transfer to a solvent purchaser, no consideration for the creditors of the bank demands that the sale be forbidden; for between two solvent persons it is of no importance to the creditors upon which person the assessment may be levied. If the transfer be made to an insolvent person, then, although the transaction may be in good faith, no doubt the creditors of the bank are injured; but, if it is sought to prevent the possibility of doing such an injury by a ruling that such transfers are invalid,—and such a ruling must rest upon the ground of public policy, and not upon the ground that the ignorant and innocent shareholder has violated any principle of justice or fair dealing,—we think it would be very difficult to apply the rule of policy consistently. The reason for such a decision could only be that, as the bank's creditors have, by the mere fact of the bank's insolvency, become entitled to enforce the double liability, a shareholder ought not to be allowed, even by an act done ignorantly and in good faith, to render a part of the creditors' security unavailable by a transfer to an insolvent person. We see no other ground on which the ruling could be sustained, and this ground seems to us unsatisfactory for the following reasons: First. The reason being that harm to the creditors should be prevented, an irresponsible shareholder ought to be permitted to transfer to another irresponsible person; for, in that event, the creditors would suffer no harm, and no reason would exist for restricting the statutory right to sell at will. Second. The reason, if sufficient, ought logically to be extended so as to strike down transfers to insolvent persons made while the bank was solvent, as well as to be applied to transfers made after it had become insolvent; for the same harm is done to creditors in the one case as in the other, and in both cases a withdrawal of the statutory security ought, upon the assumption, to be prevented. Third. The rule would, or at least might, involve inquiry into the sol-

veny of three persons,—the seller, the purchaser, and the bank; and the inconvenience of such an inquiry in each of many possible suits is entitled to weight in determining the applicability of the rule. Fourth. In every litigated case the question of the bank's solvency, at least at a particular date before its doors were closed, would be in issue; and, as this question is one of fact for the determination of a jury, it is readily conceivable that, either because the amount of evidence was not the same in every case, or because different juries were disposed to take different views of the same facts, there would be conflicting verdicts concerning the bank's solvency at substantially the same instant of time. Fifth. To apply such a rule would, in the language of defendant's counsel, "introduce into all transactions an element of uncertainty; for every transaction would be subject to review, even though made in good faith, if it subsequently proved that at the date when the transfer was made the bank, if then liquidated, would have proved insolvent, and that the transferee, if called upon to pay at that day all his debts, would have been unable to respond."

To our minds, these are reasons enough for hesitating to adopt the rule that has been urged upon us. It has no authority to support it, if we except a *dictum* in *Stuart v. Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274. In that case the principal point decided was that a fraudulent transfer of shares, made after the seller knew of the bank's insolvency, and made also for the very purpose of evading the statutory liability, was invalid against the creditors of the bank; and that the receiver could pursue the seller as if the attempted sale had not been made. The learned justice who delivered the opinion of the court, after discussing and deciding this point, went on to say: "If the bank be solvent at the time of the transfer,—that is, able to meet its existing contracts, debts, and engagements,—the motive with which the transfer is made is, of course, immaterial. But, if the bank be insolvent, the receiver may, at least, without suing the transferee and litigating the question of his liability, look to those shareholders who, knowing or having reason to know at the time that the bank was insolvent, got rid of their stock in order to escape the individual liability to which the statute subjected them. Whether—the bank being in fact insolvent—the transfer is liable to be treated as a shareholder in respect of its existing contracts, debts, and engagements, if he believed in good faith at the time of transfer that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed; although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible."

It is upon the italicized clause of this quotation that the plaintiff in error relies; but we think the clause is so obviously a remark by the way that it cannot possibly be taken as a serious decision of a point

which in the same breath the learned justice says "need not be discussed." It may also be true that the language is to be understood in the sense suggested by the brief of defendant's counsel. The suggestion is, in substance, this: The clause merely means that the seller may be treated as still a shareholder, if the transfer is to a person who is financially irresponsible; that is to say, from such a transfer the inference may be drawn, having due regard to the facts of the particular case, that the transaction was intended to be evasive, and in that event the seller will continue to be a shareholder even if he made a transfer out and out, with no secret arrangement that he was at some future time, or in some future contingency, to have the stock again, or to enjoy its profits, — in other words, even if he made such a

transfer as the English cases speak of as a transfer in good faith, the good faith consisting in the fact that the transfer is absolute, and without reservation. Whether this suggestion be correct, we have no means of knowing. The language of the court, however, is certainly a *dictum*; and if it means what the plaintiff in error declares it to mean, with great respect we must decline to follow it.

There is no need to discuss the assignments of error in detail. They present nothing that calls for further attention.

The judgment of the Circuit Court is affirmed.

Affirmed by Supreme Court of United States January 19, 1903.

ALABAMA SUPREME COURT.

William CLEGHORN, *Appt.*,
v.

WESTERN RAILWAY OF ALABAMA.

(184 Ala. 601.)

Erecting in or beside a highway a crane for delivering mail to passing trains, which, when the mail bag is strung upon it, is calculated to frighten horses of ordinary gentleness, is negligence which will render the railroad company liable to one who, in the exercise of ordinary care, is injured by the frightening thereby of the horse which he is driving, although the bag is actually placed in position by government employees.

(November 18, 1902.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Macon County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Plaintiff was driving a mule, hitched to a one-horse wagon, across defendant's railway, when the mule became frightened at a mail crane from which was suspended a mail bag, and started, violently throwing plaintiff into a ditch near the crossing, into which mule and wagon fell immediately afterward, striking plaintiff and seriously injuring him.

Further facts appear in the opinion.

Mr. Oscar S. Lewis for appellant.

Mr. George P. Harrison, for appellee:

The alleged act of the defendant, even if negligent, was not the proximate cause of the injury. Between it and the injury in-

tervened the act of the United States government in placing the mail bag upon the crane.

Louisville & N. R. Co. v. Milliken, 21 Ky. L. Rep. 489, 51 S. W. 796; *Chicago G. W. R. Co. v. Price*, 38 C. C. A. 239, 97 Fed. 423; *McGahan v. Indianapolis Natural Gas Co.* 140 Ind. 335, 29 L. R. A. 355, 37 N. E. 601; *Leavitt v. Bangor & A. R. Co.* 89 Me. 509, 36 L. R. A. 382, 36 Atl. 998; *Western R. Co. v. Mutch*, 97 Ala. 196, 21 L. R. A. 316, 11 So. 894; *Wharton, Neg.* ¶ 75; *Shearm. & Redf. Neg.* ¶ 26; 5 Am. & Eng. Enc. Law, p. 5; *Stanton v. Louisville & N. R. Co.* 91 Ala. 385, 8 So. 798.

McClellan, Ch. J., delivered the opinion of the court:

Mail cranes at flag stations are necessary to the business of railway companies carrying the mails, but it cannot be said to be necessary for such companies to erect such cranes in or so near to public roads crossing their tracks as that the cranes or their use would obstruct the use of highways by the public. To the contrary, in such erections, as well as all others, railways must have due regard to the rights of the public in adjacent highways; and if, failing in such regard, a crane is erected in or so near to a public road that a traveler, without contributing fault on his part, sustains injuries by reason of its location, the railway is liable to him in damages, as it would be for any other unnecessary and wrongful obstruction of the highway. If it may be said that a mail crane is in itself a structure of such ungainly, not to say hideous, mien as to be calculated to frighten a horse of ordinary gentleness, and one is

NOTE.—As to liability of railroad company for injuries caused to person near track by breaking of mail crane, see, in this series, *Poling v. Ohio River R. Co.* (W. Va.) 24 L. R. A. 215.

As to liability for negligence of mail clerk in throwing mail bag from train, see *Galloway v. Chicago, M. & St. P. R. Co.* (Minn.) 23 L. R. A. 60 L. R. A.

442; *Pennsylvania R. Co. v. Russ* (N. J. L.) 26 L. R. A. 283; *Shaw v. Chicago & G. T. R. Co.* (Mich.) 49 L. R. A. 308.

As to liability for loss of package in mail through negligence of railway servants, see *Boston Ins. Co. v. Chicago, R. I. & P. R. Co.* (Iowa) 59 L. R. A. 796.

erected immediately upon the side of a public road, and such a horse, in being driven by, becomes frightened and unmanageable, and hurts his driver, the latter has his action on the case against the railway company. But suppose such crane, so located, in and of its naked self is not calculated to frighten gentle horses, but becomes an object of terror to them—a scarecrow, or, more accurately, a scarehorse—when a mail bag is suspended upon it, and in conjunction with such bag, and that while the crane is thus being put to its intended uses a horse of ordinary gentleness is driven along the road, and becomes frightened at the crane and its burden, and runs away, or springs aside or backs into a ditch, and hurts the driver,—in such case can the driver recover against the railway company as upon negligence for erecting and having the crane so near to the highway, contemplating and intending this terrifying use of it? In determining this question, it is to be assumed and borne in mind that damages are not claimed for the act of putting the bag on the crane, and that the bag is in fact strung onto the crane, not by the railway, but presumably by an employee of the postal service. But it is also not to be lost sight of that it is the railway company whose business it is to get that bag at that station and carry it forward; that the postal department of the government is not concerned as to how the carrier gets the bag, but only that the bag is got by it and carried; that the crane is erected by the company to facilitate the accomplishment of a duty and obligation resting on it; and that the government puts the bag on the crane to the end that the railway company may discharge its duty with the greatest ease to itself, by taking the bag on without stopping its train. The question thus presented is one of some nicety and difficulty. It is,

moreover, *res integra*, so far as we are advised. Our opinion upon it, however, is that the railway company would be liable. By the erection of the crane for its own purpose of having mail bags strung upon it, the company assumes responsibility for injuries resulting from the structure while and in consequence of its being in the use intended, if it has been guilty of negligence in erecting the crane too near a public road, and the crane, with its burden, is an object calculated to frighten gentle horses. In such case the negligent erection of the crane, in the contemplation and with the intention that it shall be used by others for the benefit of the company in a way which is calculated to frighten domestic animals and cause them to injure their owners, is the efficient and proximate cause of an injury resulting from the position and intended use of the crane. Having in mind the purposes of the erection, and the fact that it will inevitably be put to the intended uses, there is, we think, an unbroken chain of causation from the erection of the crane at the side of a highway, and the fright of a passing horse, produced by the presence there of the crane, with the mail bag upon it. The complaint in this case makes a case, under these views of the law, and the court erred in sustaining the demurrer to it. We may not be impressed with the notion that such a structure, with a mail bag on it, is calculated to disturb the equanimity and frighten a horse of ordinary gentleness; but it is alleged to be in this complaint, and that question is one for the jury.

The judgment for the defendant must be reversed, as also the judgment sustaining the demurrer to the complaint as amended. A judgment will be here entered overruling the demurrer and remanding the cause.

CALIFORNIA SUPREME COURT.

PEOPLE of the State of California, *Resp't.*,
v.

James BURNS, *Appt.*

(.....Cal.....)

1. An assault with intent to commit a robbery may be prosecuted as an attempt to commit robbery.
2. A statute making the penalty of an attempt one half that prescribed for the commission of the offense is void for uncertainty in cases where the penalty for the offense is imprisonment for life.

On Rehearing.

3. The offense of attempt to commit robbery is created by a statute providing that every person who attempts to commit any crime, but fails, is punishable.

NOTE.—As to effect of uncertainty of a sentence upon its validity, see, in this series, *Howard v. United States* (C. C. App. 6th C.) 34 L. R. A. 509, and *Murphy v. Com.* (Mass.) 43 L. R. A. 154.

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4. Under statutes fixing the punishment for robbery at imprisonment for not less than one year, and permitting the court, in its discretion, to sentence the offender to imprisonment during his natural life, and making the punishment for an attempt, imprisonment for a term not exceeding one half the longest term of imprisonment prescribed upon conviction of the offense so attempted,—an attempt to commit robbery may be punished by imprisonment for a definite term of years.

5. Conviction of attempt to commit robbery after conviction of prior crimes punishable by imprisonment in the state prison does not require imposition of punishment under a statute providing for life imprisonment after such conviction of one guilty of a crime which upon a first conviction would be punishable, at the discretion of the court, by imprisonment for life, although one convicted of robbery under such circumstances would be within the terms of such statute, where there was no discretion to pun-

ish one guilty of an attempt to commit robbery by imprisonment for life.

(May 29, 1902.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco convicting him of an attempt to commit robbery. *Reversed.*

The facts are stated in the opinions.

Messrs. Abraham Ruef and Fabius T. Finch for appellant.

Messrs. Tiley L. Ford, Attorney General, and A. A. Moore, Jr., for respondent:

All assaults to commit felonies can be prosecuted as attempts.

People v. Gardner, 98 Cal. 127, 32 Pac. 880; *People v. Lee Kong*, 95 Cal. 666, 17 L. R. A. 626, 30 Pac. 800.

The information charged the crime of robbery, committed both by force and fear; and where the statute enumerates several acts disjunctively, which separately or together shall constitute an offense, the indictment may charge one or both of them, provided, if it charges both, it does so conjunctively.

People v. O'Brien, 130 Cal. 1, 62 Pac. 297; *People v. Thompson*, 111 Cal. 243, 43 Pac. 748.

The jury in the case at bar had a right to find the defendant guilty of robbery, or attempt to commit robbery.

People v. Gardner, 98 Cal. 127, 32 Pac. 880; *People v. Vann*, 129 Cal. 118, 61 Pac. 776; *People v. Lee Kong*, 95 Cal. 666, 17 L. R. A. 626, 30 Pac. 800; *People v. Barnhart*, 59 Cal. 381.

In view of the fact that the defendant could well have been convicted of robbery, his substantial rights were not injuriously affected, to the extent to warrant interference at this time.

People v. Muhlnher, 115 Cal. 303, 47 Pac. 128; *People v. Maroney*, 109 Cal. 277, 41 Pac. 1097; *People v. Lowen*, 109 Cal. 381, 42 Pac. 32; *People v. Jefferson*, 52 Cal. 452.

The sentence was proper.

People v. Gardner, 98 Cal. 127, 32 Pac. 880; *State v. Berzaman*, 10 Wash. 277, 38 Pac. 1037; *Re De Camp*, 15 Utah, 158, 49 Pac. 823; *People v. Muhlnher*, 115 Cal. 303, 47 Pac. 128.

Mr. Lewis F. Byington also for respondent.

Garoutte, J., delivered the opinion of the court:

The defendant has been convicted of the crime of attempt to commit robbery. He also pleaded guilty to certain prior convictions charged against him in the information.

It is first claimed that there is no such crime in this state as "attempt to commit robbery," but there is nothing in this contention. The Penal Code declares (§ 664): "Every person who attempts to commit any crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable." etc. It is here insisted that de-

fendant, if guilty under the evidence, should have been convicted of the crime of assault with intent to commit robbery. Yet this claim is made in the face of the fact that the court, in *People v. Gardner*, 98 Cal. 127, 32 Pac. 880, has declared "that all assaults to commit felonies can be prosecuted as attempts." This proposition would seem to be self-evident, for the single difference made by the statute between an assault and an attempt is that in the former there is an additional element of present ability. Necessarily, every assault includes an attempt. This question has been considered at some length in *People v. Lee Kong*, 95 Cal. 666, 17 L. R. A. 626, 30 Pac. 800, and the court now repeats what is there said: "It is not the purpose of the court to draw nice distinctions between an attempt to commit an offense and an assault with intent to commit the offense, for such distinctions could only have the effect to favor the escape of criminals from their just deservings. And in view of the fact that all assaults to commit felonies can be prosecuted as attempts, we can see no objection in carrying the discussion of the subject to any greater lengths."

It is next insisted that the penalty provided by the statute to be enforced against a defendant convicted of an attempt to commit robbery, prior convictions having been charged and proved against him, is absolutely void, as being too vague and indefinite to be enforced by the courts. And this contention presents the important question in the case. By virtue of the provisions of the Penal Code found in §§ 213, 664, and 667, if this defendant had been convicted of robbery, then his conviction, in conjunction with the prior convictions charged and proved against him, would have demanded that the court fix his punishment at imprisonment for life. In such a case there would be no range for the exercise of discretion. The penalty would be life imprisonment, no more and no less. This appears in the record to be conceded by the trial judge, the attorney general, and counsel for defendant. Such being the condition of the law, it is then conceded by counsel upon both sides that the punishment for an attempt to commit robbery, coupled with prior convictions, must necessarily be one half of the penalty provided by the law upon a conviction for robbery, coupled with prior convictions, that is, one half of life. Now, the learned judge of the trial court, by reason of this anomalous condition of the law, was at once surrounded by serious difficulties when the time arrived to render judgment, for that judgment had to be one covering one half of the period of defendant's life; and, while death is said to be certain, life, upon the contrary, is most uncertain. The trial court, by reason of the peculiar state of the law, and for the purpose of determining the prospective life of defendant, consulted certain mortality tables used by life insurance companies in the conduct of their business, and, taking into consideration defendant's present age (his sound physical

condition being an admitted fact), concluded that the remainder of his natural life would amount to thirty-eight years, and thereupon sentenced him to nineteen years in the state prison. This court is well satisfied that the practice here followed cannot be sanctioned. The trial court fixed the penalty upon the basis of an average life, and sentenced him to imprisonment for one half of the period of an average life; yet the law declares the imprisonment should be for a period of one half of the defendant's life. These mortality tables indicate averages, and that fact alone proves that a variable proportion of the men coming within any particular class die before the age fixed as the average, and the remainder die after the age so fixed. As to the particular period of time covering the balance of defendant's life, the court knew nothing, and, in the nature of things, could know nothing. Hence the period of nineteen years fixed as a penalty is based upon mere conjecture, and the judgment following it cannot be upheld. It is evident that the penalty prescribed by the law, namely, one half of life, as a punishment for a crime of the class here involved, is so vague and indefinite as to be impossible of enforcement; and the statute providing a penalty of that kind is void for that reason. The case of *People v. Gardner*, 98 Cal. 127, 32 Pac. 880, is not authority for the prosecution in this case, for in that case a judgment of life imprisonment, in terms, for the crime of rape, was not the only penalty that could have been adjudged against the defendant. Here it is conceded to the contrary. The confusion in the law in this class of cases arises largely by reason of the provisions of § 671 of the Penal Code, which authorize in certain classes of felony—as, for example, robbery—a penalty in terms of life imprisonment. That section, when considered in connection with the provisions of the Code bearing upon penalties therein provided in cases of attempts to commit felonies, coupled with prior convictions, leaves the law in this respect clothed in the garb of an intricate Chinese puzzle.

It becomes unnecessary to consider the remaining questions raised upon this appeal. For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: **Harrison, J.; Van Dyke, J.**

A rehearing in banc having been granted, and the cause reargued, **McFarland, J.**, on December 23, 1902, delivered the opinion of the court in response thereto:

The defendant was charged in the information with the crime of robbery, and the verdict was, "Guilty of an attempt to commit robbery." The information also charged two prior convictions,—one of petit larceny, and the other of a felony. The defendant pleaded "Not guilty" to the charge set out in the information, and admitted the prior convictions. The judgment was imprisonment in the state prison for a term of nineteen years, and defendant appealed.

peals from the judgment, and from an order denying his motion for a new trial.

We do not find in the record any valid reason for reversing the order denying a new trial.

The contention of appellant that there is no such crime in this state as an attempt to commit robbery is not maintainable. It was held otherwise in *People v. Lee Kong*, 95 Cal. 666, 17 L. R. A. 626, 30 Pac. 800, and *People v. Gardner*, 98 Cal. 127, 32 Pac. 880. Section 664 of the Penal Code clearly creates such crime.

Instruction 33, upon the subject of reasonable doubt and moral certainty, to which appellant objects, is substantially the same as the instruction on that subject reviewed by this court in the recent case of *People v. Huntington*, 70 Pac. 284, and it was held in the latter case that the giving of such instruction was not a ground for reversal.

There is a part of Instruction 17 which at first blush gives some plausibility to appellant's objection to it. Appellant contends that by this instruction the jury was substantially told that they could not convict him of only a simple assault unless it appeared beyond a reasonable doubt that such assault had not been made with a felonious intent to commit robbery or grand larceny. Of course, such an instruction would have been erroneous. But this is clearly not the meaning of the instruction as given. It merely tells the jury that a verdict of guilty of a simple assault would be a finding that such assault had been shown beyond a reasonable doubt, and that—as the instruction proceeds—"it had not been shown to a moral certainty and beyond a reasonable doubt either that such assault had been made in conjunction with a specific felonious intent to commit either robbery or grand larceny, as herein defined, or that a felonious attempt had been made to commit either of those offenses, as herein defined." Taking the instruction as a whole, it is clear that the jury could not have been misled by it.

The general contention that the charge of the court was so much in the nature of an argument against the appellant as to call for a reversal cannot, we think, be maintained. There are no other points arising on the appeal from the order denying the new trial which call for special notice.

We think, however, that the judgment was rendered upon a wrong theory, under which the court below felt compelled to sentence appellant to a longer term of imprisonment than, as appears in the record, it otherwise would have done; and it would therefore be unjust to allow the judgment to stand. After the return of the verdict the court announced its conclusion that the only punishment that could be inflicted upon appellant was imprisonment in the state prison for one half of his natural life; and thereupon, under objection and exception of appellant, it was shown that under the American Tables of Mortality the expectation of life of appellant was thirty-eight years, and judgment was rendered for

the exact half of that time, to wit, nineteen years. We are satisfied that, for obvious reasons, a court, for the purpose of a judgment of imprisonment in a criminal case, cannot take as a basis for such judgment the expectation of life upon which insurance companies calculate their policies, and which is founded on what vital statistics show to be the average expectation. What the actual life of a particular person would be, and what would be the half of it, cannot be known; and, if one half of the life of the appellant were the only punishment prescribed for the crime of which he was convicted, such punishment would be too vague and indefinite to be possible of enforcement, and no judgment could be rendered against him, but we think that under the decision in *People v. Gardner*, 98 Cal. 127, 32 Pac. 880, the appellant is punishable for a definite period of years. Penal Code, § 213, provides that "robbery is punishable by imprisonment in the state prison not less than one year;" and by § 671 the court in such case "may, in its discretion, sentence such offender to imprisonment during his natural life." Section 664 provides that a person who attempts to commit a crime, but fails, is punishable as follows: "(1) If the offense so attempted is punishable by imprisonment in the state prison for five years, or more, or by imprisonment in a county jail, the person guilty of such attempt is punishable by imprisonment in the state prison, or in a county jail, as the case may be, for a term not exceeding one half the longest term of imprisonment prescribed upon a conviction of the offense so attempted." In *People v. Gardner*, 98 Cal. 127, 32 Pac. 880, the appellant had been convicted of an attempt to commit rape, and rape is punishable by imprisonment in the state prison not less than five years, so that the same law applies to an attempt to commit rape as to an attempt to commit robbery. In the *Gardner Case* the appellant had been sentenced to five years, and it was contended that, imprisonment for life being the "longest term" prescribed as punishment for the completed crime of rape, an attempt to commit that crime must be punished, if at all, for one half of life, which being impossible of calculation, there was no punishment prescribed for such offense, and no judgment whatever could be rendered. But the court said: "This reasoning is ingenious, but not sound," and held that a defendant in such case could be legally sentenced for a definite term of years. No doubt, the question is fairly a debatable one; but, after a careful consideration of the subject, we see no convincing reason for overruling *People v. Gardner*, and adhere to the rule declared in that case.

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It is argued by appellant—and it seems to have been so considered by the court—that § 667 of the Penal Code determines his view to be correct, but that section has no applicability to the case at bar. It provides as follows: "Every person who, having been convicted of petit larceny, or of an attempt to commit an offense which, if perpetrated, would be punished by imprisonment in the state prison, commits a crime after such conviction, is punishable as follows: (1) If the subsequent offense is such that, upon a first conviction, the offender would be punishable by imprisonment in the state prison for life, at the discretion of the court, such person is punishable by imprisonment in such prison during life." Now, in the case at bar the "subsequent offense" was only an attempt to commit robbery, and was not, therefore, an offense which upon a first conviction "would be punishable by imprisonment in the state prison for life, at the discretion of the court." Said subdivision 1 of this section applies only to a case where the "subsequent conviction" is for the completed crime of robbery or rape, or some other offense for a conviction of which, in the absence of any prior conviction, the court, in its discretion, might impose a life imprisonment; and in such case only is the discretion of the court taken away, and the penalty of life imprisonment absolutely prescribed. With respect to the matter of a prior conviction, which frequently causes embarrassing questions, the case at bar is governed by § 666, Penal Code, which provides as follows: "Every person who, having been convicted of any offense punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable therefor as follows: (1) If the offense of which such person is subsequently convicted is such that upon a first conviction, an offender would be punishable by imprisonment in the state prison for any term exceeding five years, such person is punishable by imprisonment in the state prison not less than ten years."

The order denying the motion for a new trial is affirmed. The judgment is reversed, and the cause remanded, with instructions to the superior court to render a judgment sentencing the appellant to imprisonment in the state prison for such a term of years as, in its opinion, would be a just and fair punishment,—not less than ten years,—if there be no withdrawal of the prior convictions.

We concur: **VanDyke, J.; Garoutte, J.; Harrison, J.**

GEORGIA SUPREME COURT.

Laura SUMPTER *et al.*, Pliffs. in Err.,
v.

S. S. CARTER.

(115 Ga. 893.)

*A testator, who died in 1864, left a will, in which, so far as material to this case, he disposed of his estate as follows: "I give, bequeath, and devise to my beloved wife . . . all of my property and effects . . . during her natural life or widowhood, . . . and, in case of my said beloved wife not intermarrying, then in that event my will is that at her death that my whole estate be then equally divided between my six children, to wit, my five daughters [naming them] and my son [naming him]. My said effects thus going into the hands of my said daughters not to be subject to the control of any husband, but the same to belong to my said daughters and their children. And in case either of my said six children should depart this life without leaving issue, then their part of my estate to be equally divided between my other children, to be controlled in the same way as first above directed." Neither of the testator's children had married when he died, and his widow never married again. *Held:*

(1) That, the intention of the testator is to be followed, unless clearly in conflict with the law existing at his death, and this intention is to be ascertained in the light of the whole will, and the attendant circumstances of the testator; and where there are devising clauses, especially of a remainder, they are to operate so as to vest the estate indefeasibly at the earliest possible period of time.

(2) That upon the death of the testator each of his children took a vested remainder interest, subject to be divested in favor of the testator's other children, as substituted devisees and remaindermen, upon such child dying during the existence of the life tenancy, without leaving a child who survived the life tenant; that, the son having died before the life tenant, leaving children who survived the latter, his remainder share became indefeasible upon the death of such life tenant; and that, therefore, under a deed executed during the life tenancy, by which the son conveyed to another all his interest in described realty, which belonged to the testator at the time of his death, the grantee, upon the death of the life tenant, became indefeasibly entitled to the son's remainder share therein.

(3) That children of a daughter of the testator, who, with her, survived the life tenant, were entitled to share, in common with their mother, in the remainder interest, which, upon the death of the testator, vested in the mother, subject, however, to open and let in such children; and that, hence, a deed executed by a daughter of the testator, which conveyed to another all her interest in described realty which belonged to

the testator at his death, did not affect the interests therein of her children who were in life when the life tenant died.

(April 1, 1902.)

ERROR to the Superior Court for Hall County to review a judgment construing the will of John M. Carter, deceased. *Reversed.*

The facts are stated in the opinion.

Mr. H. H. Dean, for plaintiffs in error:

It is clearly manifest that the testator intended to create a life estate *in presenti* in his widow, the remainder to be in abeyance until her death, provided she remained a widow, and that he intended that the estate should remain intact until the death of the widow, and then be equally divided among his children, and that that portion going into the hands of his daughters should not be subject to the control of any husband, but should belong to his daughters and their children; and the manifest intention of the testator was that it was to be divided among such children of his daughters as would be in life at the death of his wife.

Toole v. Perry, 80 Ga. 681, 7 S. E. 118.

Messrs. Albert & Hughes also for plaintiffs in error.

Mr. H. H. Perry, for defendant in error:

The six children each took a vested remainder in fee, subject to be defeated if they died without leaving issue, and the plaintiffs, not being *in esse* at testator's death, took no interest either as tenants in common or in remainder.

Lofton v. Murchison, 80 Ga. 391, 7 S. E. 322; *Hollis v. Lawton*, 107 Ga. 105, 32 S. E. 846; *Baird v. Brookin*, 86 Ga. 713, 12 L. R. A. 157, 12 S. E. 981; *Estill v. Beers*, 82 Ga. 612, 9 S. E. 596; *Ewing v. Shropshire*, 80 Ga. 382, 7 S. E. 554.

There must be apt words to indicate an intention to postpone the full effect of a devise.

Brady v. Walters, 55 Ga. 25; *Boyd v. England*, 56 Ga. 598; *Butler v. Ralston*, 69 Ga. 488.

A will takes effect at testator's death.

Ga. Code, 3257; *Bailey v. Ross*, 66 Ga. 364; 29 Am. & Eng. Enc. Law, p. 447; 2 Jarman, Wills, pp. 406, 407.

The mere use of the word "children" when none are *in esse* is not sufficient to postpone the full effect of a will, and cause the estate to open for children born after.

Baird v. Brookin, 86 Ga. 713, 12 L. R. A. 157, 12 S. E. 981.

The word "children" when there are none *in esse* is a mere word of inheritance, and carries no more significance than the word "heirs."

Ga. Code, § 3085; *Ewing v. Shropshire*, 80 Ga. 389, 7 S. E. 554; *Wilkerson v. Clark*, 80 Ga. 373, 7 S. E. 319.

There being nothing in this will to show an intention to limit the children's interest to a life estate, they take an absolute estate,

*Headnotes by FISH, J.

NOTE.—For another Georgia case in this series discussing at some length the question of estates tail, see *Herts v. Abrahams* (Ga.) 50 L. R. A. 361.
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and, in the absence of express words, no extrinsic facts can be urged to raise an ambiguity, or in any way vary or cut down the interest they take.

Gillespie v. Schuman, 62 Ga. 256; *Felton v. Hill*, 41 Ga. 569; *Fraser v. Dillon*, 78 Ga. 475, 3 S. E. 695.

The provision for a division of the property does not postpone the vesting.

Mathews v. Paradise, 74 Ga. 523; *Hollifield v. Stell*, 17 Ga. 280.

Even the direction to sell and divide the proceeds does not.

Leguin v. McRee, 79 Ga. 430, 4 S. E. 863; *DeVaughn v. McLeroy*, 82 Ga. 687, 10 S. E. 211.

The provision that the widow may marry and then take a child's part absolutely does not make the remainder in any way contingent, or postpone vesting.

Bull v. Walker, 71 Ga. 203; *Vance v. Crawford*, 4 Ga. 445; *Hills v. Barnard*, 152 Mass. 67, 9 L. R. A. 213, 25 N. E. 96; *Pennington v. Pennington*, 70 Md. 418, 3 L. R. A. 817, 17 Atl. 329; *Myers v. Adler*, 6 Mackey, 515, 1 L. R. A. 435; 29 Am. Eng. Enc. Law, p. 447; *McDonald v. Taylor*, 107 Ga. 43, 32 S. E. 879; *Gibson v. Hardaway*, 63 Ga. 370.

But, even if contingent in any sense, the contingency being as to the event, the devisees could dispose of their interest.

Collins v. Smith, 105 Ga. 525, 31 S. E. 449.

All of the daughters were living, and had issue living, at the death of the life tenant, and Sanders Taylor, who had died before, left children living; so the children of testator simply took a vested remainder in fee, subject to be divested if they died before the life tenant without issue. All having issue, their title became absolute.

Stancil v. Kenau, 35 Ga. 103; *Bailey v. Ross*, 66 Ga. 354; *Doty v. Wray*, 66 Ga. 153; *Taylor v. Meador*, 66 Ga. 230.

Sanders Taylor Carter, having a vested remainder in fee, had an absolute right to dispose of it, as well as the five daughters, and, they having all sold to defendant, the plaintiffs have no interest whatever by remainder or otherwise.

Chemning v. Shumate, 106 Ga. 751, 32 S. E. 544; *Daniel v. Daniel*, 102 Ga. 181, 28 S. E. 167; *Matthews v. Hudson*, 81 Ga. 120, 7 S. E. 286; *Gibson v. Hardaway*, 68 Ga. 370; *Harris v. Smith*, 16 Ga. 558; *Hertz v. Abrahams*, 110 Ga. 707, 50 L. R. A. 361, 36 S. E. 409; *Burton v. Black*, 30 Ga. 638.

On petition for rehearing.

The decision is contrary to the established rule of property in § 3085 of the Code. This declares without qualification that gifts to one "and her children" convey an absolute estate.

Ga. Code, § 3085.

This section applies to a remainder.

Ellis v. Gray, 110 Ga. 611, 36 S. E. 97; *Marchman v. Todd*, 15 Ga. 29; *Lookwood's Appeal*, 55 Conn. 165, 10 Atl. 517; *Williams v. Duncan*, 92 Ky. 125, 17 S. W. 330; *Haldeman v. Haldeman*, 40 Pa. 29, 60 L. R. A.

Judges should not alter a rule of property.

Choice v. Marshall, 1 Ga. 106; 1 Bl. Com. pp. 70, 71; *Gray v. Gray*, 20 Ga. 831; *Caruthers v. Bailey*, 3 Ga. 110.

If the tenant in tail has no issue at the time mentioned, the devise over takes effect; if otherwise, the devise over is defeated, notwithstanding a subsequent failure of issue.

Lyon v. Mitchell, 1 Madd. 467; *Hutchinson v. Stephens*, 1 Keen, 240; *Broadhurst v. Morris*, 2 Barn. & Ad. 1; *Wilkerson v. Clark*, 80 Ga. 373, 7 S. E. 319; *Prine v. Mapp*, 80 Ga. 137, 5 S. E. 66; *Gray v. Gray*, 20 Ga. 804.

A direct devise operating fully at the death of testator would only take in such as are *in esse* at that time.

29 Am. & Eng. Enc. Law, p. 410; 2 Jarman, Wills, 702; 2 Wms. Exrs. 1172.

In order to vary the interests of the heir at law, there must be some express and clear words.

Fraser v. Dillon, 78 Ga. 475, 2 S. E. 695; *Gillespie v. Schuman*, 62 Ga. 256; *Felton v. Hill*, 41 Ga. 569; 2 Jarman, Wills, p. 112.

The mere use of the word "children" does not have this effect.

Robert v. West, 15 Ga. 124; *Williams v. Duncan*, 92 Ky. 125, 17 S. W. 330; *Lookwood's Appeal*, 55 Conn. 165, 10 Atl. 517; *Haldeman v. Haldeman*, 40 Pa. 29.

Estates ought not only to be construed as vesting as soon as possible, but as vesting absolutely and unconditionally.

Bailey v. Ross, 66 Ga. 364; *Shipp v. Gibbs*, 88 Ga. 184, 14 S. E. 196; *Wiley v. Smith*, 3 Ga. 562; *Ewing v. Shropshire*, 80 Ga. 384, 7 S. E. 554; 29 Am. & Eng. Enc. Law, p. 468; *McArthur v. Scott*, 113 U. S. 378, 28 L. ed. 1027, 5 Sup. Ct. Rep. 652.

Fish, J., delivered the opinion of the court:

The will of John M. Carter, Sr., who was the grandfather of the plaintiffs in error, was executed August 26, 1863, and is, so far as material to this case, as follows: "I give, bequeath, and devise to my beloved wife, Amelia Carter, all my property and effects, during her natural life or widowhood . . . and, in case of my said beloved wife not intermarrying, then in that event my will is that at her death my whole estate be then equally divided between my six children, to wit, my five daughters, Lucinda, Almada, Sarah Elizabeth, Teresa, and Thena Alieva, and my son, Sanders Taylor Carter. My said effects thus going into the hands of my said daughters not to be subject to the control of any husband, but the same to belong to my said daughters and their children. And in case either of my said six children should depart this life without leaving issue, then their part of my estate to be equally divided between my other children, to be controlled in the same way as first above directed." The testator died in the year 1864. His wife, the life tenant, died in 1898, without having intermarried. The son executed a deed to his interest in certain described land which belonged to the testator

at the time of his death to the defendant in error, and died before the life tenant, leaving children surviving her. The five daughters, on the same day the son executed his deed, also made deeds conveying all of their interests in the same property to the defendant in error, and each survived the life tenant, with children surviving her, born after the testator's death. Plaintiffs in error brought an equitable petition against the defendant in error, praying for a construction of the will of their grandfather, John M. Carter, and for a joint and several recovery of whatever interests they were entitled to under the will in this land, conveyed by their respective parents to the defendant in error, and that the land be sold, and the proceeds be partitioned between the different owners thereof according to their respective interests therein. The petition, after amendment, was dismissed on demurrer, the court holding that none of the plaintiffs were entitled to recover under the allegations of the petition. To this ruling the plaintiffs excepted.

1. In construing wills, as they rarely use exactly the same language, each case is to be determined on its own merits (*Cook v. Weaver*, 12 Ga. 47; *Olmstead v. Dunn*, 72 Ga. 850-857), and the intention of the testator is to be diligently sought for and followed, if consistent with law (Civil Code, § 3324; *Usry v. Hobbs*, 58 Ga. 33; *Bailey v. Ross*, 66 Ga. 363, 364; *Morton v. Murrell*, 68 Ga. 145; *Hudgens v. Wilkins*, 77 Ga. 556). This law is that which existed at the death of the testator (*Hertz v. Abrahams*, 110 Ga. 707, 50 L. R. A. 361, 36 S. E. 409), and his intention only yields to the law when it clearly and decidedly conflicts therewith (*Williams v. McIntyre*, 8 Ga. 37). The intention of the testator must be gathered from the whole will. *Edmondson v. Dyson*, 2 Ga. 312; *Benton v. Patterson*, 8 Ga. 151; *Cook v. Weaver*, 12 Ga. 47; *Robert v. West*, 15 Ga. 123 (4); *Felton v. Hill*, 41 Ga. 554 (2); *Tennille v. Phelps*, 49 Ga. 540; *Olmstead v. Dunn*, 72 Ga. 850-857; *Gaboury v. McGovern*, 74 Ga. 140. All the attendant circumstances of the testator and his family are to be considered. *Cook v. Weaver*, 12 Ga. 47; *Williams v. McIntyre*, 8 Ga. 37; *Tennille v. Phelps*, 49 Ga. 540; *Olmstead v. Dunn*, 72 Ga. 850-857. And all divesting clauses, especially as to remainders, are to be strictly construed so as to vest the estate absolutely at the earliest possible period of time. 29 Am. & Eng. Enc. Law, pp. 467, 468, note 2; *Bailey v. Ross*, 66 Ga. 364.

2. The words of the testator devising the remainder: "In case of my said beloved wife not intermarrying, then in that event my will is that at her death my whole estate be then equally divided between my six children, to wit, my five daughters, Lucinda, Almeda, Sarah Elizabeth, Teresa, and Thelma Alieva, and my son, Sanders Taylor Carter,"—standing alone, would undoubtedly give an absolute or indefeasible estate in remainder to each of the said children, which would vest in interest at the testator's death and in possession at the life tenant's death 60 L. R. A.

(*Shipp v. Gibbs*, 88 Ga. 184, 14 S. E. 196); and the remainder share of a child who should die before the life tenant would descend to that child's heirs at law, whoever they might be (Civil Code, § 3101), or vest in such child's assigns by his or her deed thereto, made during the life tenancy (Id. § 3601). And the superadded words of the testator: "And in case either of my said six children should depart this life without leaving issue, then their part in my estate to be equally divided between my other children,"—do not change the vested remainder, previously and explicitly given to each child, into a contingent remainder to only those children of the testator who survive the life tenant, but merely designate the contingent event upon which such remainder to each child may become divested prior to the time of its vesting in possession at the period of distribution, namely, at the death of the life tenant, in favor of the testator's other children and remaindermen then living as substituted devisees. When we bear in mind that the entire estate given in remainder to the testator's six children was to be equally divided among them at the death of the life tenant, and that each child's vested remainder interest by subsequent words was simply made defeasible, upon the mere contingency of such child dying without leaving issue, in favor of the others as survivors, we then have the key to the intention of the testator, which is clearer than in devises to A, and upon his death to B, C, and D, and the survivors of them. The dying of a remainderman in the case in hand without leaving issue—which is the sole contingency upon which such remainderman's vested share otherwise distributable to him or her at the death of the life tenant is to be divested—cannot be referred to a death before the testator, whereby the whole remainder is to vest in the other children and remaindermen as survivors at his death, because he fixed a later period, namely, at the death of the life tenant, for the distribution or vesting in possession of his whole estate among the remaindermen then entitled indefeasibly; and as the time when his "other children" and remaindermen, as survivors, were to be ascertained to take the share of a child dying previously without leaving issue living at the life tenant's death, and because the life tenant, who was not incapacitated from taking the estate given to her, neither died nor renounced her life interest before the testator's death, which events alone would have accelerated the vesting in possession of the remainder interest at the testator's death, and fixed the persons then entitled thereto indefeasibly. 20 Am. & Eng. Enc. Law, p. 895; 29 Am. & Eng. Enc. Law, p. 489. And it cannot be made referable to the dying of either remainderman after the life tenant, because, instead of one division taking place at one fixed period, as the testator directed, there would then be partial divisions occurring one after another, as often as a remainderman died after the life tenant without leaving children; or all the remaindermen might

die without leaving children, and in that event, when the last child died, the whole estate would have to revert to the testator's heirs at law. This construction would not only prevent the free alienation of the property, and violate the rule of the law that divesting clauses, especially as to remainders, must be strictly construed, so as to absolutely vest the estate at the earliest possible period of time, and not postpone the vesting of estates in possession indefinitely, but would simply make a will for the testator. Hence, the irresistible conclusion is that the wards "dying without leaving issue," as applying to a divestment of any child's vested remainder share in favor of the other children of the testator and remaindermen, as substituted devisees, clearly refer to a dying within the lifetime of the life tenant so as to vest the remainder in the whole estate indefeasibly at the death of the life tenant, as the testator directed. It is just the same as if the testator, as to his son's remainder interest, had said: "At the death of my wife, the life tenant, my son is to have an equal share in my whole estate absolutely; but, should he die before the time I thus fix for him to have his share vested indefeasibly in possession, without leaving children *in esse* at that time, then, and then only, I give his share to my other children and remaindermen who survive the said period of distribution." A vested remainder may be absolutely or defeasibly vested. And "a vested remainder subject to a divesting contingency has, until the contingency happens, all the incidents of an indefeasible interest; if the contingency never happens . . . the estate becomes absolute." 20 Am. & Eng. Enc. Law, p. 854. The vested remainder share of the testator's son was subject to be divested, upon the sole contingency of the son dying without leaving issue *in esse* at the life tenant's death, in favor of his sisters and other devisees then living. This contingency never happened. Therefore, in consonance with the testator's intention and the soundest reason, there being no devise to the children of the son, the latter's vested remainder share became absolute and indefeasible upon his dying before the life tenant, leaving issue *in esse* at the life tenant's death (*Besant v. Cox*, L. R. 6 Ch. Div. 604,—which is directly in point), or upon his surviving the life tenant, with or without children, which supports the immediate preceding principle (*Ibid.*; *Bonser v. Cox*, 6 Beav. 82; *M'Graw v. Davenport*, 6 Port. [Ala.] 319; *Williamson v. Chamberlain*, 10 N. J. Eq. 373, approved in *Baldwin v. Taylor*, 37 N. J. Eq. 83; *McCormick v. McElligott*, 127 Pa. 230, 17 Atl. 896, and the cases cited in the circuit judge's opinion. *Lee v. Mumford*, 19 Ky. L. Rep. 1585, 44 S. W. 91; *Weakley v. Hanna*, 21 Ky. L. Rep. 450, 51 S. W. 570; *Forsythe v. Lansing*, 22 Ky. L. Rep. 1064, 59 S. W. 854). And, even if the will in this case had made the vested remainder interest of the son defeasible by an express devise to his children in case of his death, his death would mean a dying within the lifetime of the life

tenant, and hence his children could not take under the express contingent devise to them if he survived the life tenant, because his remainder share would then vest in him indefeasibly. *Bartlett v. Bartlett*, 33 Ga. Supp. 174 (construing the third item with the fourth, fifth, and sixth items of the will in that case); *Bailey v. Ross*, 66 Ga. 354, 363-365, and the cases cited on latter page; *Hervey v. McLaughlin*, 1 Price, 204, 16 Revised Rep. 713; *Galland v. Leonard*, 1 Swanst. 161, 18 Revised Rep. 44; *Olivant v. Wright*, L. R. 1 Ch. Div. 346; *Vidal v. Verdier*, Speers Eq. 402; *Galway v. Bryce*, 10 Misc. 255, 30 N. Y. Supp. 985. And the cases of *Usry v. Hobbs*, 58 Ga. 32; *Doty v. Wray*, 66 Ga. 153; *Lufburrow v. Koch*, 75 Ga. 448; *Clark v. Henry*, L. R. 11 Eq. 222, 227, 228; *Bishop v. McClelland*, 44 N. J. Eq. 450, 1 L. R. A. 551, 16 Atl. 1; *Wolfe v. VanNostrand*, 2 N. Y. 438-442; *Fields v. Whitfield*, 101 N. C. 305, 7 S. E. 780; together with 3 Jarman, Wills, Randolph & T.'s ed. 611, and Smith, Executory Interest, § 658,—also give light in support of the principles here discussed.

The children of the testator's son take no estate under the will, either expressly or by implication; and the latter class of estates are not favored. *McCord v. Whitehead*, 98 Ga. 385, 25 S. E. 767. This rule as to estates by implication applies with especial force to the case at bar, as there is no intent whatever on the part of the testator to give his son a lesser estate than a remainder in fee in his whole share, which was only to be divested, in favor of the testator's other children and remaindermen, upon the contingency hereinbefore explained, which never happened. The existence of the son's children at the time of the death of the life tenant, he having died before, simply fulfills one of the provisions in the testator's will, whereby the son's remainder share, which was defeasibly vested, would then become indefeasible. If he had made no deed to his remainder interest, his children in life at the time of the death of the life tenant would have taken his then indefeasible remainder share by inheritance from him. But his deed, on account of his leaving children *in esse* at the death of the life tenant, which then made his remainder absolute, passed that absolute interest to his grantee. This principle is upheld in *Chewning v. Shumate*, 106 Ga. 752, 753, 32 S. E. 544; *Davis v. Hollingsworth*, 113 Ga. 210, 38 S. E. 827, and *Oliver v. Powell*, 114 Ga. 592, 40 S. E. 826. It is only when the defeasible remainder interest of a testator's child who dies before the life tenant is expressly given in that contingency to his children, that his deed made during the life tenancy would not convey the absolute fee at the life tenant's death as against his children surviving the latter period. *Galway v. Bryce*, 10 Misc. 255, 30 N. Y. Supp. 985, 986.

3. We are thus brought to a consideration of the remainder interests of the five daughters who married after the testator's death, and survived the life tenant, with children then living. After first giving to these

daughters, together with his son, each by name, a vested remainder in his whole estate, to be equally divided among them at the death of the life tenant, the testator says: "My effects thus going into the hands of my said daughters not to be subject to the control of any husband, but the same to belong to my said daughters and their children. And in case either of my said six children should depart this life without leaving issue, then their part of my estate to be equally divided between my other children, to be controlled in the same way as first above directed." The vital question here presented is, Does this devise in remainder create an estate tail in the daughters, which would give them the fee under our act of December 21, 1821 (Cobb's Digest, 169), or does it create a tenancy in common between the daughters and their children born up to and living at the time of the vesting of the remainder in possession at the death of the life tenant? The answer to this question depends upon whether the word "children" in the phrase "and their children" was used in the sense of a word of limitation or not. There is no middle ground. We think that the testator clearly intended to create the estate last mentioned, and that such intention violated no rule of law in force at his death or at any other time. If the devise had been of an immediate estate, to vest in interest and in possession at the death of the testator, as directly, in the first place, to a daughter and her children (the daughter having no children when the will took effect), there could then be no doubt that such devise would create an estate tail in the daughter. One of the rules in *Wild's Case*, 6 Coke, 17, and its meaning is thus stated in 3 Jarman, Wills, Randolph & T.'s ed. 174: "Where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail; for it is said: 'the intent of the deviser is manifest and certain that the children (or issues) should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate; therefore such words shall be taken as words of limitation.'" The modification of this rule, as suggested by Jarman (Id. 177), so that children living at the death of the testator, when the will takes effect, would not be excluded as purchasers in an immediate devise in interest and possession at the testator's death to A and his children, has been approved in this state, whereby such children and their parent would take as tenants in common. *Hoyle v. Jones*, 35 Ga. 40, 89 Am. Dec. 273; *Gillespie v. Schuman*, 62 Ga. 252; *Ewing v. Shropshire*, 80 Ga. 384, 385, 7 S. E. 554. As thus modified, and applying it to such immediate devisees or grants in cases where A has no child living at the testator's death or at the execution and delivery of the deed, the aforesaid rule, by which A then takes an estate tail, has been followed by many

decisions of this court and adopted into our Code. Civil Code, § 3085; *Ewing v. Shropshire*, 80 Ga. 374, 7 S. E. 554; *Estill v. Biers*, 82 Ga. 608, 9 S. E. 596; *Baird v. Brookin*, 86 Ga. 709, 712, 12 L. R. A. 157, 12 S. E. 981; *McCord v. Whitehead*, 98 Ga. 385, 25 S. E. 767; *Hollis v. Lawton*, 107 Ga. 102, 32 S. E. 846. If the devise were to A for life, and after A's death to B and her children, without more (B having no children at testator's death), the devise might, though we are not called on by the facts in the case at bar to say it necessarily would, create an estate tail in B, on the assumption that "children" in the phrase "and her children," unexplained by preceding, associated, or superadded words, was used in the sense of "issue" generally, and therefore a word of limitation, as held in *Butler v. Ralston*, 69 Ga. 485. Jarman, in his work on Wills, Randolph & T.'s ed. 178, thus speaks of a principle which he thought ought to apply to devises in remainder to A and his children *simpliciter*: "If the literal terms of the rule in *Wild's Case* can be departed from in the manner suggested in order to give effect to its spirit, it would seem to follow that the parent would never be held to take an estate tail if there were a child, who, according to the established rules of construction, could have taken jointly with the parent. Consequently, if the devise were future, so that all children coming in *case* before the period of vesting in possession would be entitled, the rule which makes the parent tenant in tail would (if at all) only come into operation in the absence of any such objects. In *Broadhurst v. Morris*, 2 Barn. & Ad. 11, the rule seems to have been applied to a devise of this description, but this peculiarity in the case does not appear to have attracted attention." And "this peculiarity in the case" was not considered in our own case of *Butler v. Ralston*. The principle thus referred to by Jarman is upheld in the recent case of *Mitchell v. Mitchell*, 73 Conn. 303, 47 Atl. 325, and is intimated to be correct in the later case of *Childers v. Logan*, 23 Ky. L. Rep. 1239, 65 S. W. 124. But if this principle is not applicable in cases like *Butler v. Ralston* (and we do not now hold that it is), such cases are no authority in the case at bar, where the will contains associated and superadded words explaining the sense in which the word "children" was used. In *Gaboury v. McGovern*, 74 Ga. 146, the case of *Butler v. Ralston* is expressly referred to, and thus distinguished: "It is sufficient to reply that . . . there were no superadded words to show that the maker of the instrument intended that the words used should be construed to be words of purchase, and not of limitation." The decision in *Butler v. Ralston* itself fully recognizes the principle that the word "children," in a devise to A and his children, can be shown to be a word of purchase by explanatory words in other parts of the will.

It cannot be questioned, certainly in this state, that words of limitation in one particular clause of a will or deed, which, stand-

ing alone, create an express estate tail, under either the rule in *Wild's Case* or that in *Shelley's Case* [1 Coke, 88], may be explained by other and superadded words in the instrument to mean a word of purchase, which will prevent an estate tail. *Dudley v. Mallory*, 4 Ga. 61-63; *Benton v. Patterson*, 8 Ga. 151, 152; *Kemp v. Daniel*, 8 Ga. 385, 387; *Dudley v. Porter*, 16 Ga. 615-619; *Williams v. Allen*, 17 Ga. 81, 82; *Sharman v. Jackson*, 30 Ga. 224; *Gaboury v. McGovern*, 74 Ga. 142-147. As is said in *Benton v. Patterson*, which exemplifies the rulings in the other cases: "The whole will must be considered together, and it will not do to rest the construction upon any particular clause." The principle referred to in 3 Jarman, Wills, Randolph & T.'s ed. 239, that a mere limitation over upon a definite failure of issue at the death of the first taker will not explain the word "issue" in the antecedent devise to A and his issue if A has no issue, but will ingraft a contingency upon the estate first devised, clearly applies to such devises which take effect in possession at the testator's death. In England such devises give A an estate tail, with remainder over expectant upon the happening of the contingency (*Ibid.*); and, if only personality is bequeathed, A takes the fee, subject to be divested in favor of the executory legatees upon his dying without a child. *Lyon v. Mitchell*, 1 Madd. 467. The English rule as to personality in such cases has been followed in Georgia as to realty also, and we have an illustration of this principle in the case of *Davis v. Hollingsworth*, 113 Ga. 210, 38 S. E. 827. Yet even in such cases the vice chancellor in *Lyon v. Mitchell* (page 481) said that the extent of the estate given under the first devise is to be governed by the words in the limitation over, "where they bear upon, and unite with, and tend to affect the construction of the prior words, and which in many cases may enable us to come to a conclusion respecting it." He also said (pp. 472, 473) that a devise to A and his issue as tenants in common would be another mode of showing a legal intention on the part of the testator not to create an estate tail; but we think this would apply to estates vesting in possession at some period after the testator's death, rather than at his death. There are doubtless cases which hold that the principle last mentioned above by Jarman also applies where there is a remainder to A and his issue, or heirs of his body, or children (A having none), with a naked limitation over at his death, whenever that might occur, without issue or children; for, in such cases death would not be confined to a dying before the life tenant; there would be no substituted devisees to take the remainder indefeasibly at the death of the life tenant, and therefore no children of A who could take an estate in common with him when the life estate terminated. That courts will lay hold of any legitimate facts or words to uphold the intention of the testator not to create an estate tail is also shown in the distinction made between an

immediate devise in possession to A and his children and a remainder to A and his children without a gift over, and A, in each case, has a child living when the will was made or the testator died. In an immediate devise (that is, to take effect in possession at the death of the testator) to A and his children, and A has a child living, A and this child would take as joint tenants in England, under one of the rules or resolutions in *Wild's Case*, 6 Coke, 17, 18; 3 Jarman, Wills, Randolph & T.'s ed. 179; and as tenants in common in Georgia. *Gillespie v. Solomon*, 62 Ga. 252; *Ewing v. Shropshire*, 80 Ga. 384, 385, 7 S. E. 554. After-born children would be excluded. *Ibid.* The latter children, not being in *rerum natura*, could not acquire the legal title to an immediate estate in possession, and they could not take a remainder, for such was not the testator's intent. On the other hand, if the devise is to A for life, and at A's death to B and her children, and B had a child living when the will was made or the testator died, not only that child, but all other children born up to and living at the death of the life tenant would take the remainder jointly or in common with their parent. *Oates v. Jackson*, 2 Strange, 1172; *Annable v. Patch*, 3 Pick. 363. This last ruling is made independent of any rule in *Wild's Case*. It is based upon the fact that, as there was a child in life when the will was made or the testator died, he intended all children of B to take as purchasers when the remainder vested in possession, and that this intent is upheld by the well-known rules of law that a remainder to unborn children is legal, and that all children born up to and living at the time fixed for the vesting of the remainder in possession are entitled to take as purchasers. Even in England, where the intention of the testator is presumed in favor of the creation of an estate tail, the courts in cases of a remainder to A and his issue or children (A having no child when the will was made or the testator died) give effect to other words in the will to restrict the word "issue" or "children" to a word of purchase. In *Hockley v. Mawbey*, 3 Bro. Ch. 82, the devise was to the testator's wife during her life; at her death to the testator's son and to his issue lawfully begotten or to be begotten, to be divided among them as he (the son) thought fit; and, if the son died without issue, then to the children of the testator's sisters. The lord chancellor said: "He [the testator] did not mean the estate to go as an estate tail, but that the children should take distributively, in which case they must take as purchasers; and the consequence is that Richard [the son] took only an estate for life. . . . In order to take, they [the children] must be alive at the death of Richard [the son]. . . . It is sufficient that the division must take place at the death of Richard [the son], which is within the rules,"—that is, as against a perpetuity. If it had been possible under the terms of the will in *Hockley v. Mawbey* to restrict children of the son to those living at the

life tenant's death, when the son and his children, if any, would then take the remainder indefeasibly, could a reasonable doubt exist that the court would have held that the remainder absolutely vested in possession in the son and his children then living? We think not, because such devise including the children would not only be within the rule showing no perpetuity, but the children would be in existence to share in the division of the remainder indefeasibly at the life tenant's death. And such a construction would be more readily adhered to in this state, where, as held in *Dudley v. Mallery*, 4 Ga. 62; *Benton v. Patterson*, 8 Ga. 151; *Robert v. West*, 15 Ga. 145, 146; and *Dudley v. Porter*, 16 Ga. 616,—the intention of testators is not to be presumed in favor of the creation of estates tail.

In the case at bar the words of the testator, associated with the devise in remainder to his daughters, to belong to them and their children, and the superadded words immediately subjoined thereto, show beyond all doubt that the word "children" was used by him as a word of purchase, which utterly precludes an estate tail in the daughters. The testator first provides that at the death of his wife, the life tenant, his whole estate is to be equally divided among his six children, one son and five daughters, whom he specifically names. Then he adds: "My said effects thus going into the hands of my said daughters [that is, at the death of the life tenant] not to be subject to the control of any husband, but the same to belong to my said daughters and their children." The testator here evidently meant that the property should belong to his daughters and their children living at the life tenant's death, for the distributive word "belong," which is a word of ownership, applies to the children as well as to their mothers, and the death of the life tenant is the time fixed by his preceding words for this distribution of his whole estate to be made indefeasibly. "The primary definition of the word 'belong' is 'to be the property of.'" 3 Am. & Eng. Enc. Law, 2d ed. p. 915. "To be the property of" the children, they must take as purchasers, and the mode of their taking in this state would be in common with their mothers. The devise, then, down to this point, is certainly as strong as one made in remainder to A and her children as tenants in common; and "the provision that they should take as tenants in common . . . shows very distinctly that the testator was contemplating something very different from an estate tail." *Doc ex dem. Strong v. Goff*, 11 East, 671. Moreover, the legal estate in remainder is not devised directly to his daughters and their children. On the contrary, it goes into the hands of the daughters at the death of the life tenant, to belong to them and their children. These words create a trust, and make the daughters trustees for their children, if any. Civil Code, § 4138; 27 Am. & Eng. Enc. Law, p. 3, and note 3; *Gordon v. Green*, 10 Ga. 535 (6), 541. The will made provision for the daughters to hold the legal estate of

their own portions, as well as the portions to belong to their children, free from the control of their husbands. They were capable of acting as trustees for their children. 27 Am. & Eng. Enc. Law, pp. 16, 20. And even if they were incompetent, for any reason, to act as such trustees, a court of equity would appoint trustees to execute the trusts. *Ibid.*; Civil Code, § 3179. A trust for unborn children to take in remainder is legal, just as a remainder for unborn children without a trust is legal. And the trust would continue executory after the termination of the life estate only until the children became of legal age, when the law itself would execute the trust, and divide the property without any act on the part of the trustee. The fact that the husbands of the testator's daughters in *Toole v. Perry*, 80 Ga. 681, 7 S. E. 118, were made trustees of the remainders devised to the daughters and their children was one of the reasons commented on in *Baird v. Brookins*, 86 Ga. 716, 12 L. R. A. 157, 12 S. E. 981, for holding that "children," in *Toole v. Perry*, was used as a word of purchase. Such reason certainly applies with much greater force in the case at bar, where the property is expressly directed to go into the hands of the daughters themselves at the death of the life tenant, to belong to them and their children, which, as best comporting with reason and the intention of the testator, means a trust for the daughters' immediate descendants *in esse* at the death of the life tenant, when the testator's whole estate was to be divided indefeasibly, and not a trust for the daughters to hold for their issue *in infinitum*. The words, then, of the testator thus far alone strongly indicate, if they do not conclusively show, that when he made his will "he had in mind a class of persons [to wit, children of his daughters] who might thereafter be born" (*Hollis v. Lawton*, 107 Ga. 106, 32 S. E. 846), and within the period, too, fixed by him for the distribution of his entire property in remainder indefeasibly. But, to put his meaning beyond the pale of doubt, the testator shows by his superadded words how and to whom any such remainder share shall go at the life tenant's death, by substitution, if either of his daughters should die before the life tenant without a child surviving the life tenant's death. Immediately subjoined to the devise in remainder to go into the hands of his daughters at the death of the life tenant, to belong to them and their children, he says: "And in case either of my said six children should depart this life [that is, before the life tenant] without leaving issue [that is, *in esse* at the death of the life tenant], then their part of my estate to be equally divided between my other children;" that is, the testator's other children living at the death of the life tenant, which is the period fixed by the testator for the distribution of his whole estate indefeasibly, as shown by the construction hereinbefore placed upon this clause of the testator's will in deciding the nature of his son's remainder interest. And then the testator makes the final and im-

portant provision that any remainder share thus taken by his other children, as substituted devisees, at the life tenant's death is "to be controlled in the same way as first above directed;" that is, just as the remainder shares to the son and to the five daughters were previously given down to the divesting clause, to wit, if his son survived the life tenant, with or without children, he should then take an equal part of any divested remainder share by substitution, and also his own specific remainder share absolutely; if any daughter survived the life tenant, without children, she should then take an equal part of any divested remainder share by substitution, and also her own specific remainder share absolutely, although children might afterwards be born to her; and if any daughter survived the life tenant, with children, she should then receive into her hands an equal part of any divested remainder share by substitution, and also the specific remainder share first devised to go into her hands at the life tenant's death, to belong to her and her children (that is, her children then living) absolutely. No person who was intended by the testator to take could by law take any part of his property after its division, or the life tenant's death, for that division was to be of the testator's whole estate, indefeasibly. The devisees, then, in remainder to each daughter, to belong to her and her children, are to a collection of persons, uncertain in number, to be ascertained at the death of the life tenant; and, whether such persons be called a class *per se* or not, the legal conclusion which we have reached would necessarily follow. "A number of persons are popularly said to form a class when they can be designated by some general name as 'children,' 'grandchildren,' 'nephews,' but in legal language the question whether a gift is one to a class depends, not upon these considerations, but upon the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number of persons." 1 Jarman, Wills, Randolph & T.'s ed. 534. And while a remainder to A and her children *simpliciter* (A having none when the testator died) may not be a devise to a class, yet a devise in remainder to A and her children living at the life tenant's death, or of an estate at an earlier period of distribution after the testator's death, may, in legal effect, be called one to a class (*Mitchell v. Mitchell*, 73 Conn. 303, 47 Atl. 326); and all living at the period of distribution will take equally, unless otherwise directed by the testator (*Ibid.*). One of the principal objections sometimes urged to construing "children," in such cases, as a word of purchase, namely, that the issue of the children would not take upon the latter's death before the period of distribution, finds no place or lodgment in the case before us, for two reasons: First, any divested re-

mainder share goes to the testator's own children and his daughters and their children, if any, by substitution, at the life tenant's death, neither great-grandchildren nor other remote kindred being the objects of his bounty; secondly, in a case of substitution, like this one, the nonexistence of a daughter and her children at the death of the life tenant, though she might have had children before that time, would not pass that particular share to the heirs of such daughter or children, because the testator himself designates the persons who shall take at the life tenant's death as substituted devisees.

It is impossible to hold that the testator's daughters take an estate tail, which would result in giving to them the absolute fee, under our act of December 21, 1821, because such ruling could only be made by construing the devise as a simple and naked one to A and her children or issue generally. And we cannot hold that the daughters take an estate tail, whereby, under the act of 1821, the fee given would be made determinable upon a mere limitation over on a definite failure of issue if a daughter died at any time without a child, because that construction would include a postponement of the vesting of the remainder in possession absolutely beyond the life tenant's death; and because there is no limitation over in this case, but a mere substitution, to take effect at the death of the life tenant, if at all. Therefore the logical and legal conclusion is that the remainder shares to the daughters go into their hands at the death of the life tenant, to belong to them and their children then living as tenants in common; and that such remainder shares, which vested in interest in the daughters at the testator's death, consequently open to take in their said children at the period of distribution. We think this ruling harmonizes the whole will, and also upholds the rule of law favoring the vesting of remainders indefeasibly at the earliest possible period of time, which the intention of the testator in this case manifestly follows. We may add that "this belongs to a class of cases where one case seldom rules another, for the reason that each will must be interpreted by itself, and does not depend to any great extent on prior interpretations of other wills." The principles in the case of *Gaboury v. McGovern*, 74 Ga. 133, explaining the word "issue" in a prior clause to the testator's unmarried daughter and her issue during her life by the superadded words to mean "children" and a word of purchase, and in *Toole v. Perry*, 80 Ga. 681, 7 S. E. 118, showing that a devise in remainder to the testator's daughter and her children included children born after the testator's death, and also by a second marriage, and living at the period of distribution, on the strength of subsequent words presuming that the testator meant children by her present or any future husband, apply as authority in the case under consideration. These cases are recognized as correct in *Hollis v. Lawton*, 107 Ga. 106, 32 S. E. 846, and are therein distinguished from the facts in that case, which

was the grant of an immediate estate in possession to A and her children, without any explanatory words, and it was there correctly held that no child born after the estate vested in possession was entitled. In *Blankenbaker v. Woodruff*, 97 Ky. 276, 30 S. W. 614. the testator gave a life estate to his wife; with a remainder to three daughters by name (one of them being unmarried), to be equally divided among the daughters upon the widow's decease, "for their benefit and the benefit of the heirs of their natural bodies, up to the age of thirty years on the part of each of said heirs of their natural bodies." It was held that the latter words explained the preceding words "heirs of their natural bodies" to mean children in esse at the life tenant's death, and that, therefore, each daughter took a fee-simple estate in remainder jointly with her children, if she had any, upon the death of the life tenant.

Among the cases holding that a devise to A for life, with remainder to B and his children (B having no child at the time of the devise), and, if B dies without children or issue, then to C, gives B an estate tail, are *Broadhurst v. Morris*, 2 Barn. & Ad. 11; *Wood v. Baron*, 1 East, 259; *Moore v. Gary*, 149 Ind. 51, 48 N. E. 630; and *Parkman v. Bowdoin*, 1 Sumn. 359, Fed. Cas. No. 10,763. They are, however, all clearly distinguishable in their facts from the case at bar, which, among other things, is not, like them, a case of a limitation over, but of a substitution, pure and simple, to take effect, if at all, at the life tenant's death. In *Broadhurst v. Morris* the remainder was to B and his lawfully begotten children forever, and in default of such issue at his decease to C. The contention was that the limitation over should be construed as if a comma had been placed after "issue," and therefore as upon an indefinite failure of issue. The clause is so construed by Judge Story in *Parkman v. Bowdoin*, 1 Sumn. 369, Fed. Cas. No. 10,763. And this court construed the clause to mean an indefinite failure of issue in *Wiley v. Smith*, 3 Ga. 565. The English court, without apparently considering the principle as to what persons would be entitled at the time for the remainder to vest in possession, and there being nothing to show that the dying of B, the remainderman, was referable to a dying within the lifetime of the life tenant, simply delivered a four-line opinion that B took an estate tail. In *Wood v. Baron*, the remainder was to B, to hold as a place of inheritance, to her and her children or her issue, and, if she die leaving no child or children, or if the latter should die without issue, then to C. Lord Kenyon thought the words in the limitation over meant upon an indefinite failure of issue, and distinguished it from several cases he cited in which the words are different and upon a definite failure of issue, but said the court would consider it. Afterwards the court certified, in less than four lines, that B took an estate tail, manifestly because, as Lord Kenyon had intimated, the words in the limitation over imported an indefinite

failure of issue under the common-law rule of construction, and this was no doubt the reason, inasmuch as B had a child in life when the will was made and when the testator died. In *Moore v. Gary*, the remainder was to B and his issue, being his own children lawfully begotten, forever, and, upon his dying without issue—that is, without heirs, being his own children lawfully begotten, living at his death—to C. The court held that both the antecedent and superadded clause meant an indefinite failure of issue, and therefore that B took an estate tail. In *Parkman v. Bowdoin* the remainder was to B and to his lawful begotten children in fee simple forever, but, in case he should die without children lawfully begotten, to C. The opinion was rendered by Justice Story, and is by far the best of its kind of which we have knowledge. Like the other cases here distinguished, there was nothing in that case confining the death of B. within the lifetime of the life tenant. Justice Story spoke of a remainder being an immediate estate, but he overlooked the wide distinction and consequent results between a remainder vested in interest and a remainder vested in possession. And he finally held that the limitation over meant an indefinite failure of issue, which made the word "children" in the preceding clause, "and his children," retain its original sense as a word of limitation, and gave B an estate tail. This construction, which was based on the common-law rule existing prior to the English wills act that went into effect on January 1, 1838, is contrary to what would be decided in this state since our act of 1854, which changed the meaning of all such phrases into a definite failure of issue, and therefore *Parkman v. Bowdoin*, as well as the preceding cases distinguished, would be no authority in this state as to a will made since said act, even on an identically phrased or worded will. There are other cases where estates were given to B and his children, to vest in B at twenty-one years of age, and, if he died before twenty-one, to C, in which it was held that B took an estate tail,—as in *Davie v. Stevens*, 1 Dougl. 321. Besides being wholly unlike the case at bar, a reading of that case will show that B was never even married when the estate vested in him in possession at the age of twenty-one. From what we have said about these cases it is seen of what little value precedents are in construing a will, unless the facts are precisely or substantially alike, and the cases decided do not omit the consideration of well-established and apposite rules of construction.

It follows that in the case now in hand a deed executed by a daughter of the testator, which conveyed to another all her interest in described realty which belonged to the testator at his death, did not affect the interest therein of her children who were in life when the life tenant died. From the foregoing it follows that the trial judge correctly held that the petition set forth no cause of action in behalf of the plaintiffs who are the children of the testator's son, but that he erred in ruling that the other

plaintiffs who are the children of the daughters of the testator were not entitled to recover under the allegations of the petition.
Judgment reversed.

All the Justices concur, except **Little and Lewis, JJ.**, absent.

Petition for rehearing denied.

IDAHO SUPREME COURT.

Bridget E. BEELER, Admr., etc., of
Joseph P. Beeler, Deceased, Appt.,
v.

C. C. MERCANTILE COMPANY, Limited,
et al., Respts.

(.....Idaho.....)

*1. A hotel building, affixed to land, and held and conveyed with the land upon which it stands as real estate, cannot thereafter, by mere agreement of the parties, become a chattel or personal property, and be legally encumbered by a chattel mortgage, until after its severance from the land.

2. A chattel mortgage on real estate creates no lien thereon, as the provisions of § 3385, Rev. Stat., as amended, are a prohibition against mortgaging real estate by chattel mortgage.

(December 4, 1902.)

A PPEAL by complainant from a judgment of the District Court for Kootenai County in favor of defendants in an action to enjoin foreclosure of a chattel mortgage. *Reversed.*

The facts are stated in the opinion.

Mr. Charles L. Heitman, for appellant:

A house or other building which, from its size, or the materials of which it is constructed, or the manner in which it is fixed to the land, cannot be removed without practically destroying it, will not become a mere chattel by means of any agreement which can be made concerning it.

Ford v. Cobb, 20 N. Y. 344; *Hoyle v. Plattsburgh & M. R. Co.* 54 N. Y. 315, 13 Am. Rep. 595; *Richardson v. Copeland*, 6 Gray, 536, 66 Am. Dec. 424; *Lyle v. Palmer*, 42 Mich. 314, 3 N. W. 921; *Docking v. Frazell*, 34 Kan. 29, 7 Pac. 618.

Personal chattels which have become fixtures are incorporated in, and are a part of, the land as much as a house or a tree, until an actual severance.

Bond v. Coke, 71 N. C. 97.

The execution of a chattel mortgage on fixtures does not create a severance.

Richardson v. Copeland, 6 Gray, 536, 66 Am. Dec. 424; *Docking v. Frazell*, 34 Kan. 29, 7 Pac. 618; *Horne v. Smith*, 105 N. C.

322, 11 S. E. 373; *Voorhees v. McGinnis*, 48 N. Y. 278; *Lavenson v. Standard Soap Co.* 80 Cal. 245, 22 Pac. 184; *McNally v. Connolly*, 70 Cal. 3, 11 Pac. 320; *Gray v. Holdship*, 17 Serg. & R. 413, 17 Am. Dec. 680; *Butler v. Page*, 7 Met. 40, 39 Am. Dec. 757; *Roseville Alta Min. Co. v. Iowa Gulch Min. Co.* 15 Colo. 29, 24 Pac. 920.

There must be an actual severance to make it a personality.

Hull v. Hull, 1 Idaho, 361; *Hyatt v. Vincennes Nat. Bank*, 113 U. S. 416, 28 L. ed. 1012, 5 Sup. Ct. Rep. 573; *Knapp v. Jones*, 143 Ill. 375, 28 N. E. 820, 32 N. E. 382; *Gray v. Holdship*, 17 Serg. & R. 413, 17 Am. Dec. 686.

The right of redemption is a substantial right. Our statute securing this right of redemption is a binding rule of property, and cannot be nullified by any agreement of the parties.

Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858.

The mortgagor is not allowed to renounce beforehand his privilege of redemption.

1 Jones, Mortg. § 251; 3 Pom. Eq. Jur. § 1180; 15 Am. & Eng. Enc. Law, p. 827.

Under the registry laws of this state, the chattel mortgage in controversy was in the nature of a secret lien as against the creditors of Joseph P. Beeler.

Tibbetts v. Horne, 65 N. H. 242, 15 L. R. A. 56, 23 Atl. 145; *Karat v. Gane*, 136 N. Y. 316, 32 N. E. 1073; *Cardenas v. Miller*, 108 Cal. 250, 39 Pac. 783, 41 Pac. 472.

Mr. John B. Goode, for respondents:

The question of the validity of this chattel mortgage cannot be raised by the mortgagor or his representative in this case against the mortgagee.

Jones, Chat. Mortg. p. 126.

Many things ordinarily considered fixtures to the realty may become to all intents and purposes personal property by agreement of all parties interested in both the realty and the fixtures.

Jones, Chat. Mortg. p. 124; *Smith v. Waggoner*, 50 Wis. 155, 6 N. W. 568; *Ford v. Cobb*, 20 N. Y. 344; *Godard v. Gould*, 14 Barb. 662; *Shell v. Haywood*, 16 Pa. 523.

The limitation to the right to change the status of property depends only upon the essential character of the property and the manner in which it is annexed, *e. g.*,

*Headnotes by **SULIVAN, J.**

NOTE.—For other cases in this series considering the question whether buildings placed on land are fixtures thereto, see *Miller v. Wadingham* (Cal.) 11 L. R. A. 510; *Leonard v. Clough* (N. Y.) 16 L. R. A. 305; and *Peaks v. Hutchinson* (Me.) 59 L. R. A. 279.

As to effect of agreement to prevent fixtures from becoming part of realty, see *McFadden v.* 60 L. R. A.

Allen (N. Y.) 19 L. R. A. 446; *Muir v. Jones* (Or.) 19 L. R. A. 441, and note; *German Sav. & L. Soc. v. Weber* (Wash.) 38 L. R. A. 267; *Fuller-Warren Co. v. Harter* (Wis.) 53 L. R. A. 603; *Anderson v. Creamery Package Mfg. Co.* (Idaho) 56 L. R. A. 555; and *Schellenberg v. Detroit Heating & Lighting Co.* (Mich.) 57 L. R. A. 632.

whether it can be removed without serious damage to the freehold or substantially destroying its own quality and value.

Ewell, Fixtures, 68; *Fortman v. Goepfer*, 14 Ohio St. 558; *Ford v. Cobb*, 20 N. Y. 344; *Sheldon v. Edwards*, 35 N. Y. 283; *Voorhees v. McGinnis*, 48 N. Y. 278; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537.

The clear tendency of modern authority seems to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and other tests seem to derive their chief value as evidence of such intention.

Ewell, Fixtures, 22; *McDonald v. Shepard*, 25 Kan. 112; *Eaves v. Estes*, 10 Kan. 314, 15 Am. Rep. 345; *Hinkley & E. Iron Co. v. Black*, 70 Me. 473, 35 Am. Rep. 346; *Morris v. French*, 106 Mass. 326; *Yater v. Mullen*, 24 Ind. 277.

Whether or not the buildings placed upon real estate are fixtures is governed by the manner in which they are placed thereon,—the use or purpose of the buildings in connection with the real estate; but principally by the intention of the owner.

German Sav. & L. Soc. v. Weber, 16 Wash. 95, 38 L. R. A. 267, 47 Pac. 224; *Holt County Bank v. Tootle*, 25 Neb. 408, 41 N. W. 291; *Bartholomew v. Hamilton*, 105 Mass. 239; *Souden v. Craig*, 26 Iowa, 156, 98 Am. Dec. 125; *Traders' Bank v. First Nat. Bank*, 6 Kan. App. 400, 50 Pac. 1038; *Deering v. Ladd*, 22 Fed. 575; *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 655; *Harkey v. Cain*, 69 Tex. 146, 6 S. W. 637; 13 Am. & Eng. Enc. Law, p. 623.

Sullivan, J., delivered the opinion of the court:

This action was brought to enjoin the sheriff of Kootenai county from foreclosing a chattel mortgage on a hotel building situated in Bonner's Ferry, under the provisions of §§ 3390-3393 of the Revised Statutes, by notice and sale, and to have said chattel mortgage declared null and void. The facts are substantially as follows: On April 11, 1900, Joseph P. Beeler executed to the C. C. Mercantile Company, Limited, five promissory notes amounting in the aggregate to \$900, and to secure the payment of the same executed said chattel mortgage on the hotel building known as the "International Hotel," situated on lots 1, 2, 3, and 4, in block 5, first addition to Bonner's Ferry, Kootenai county. Said hotel building is referred to as personal property in said mortgage. Said Beeler thereafter died, and Bridget E. Beeler was appointed administratrix of his estate, and commenced this suit as such administratrix. On April 11, 1901, the respondent corporation began proceedings to foreclose said chattel mortgage by the sheriff, under the provisions of the above-cited sections of the Revised Statutes, and this action was commenced for the purpose above stated, and resulted in a judgment in favor of the respondent corporation. The pleadings are of considerable

length, but the main issue is as to whether said hotel building is personal property or real estate. There is no substantial conflict in the evidence. The evidence shows that said hotel building is a large, substantial, two-story frame building, consisting of twenty or more rooms. A part of it had been removed to said lots, and a part built thereon by the predecessors of Beeler. It also appears that said lots of land, together with the hotel building, had for some time prior to the date of said chattel mortgage been owned, conveyed, occupied, and used by the grantors of Beeler as real estate, and on April 11, 1900, said grantors, by warranty deed, conveyed said hotel building, together with said lots of real estate, to said Beeler, and he used, held, and occupied it as real estate during his lifetime. It also appears that Lucas, Markle, and Gray, grantors of said Beeler, had encumbered said real estate by giving a real-estate mortgage thereon to the respondent corporation, and that said lots and hotel building were treated as real estate by it. It also appears that said Beeler sold and conveyed to the respondent the east half of said lots, with the agreement and understanding that he could remove said hotel building from said lots; that he undertook to remove a part of it,—the kitchen,—but was prevented from doing so by an adjoining property owner, and then moved it back again. It also appears that said chattel mortgage is dated April 11, 1900, and the deed from Beeler conveying the east half of said lots to the respondent was dated April 12, 1900; that, although the two instruments bear different dates, they were the culmination of a single agreement, by which Beeler had the right to remove said building. It appears that it was discussed between the parties as to what kind of a mortgage Beeler should give on the hotel building to protect the respondent, and it was finally decided that it should be a chattel mortgage, and it was given. It is thus made to appear that it was the intention and agreement of the parties that said hotel building should be considered to be personal property. It is also shown that the estate of said decedent is insolvent.

The main contention is as to whether said hotel building, under those facts, is real estate or personal property. It is contended by counsel for respondent that it is personal property; for the reason that at the time Beeler became the owner of it and the lots on which it stood he elected, for his own convenience, to treat the hotel building as a chattel, and to mortgage it as such, so that he might remove it from the lots, the east half of which he conveyed at the same time to another party; and that, having elected, at the very inception of his ownership, to treat it as a chattel, it became one; and that he might, under the law, place a valid chattel mortgage upon it. In support of that contention counsel cites *Jones, Chat. Mortg.* § 124, and authorities there cited, and *Ewell, Fixtures*, p. 68, and authorities there cited. The former authority holds

that fixtures may become chattels by agreement of parties as between themselves, and it is conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and cannot, in general, be changed by the convention or agreement of the parties. Mr. Ewell, after discussing the rule contended for by counsel, and citing authorities for and against it, says, on page 69, as follows: "The better reason and the weight of authority is, that such agreement [to change real estate to personal property] or understanding, express or implied, must have existed prior to the annexation of the chattel to the land; and that, if the thing is annexed by a stranger, without the prior consent of the owner of the land, or any contract with him, express or implied, it cannot afterwards become personal property by the mere oral assent of the landowner, without a severance from the land." In the case at bar the grantors of Joseph P. Beeler sold and conveyed to him by warranty deed said hotel building and the lots upon which it stood. They sold it as real estate, and Beeler bought it as real estate, and the building had not been severed from the land at the time said chattel mortgage was given or when this action was tried. In *Burk v. Hollis*, 98 Mass. 55, it is held that where a house, built on the land of another as personalty, was by him conveyed to the owner of the land, it at once becomes real estate, and the owner of the land cannot, by executing a chattel mortgage to secure part of the purchase money, sever and convey as personal estate any interest in it, merely by treating it as personal estate in the instrument of conveyance. Counsel for respondent relies to some extent upon *Docking v. Frazell*, 38 Kan. 420, 17 Pac. 160. That is a case from Kansas, and was twice appealed to the supreme court of that state. See 34 Kan. 29, 7 Pac. 618. On the first appeal the building in controversy was presumed to be real estate. Upon a retrial, after a reversal of the case, more testimony was introduced than at the original trial, and it was clearly shown that said building was moved onto leased lots, and by the terms of the written lease the lessee was required to remove the building placed thereon at the termination of the lease. And on the second appeal it was held that said building was personal property, and that a chattel mortgage given thereon was valid. Many of the authorities cited relate and apply to trade fixtures placed on leased premises with an agreement and understanding that they might be removed at the termination of the lease, and are not applicable to the facts of the case at bar. There is a clear distinction between that case and the one at bar. In the latter case the hotel building was erected on real estate owned by the persons who caused the hotel to be placed there, and had not been removed therefrom at the time said chattel mortgage was executed, and falls within the rule above quoted from Ewell on Fixtures to the effect that real-estate

tate fixtures cannot become personal property by the assent of the landowner without its severance from the land. Section 2825, Rev. Stat., defines the term "real estate" as follows: "Real property or real estate consists of: (1) Lands, possessory rights to land, ditch and water rights, and mining claims, both lode and placer; (2) that which is affixed to land; (3) that which is appurtenant to land." Said hotel building was affixed to and appurtenant to said lots of land at the time the chattel mortgage was given, and had prior to that date or on that date been transferred by warranty deed as real estate, and clearly was, under the terms of said section of the statute, real estate.

Section 3385, Rev. Stat., as amended (see Acts 1899, p. 292), prescribes upon what property a chattel mortgage may be given, and is as follows: "Chattel mortgages may be made upon all property, goods, or chattels, not defined by statute to be real estate, upon growing crops, and upon crops to be sown and grown in the future; but, should the persons executing mortgages upon crops, to be afterwards sown, fail to sow or cause the same to be sown, no lien of such mortgages shall attach to crops sown by other persons upon the lands described in said mortgages, except in so far as the mortgagors in said mortgages have or retain interests in said crops." The provisions of that section limit chattel mortgages to property other than real estate and upon crops. Therefore a valid chattel mortgage cannot be given upon property other than that there prescribed; and there is good reason for this rule, as the registry law requires (Acts 1899, p. 121) chattel mortgages to be filed with the county recorder, and kept there, and certain facts contained in the mortgage must be entered in a record kept for that purpose; while a real-estate mortgage must be filed by the recorder and recorded at length in a record provided for that purpose. They are recorded in different books, and a real-estate mortgage registered as a chattel mortgage, or *vice versa*, would not be a legal registry or recording. The provisions of said section are a prohibition against mortgaging real estate by chattel mortgage.

After defining real estate and personal property, our statute prescribes the method and manner of encumbering and transferring each class, and it is not in the power of parties to waive or alter, by their agreement, any of these regulations. In *Hoyle v. Plattsburgh & M. R. Co.* 54 N. Y. 315, 13 Am. Rep. 595, the court, in referring to rules established by statute for the transfer of property, said: "These regulations have been adopted with regard, not only to the interests of the parties immediately concerned, but also with regard to the interest of others in ascertaining the ownership of property." Also, see *Richardson v. Copeland*, 6 Gray, 536, 66 Am. Dec. 424. We think, under our statutes and the facts of this case, that the hotel building in controversy was real estate, and that said

chattel mortgage created no lien upon it, and is therefore void. That being true, it is not necessary for us to pass upon the other errors assigned.

The judgment must be reversed, and the cause remanded, with instructions to enter

judgment in favor of the appellant as prayed for in the complaint. Costs are awarded to appellant.

Quarles, Ch. J., and Stockslager, J., concur.

ILLINOIS SUPREME COURT.

Charles GILMORE, *Plff. in Err.*,

v.

Morris W. FULLER, by Next Friend.

(198 Ill. 130.)

1. One participating in a charivari of a wedding party cannot recover for injuries inflicted by the negligent discharge of a pistol by a coparticipant, where the statute imposes a fine upon whoever disturbs the peace of a family or neighborhood by loud and unusual noises, or disturbs any assembly of people met for a lawful purpose.
2. That instructions requested by the defeated party, embodying correct principles of law, were given to the jury, will not prevent a reversal if contradictory and erroneous instructions were given for his adversary.
3. Requested instructions to find for defendant on counts of a declaration charging him with assault by the discharge of a pistol should be given where there is no evidence tending in the slightest degree to show that he intended to do any harm, or that the wound inflicted on plaintiff was in any way intentional or wilful.

(October, 25, 1902.)

ERROR to the Appellate Court, Third District, to review a judgment affirming a judgment of the Circuit Court for Piatt County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by Magruder, Ch. J.:

This is an action of trespass on the case, brought on April 7, 1899, by the defendant in error, a minor, suing by his next friend, Hollis D. Fuller, against the plaintiff in error, who at the time of the commencement of the suit was also a minor, but since the trial has attained his majority. The action was brought to recover damages for a personal injury. The trial below before the court and a jury resulted in verdict and judgment in favor of defendant in error for the sum of \$1,500. An appeal was taken to the appellate court, where the judgment of the circuit court of Piatt county has been affirmed. The present writ of error is prosecuted from such judgment of affirmance. The declaration consists of three counts. The first and second counts charge that plaintiff in error made an assault upon defendant in

error, and shot off a certain pistol, then and there loaded with gunpowder and leaden balls, at and against the defendant in error, and thereby then and there shot and wounded defendant in error in so grievous a manner that his life was despaired of, etc. The third count charges that the plaintiff in error, having in his possession a certain pistol loaded with gunpowder and leaden balls, so carelessly and negligently handled said pistol that the same, by the negligence and carelessness of plaintiff in error, was fired and shot off, by means whereof plaintiff in error, by his carelessness and negligence in handling said pistol, shot and wounded defendant in error in so grievous a manner that his life was despaired of, etc. The plaintiff in error filed several pleas, the first of which was, "Not guilty." The second plea averred that the defendant in error and plaintiff in error and a large number of other persons, at the residence of Daniel Hirsch, were engaged in a charivari of a young married couple, and that the defendant in error and the plaintiff in error, and other persons, with guns, revolvers, sleigh bells, and other instruments, were then and there wilfully disturbing the peace and quiet of the family of said Daniel Hirsch and of the neighborhood, by shooting guns, revolvers, pistols, ringing sleigh bells, blowing horns and other instruments, and that a revolver in the hands of plaintiff in error, by accident and without his will or fault or neglect, was discharged, by which the defendant in error, without the intention or neglect of the plaintiff in error, was injured, etc. The third plea was a plea of not guilty, signed by the guardian *ad litem* of the plaintiff in error. The fourth plea was a special plea of the guardian *ad litem* for plaintiff in error, and averred that defendant in error and plaintiff in error were together at the residence of Daniel Hirsch, engaged in a charivari, and that a revolver in the hands of plaintiff in error, by accident and without the will or fault of plaintiff in error, and while the barrel thereof was pointed in an opposite direction from the defendant in error, was discharged, by which the defendant in error, without the negligence or fault of the plaintiff in error, was injured.

The facts were substantially as follows: On February 2, 1898, defendant in error and plaintiff in error were attending school in De Land, Piatt county. Plaintiff in error lived at the home of his father, in the country, and defendant in error with his mother, in De Land. On the evening of that day there was a wedding at the residence of

NOTE.—For a case in this series as to the unlawfulness of a charivari party, see *Higgins v. Minaghan* (Wis.) 11 L. R. A. 138.
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Daniel Hirsch, living about 2 miles from De Land. On the evening of that day some ten or twelve boys, including the parties to this suit, living in the neighborhood of De Land, met at the schoolhouse, pursuant to a previous arrangement, to engage in a charivari of a newly married couple at the house of Daniel Hirsch, living about a half mile distant from the schoolhouse. They took from the schoolhouse a bell, and provided themselves with bells, pans, plowshares, revolvers, and a shotgun, and other implements for making a noise. They reached Hirsch's home, in a body, between 9 and 10 o'clock. There, with a shotgun, revolvers, plowshares, sleigh bells, dinner bells, etc., they approached near the house, where the guns and pistols were discharged, and the other instruments were put in motion, and all the noise was made which they could make with such instruments. Considerable excitement and commotion were created in the house among the women. The hired man came to the gate of the yard, and asked them not to fire off firearms, as it would frighten the horses of the guests there hitched. Both defendant in error and plaintiff in error participated in this charivari, and were so engaged at the time the injury complained of was received by defendant in error. Plaintiff in error fired his pistol six times into the air over his head, then put in three more cartridges,—all the cartridges he had,—and then held the pistol above his head in his right hand, pointed upward, and pulled the trigger three times, but the last cartridge did not explode. While he was either in the act of bringing the pistol down, or unbreaching it, it exploded, and shot defendant in error in the face, near the eye. At this time Gilmore was about 2 feet east of the house, facing to the east. Fuller and Cathcart were about 10 feet east of the house, facing to the west, almost immediately in front of Gilmore, and were at the time engaged in ringing a strand of sleigh bells. The evidence of defendant in error tends to show that plaintiff in error took down his hand, and held the barrel in his left hand across his body,—the barrel pointing north,—and attempted to take out the shells, when the pistol was discharged. The appellate court, in its opinion, says: "There is a conflict in the testimony as to whether the explosion occurred while he [plaintiff in error] was bringing the revolver from the perpendicular position in which he had been holding it, or while he was making an effort to unbreach it with both hands at about the level of his waist." When defendant in error was wounded, he was at once taken into the house of Mr. Hirsch, and doctors were sent for, who treated the wound. The wound appears to have healed up, and, after being confined to the house on account of it for about a month, defendant in error again went to school, and also engaged in work as a clerk in some store in the town. The physicians probed for the bullet, but were unable to extract it. The medical experts seemed to differ in their opinion as to the nature and character of the wound, and its 60 L. R. A.

probable effect upon the general health of defendant in error. The evidence tends to show that defendant in error suffers pain when he attempts to read by lamplight, and when his eyes are exposed to the cold. It also appears that the wind causes his eye to moisten, and tears to come. There is some evidence tending to show that the bullet which struck defendant in error was a spent or deflected ball.

Messrs. Herrick & Herrick and Reed & Edie, for plaintiff in error:

A party who acts in defiance of law has no just claim to its agency in obtaining redress for the damage he may have sustained in the course of his illegal transactions.

Beach, Contrib. Neg. § 47; Cooley, Torts, 2d ed. p. 151; *Devor v. Knauer*, 84 Ill. App. 184; *Way v. Foster*, 1 Allen, 408; *Smith v. Boston & M. R. Co.* 120 Mass. 490, 21 Am. Rep. 538; *Wallace v. Cannon*, 38 Ga. 199, 95 Am. Dec. 385; *Hall v. Corcoran*, 107 Mass. 253, 9 Am. Rep. 30; *Scott v. Duffy*, 13 Pa. 20; *DeGroot v. VanDuzer*, 20 Wend. 406; *Coppell v. Hall*, 7 Wall. 558, 19 L. ed. 244; *Holman v. Johnson*, 1 Cowp. 341; *Heland v. Lowell*, 3 Allen, 408, 81 Am. Dec. 670; *Harris v. Hatfield*, 71 Ill. 301; *Frye v. Chicago, B. & Q. R. Co.* 73 Ill. 399; *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245; *Chicago & A. R. Co. v. Michie*, 83 Ill. 427.

The act of one while engaged in a common purpose is the act of all.

1 Greenl. Ev. § 111; *Higgins v. Minaghan*, 78 Wis. 602, 11 L. R. A. 138, 47 N. W. 941.

The intention to do harm is of the essence of an assault.

Hilliard, Torts, 3d ed. §§ 8, 9, pp. 181, 182; 2 Greenl. Ev. § 83; *Razor v. Kinsey*, 55 Ill. App. 605; *Paston v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615.

Where a party, by the exercise of ordinary care, can ascertain and avoid an impending danger, or where he knows of the existence of danger, it is not only his duty to avoid such danger, but he is not in the exercise of ordinary care when he fails to do so, and cannot recover in an action for damages.

Clark v. Murton, 63 Ill. App. 49; *Chicago & N. W. R. Co. v. Sweetney*, 52 Ill. 325; *Chicago & N. W. R. Co. v. Donahue*, 75 Ill. 106; *Chicago & N. W. R. Co. v. Kane*, 50 Ill. App. 100; *Aerkfetz v. Humphreys*, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835.

Negligence, to be actionable, must result in damage to some one, which result, under all the circumstances, might have been reasonably foreseen by a man of ordinary intelligence and prudence, to be the probable result of the initial act.

Cleghorn v. Thompson, 62 Kan. 727, 54 L. R. A. 404, 64 Pac. 605; *Chicago, B. & Q. R. Co. v. Stumps*, 55 Ill. 374; *Pollock, Torts*, 36; *Thomp. Neg.* 1234, 1235; *Ray, Neg. p.* 361; *Bigelow, Torts*, 289; *Allegheny v. Zimmerman*, 95 Pa. 237, 40 Am. Rep. 649; *McCully v. Clarke*, 40 Pa. 402, 80 Am. Dec. 584; *Gravelle v. Minneapolis & St. L. R. Co.* 3 McCrary, 352, 10 Fed. 711.

When the evidence fails to establish the defendant's duty and its nonperformance, the jury is not justified in finding negligence.

Toledo, W. & W. R. Co. v. Brannagan, 75 Ind. 490; *Searles v. Manhattan R. Co.* 101 N. Y. 661, 5 N. E. 66; *Patterson, Railway Acci. Law*, § 373, note 5; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 197; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Gregory v. Cleveland, O. C. & I. R. Co.* 112 Ind. 385, 14 N. E. 228; *Conner v. Citizens' Street R. Co.* 105 Ind. 62, 55 Am. Rep. 177, 4 N. E. 441; *Woolery v. Louisville, N. A. & C. R. Co.* 107 Ind. 381, 57 Am. Rep. 114, 8 N. E. 226; *Pollock, Torts*, 365.

Messrs. Tipton & Tipton, for defendant in error:

The defendant must show that the injury was inevitable, and that he was not chargeable with any negligence.

Atchison v. Dullam, 16 Ill. App. 42; *Morgan v. Cox*, 22 Mo. 373, 66 Am. Dec. 623; *Castle v. Duryee*, 2 Keyes, 169; *Judd v. Ballard*, 66 Vt. 668, 30 Atl. 96; *Vincent v. Stinehour*, 7 Vt. 62, 29 Am. Dec. 145; *Morris v. Platt*, 32 Conn. 75; *Bullock v. Babcock*, 3 Wend. 391; *Leame v. Bray*, 3 East, 593; *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Claffin v. Wilcox*, 18 Vt. 605; *Howard v. Tyler*, 46 Vt. 683; *Bahel v. Manning*, 112 Mich. 24, 36 L. R. A. 523, 70 N. W. 327; *Tally v. Ayres*, 3 Sneed, 677.

A very high degree of care is required of all persons using firearms in the immediate vicinity of other persons, no matter how lawful, or even necessary, such use may be.

Sedgw. Damages, § 587; *Shearm. & Redf. Neg. ed.* 1880, 238-248; *Wait, Act. & Def.* 702, 703; *Addison, Torts*, § 544; *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406; *Wright v. Clark*, 50 Vt. 130, 28 Am. Dec. 496; 7 Am. & Eng. Enc. Law, pp. 523, 524; 1 *Thomp. Neg. ed.* 1880, 238-248; *Pittsburgh, C. & St. L. R. Co. v. Shields*, 47 Ohio St. 387, 8 L. R. A. 464, 24 N. E. 658; *Koelsch v. Philadelphia Co.* 152 Pa. 355, 18 L. R. A. 759, 25 Atl. 522.

The ground of liability for accidental injury from the discharge of a gun is negligence.

Weaver v. Ward, Hobart, 134; *Lynch v. Nordin*, 1 Q. B. 29, 2 Stephens, N. P. 1017; *Reg. v. Salmon*, 43 L. T. N. S. 573; *Underwood v. Hewson*, 1 Strange, 596; *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Cole v. Fisher*, 11 Mass. 137; *Moody v. Ward*, 13 Mass. 299; *Morgan v. Cox*, 22 Mo. 373, 66 Am. Dec. 623; *Castle v. Duryee*, 2 Keyes, 169; *Dalton v. Favour*, 3 N. H. 465; *Tally v. Ayres*, 3 Sneed, 677; *Chataigne v. Bergeron*, 10 La. Ann. 699; *Seltzer v. Saxton*, 71 Ill. App. 229.

Where a party charged with an assault with intent to commit murder insists that the prosecuting witness was shot by accident, and it is proved that the shooting was done recklessly, regardless of the lives of others, the act of such party will be con-

strued as implying general malice, rendering him amenable to the penalties of the law.

Vandermark v. People, 47 Ill. 122; *Dunaway v. People*, 110 Ill. 333, 51 Am. Rep. 686; *Crosby v. People*, 137 Ill. 340, 27 N. E. 49; *Weaver v. People*, 132 Ill. 541, 24 N. E. 571.

The evidence should never be withdrawn from the jury unless the testimony be of such conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside the verdict in opposition to it.

Chicago & N. W. R. Co. v. Snyder, 128 Ill. 658, 21 N. E. 520; *Goldie v. Werner*, 151 Ill. 555, 38 N. E. 95.

Magruder, Ch. J., delivered the opinion of the court:

At the close of the evidence of the defendant in error, the plaintiff in error submitted a written instruction to the court, directing the jury to find a verdict for the defendant. This instruction was refused, and exception was taken to such refusal. At the close of all the testimony the plaintiff in error again made a motion to withdraw the evidence from the jury, and to instruct the jury to find for the plaintiff in error. A written instruction to this effect was refused by the court, and plaintiff in error took exception to such refusal. We are of the opinion that the instruction should have been given, upon the ground that the evidence does not tend to support a cause of action.

Section 56 of division 1 of the Criminal Code provides that "whoever wilfully disturbs the peace and quiet of any neighborhood or family, by loud or unusual noises, or by tumultuous or offensive carriage, threatening, traducing, quarreling, challenging to fight or fighting, or whoever shall carry concealed weapons, or in a threatening manner display any pistol, knife, slung-shot, brass, steel or iron knuckles, or other deadly weapon, shall be fined not exceeding \$100." Section 60 of division 1 of the Criminal Code provides that "whoever wilfully interrupts or disturbs any school or other assembly of people, met for a lawful purpose, shall be fined not exceeding \$100." 1 *Starr & C. Anno. Stat.* 2d ed. pp. 1266, 1267. Unquestionably defendant in error and plaintiff in error were both engaged in wilfully disturbing the peace and quiet of the family of Daniel Hirsch by loud and unusual noises. The enterprise in which they were both engaged at the time of the injury was an unlawful one. The fact that it is called a "charivari" does not make it any the less unlawful. The assemblage around the house of Daniel Hirsch in the nighttime, there engaged in disturbing a family in which a wedding had occurred, was an unlawful and illegal assemblage, and not only so, but a gathering of illegal trespassers. They were all, including both plaintiff in error and defendant in error, engaged in the same unlawful enterprise. Defendant in error says that, he did not know that the plaintiff in error, Gilmore, had a revolver in his possession, before they went upon the premises of Hirsch; but his own testimony shows that,

after they reached the premises of Hirsch, he saw the revolver in the possession of plaintiff in error, and saw and heard it fired off more than half a dozen times before he was wounded. After defendant in error witnessed the firing of the revolver by plaintiff in error, he still continued to join in the making of the noises which disturbed the family, and was, with another young man, named Cathcart, engaged in shaking a strand of sleigh bells.

Webster, in his dictionary, defines "charivari" as "a mock serenade of discordant noises, made with kettles, tin horns, etc., designed to annoy and insult." Worcester, in his dictionary, defines a charivari as "a vile or noisy music made with tin horns, bells, kettles, pans, etc., in derision of some person or event; a mock serenade." In *Higgins v. Minaghan*, 78 Wis. 602, 11 L. R. A. 138, 47 N. W. 941, which was an action for damages brought for the shooting of the plaintiff in the leg while he and others were giving the defendant a charivari, the plaintiff's counsel, on the *voir dire*, was permitted to ask, against the objection of the defendant, whether the jurors had any prejudice for or against charivari parties, or entertained any prejudice against parties that engaged in a charivari; and the supreme court of Wisconsin there said: "The learned circuit judge seems to have had some doubt about the propriety of this course of examination, and we think it was wholly wrong. Every good, law-abiding citizen must and does condemn such unlawful and riotous assemblies. They are wholly indefensible in law and morals, and are reprobated by every well-disposed person. With the same propriety a juror called upon to try a man charged with a criminal act might be asked if he had or entertained any bias or prejudice for or against crime or criminals. . . . We do not understand that a prejudice entertained by a juror against a particular crime constitutes a sufficient ground for excluding him when called to try a person for such offense. . . . It would be almost impossible to obtain a panel in a case if every citizen was excluded from it who had a prejudice against or was opposed to charivari, which is, in law, a crime." In the same case it is also said: "The charivari parties, consisting of the crowd in front of or upon the defendant's premises, constituted an unlawful assembly, and by their transactions, conduct, and behavior became what is known in the law as a 'riot,' tending to the disturbance of the peace, and the annoyance, if not the terror, of the defendant and others in the vicinity; they were trespassers in the highway. . . . The rioters themselves knew, or should have known, that their acts and conduct about the house in the night were well calculated to produce terror and fright, and injuriously affect the defendant's family. . . . Here the rioters were firing guns, blowing horns, drumming on pans, and making all kinds of hideous noises," etc.

What results from the fact that defendant 60 L. R. A.

in error and plaintiff in error were both engaged in such an unlawful and criminal enterprise as is above described? In *Harris v. Hatfield*, 71 Ill. 298, a suit was brought to recover damages on account of disease communicated to the cattle of plaintiff by Texas cattle brought into this state by defendant in the month of July in violation of a statute forbidding such act, it appearing that the plaintiff had put his cattle, among which were the Texas cattle, into his own pasture; that soon afterward the plaintiff discovered that some of them were Texas cattle, and still kept the possession and control of them, and bought some of them, and kept them with his other cattle; and it was there held that a court of justice will not assist a party who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. The principle is thus concisely stated in *Heland v. Lowell*, 3 Allen, 407, 81 Am. Dec. 670: "And it is the established law that, when a plaintiff's own unlawful act concurs in causing the damage that he complains of, he cannot recover compensation for such damage." In *Frye v. Chicago, B. & Q. R. Co.* 73 Ill. 399, we said: "The rule is well settled that, if a party suffers injury whilst violating a public law, the other party being also a transgressor, he cannot recover for the injury, if his unlawful act was the cause of the injury. The party bringing the cattle to the state may have violated the law. Appellants were no less transgressors, and the maxim, *In pari delicto melior est conditio defendentis*, must apply. In *Harris v. Hatfield*, 71 Ill. 298, similar views were expressed." See also, *Toledo, W. & W. R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613; *Toledo, W. & W. R. Co. v. Brooks*, 81 Ill. 245; *Chicago & A. R. Co. v. Michie*, 83 Ill. 427. As long ago as the case of *Holman v. Johnson*, 1 Cowp. 343, Lord Mansfield said: "The principle of public policy is this: *Ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." In *Hall v. Corcoran*, 107 Mass. 253, 9 Am. Rep. 30, it was said by the supreme court of Massachusetts: "The general principle is undoubted that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort, the test in each case is whether, when all the facts are disclosed, the action appears to be founded in a violation of law, in which the plaintiff has taken part." *Way v. Foster*, 1 Allen, 408; *Smith v. Boston & M. R. Co.* 120 Mass. 490, 21 Am. Rep. 538; *Wallace v. Cannon*, 38 Ga. 199, 95 Am. Dec. 385; *Scott v. Duffy*, 14 Pa. 20; *Devor v. Knauer*, 84 Ill. App. 184; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737; *De Groot v. Van Duzer*, 20 Wend. 406; *Coppell v. Hall*, 7 Wall. 558, 19 L. ed. 244.

The same doctrine is laid down in the text-books. Beach, in his work on Contributory Negligence, 3d ed. § 47, says: "When the plaintiff is obliged to lay the foundation of his action in his own violation of law, he cannot recover. And when his illegal act also contributes to produce the injury of which he complains, he has no action, unless the defendant acted wantonly." Cooley, in his work on Torts, 2d ed. *151, says: "A further illustration of the rule which refuses redress to one participating in a wrong may be had where two persons are engaged in the same unlawful enterprise or action, and in prosecuting it one is injured by the negligence of the other." The reasoning of the latter author is that, when the party injured undertakes to trace his injury to the negligence of the other, he shows that at the time he was himself engaged in an unlawful action, and that it was only because of such action that the opportunity was afforded for the negligent injury. The author then says: "The injury, therefore, is as directly traceable to his own breach of the law as to the negligence of his associate; each has combined to produce it, and without both it could not have occurred. What the plaintiff must ask, therefore, must be this: That the law shall relieve him from the consequences of his disregard of the law, and this, as already stated, it will refuse to do." So in the case at bar the defendant in error traces his injury to the negligence of the plaintiff in error, but in doing so he necessarily shows that at the time both he and the plaintiff in error were engaged in the unlawful enterprise of disturbing the peace and quiet of the family of Hirsch by loud and unusual noises, and by the firing of revolvers and a shotgun. Because of the engagement jointly and together of both plaintiff in error and defendant in error in the criminal charivari, an opportunity was afforded for the injury complained of. Therefore the injury was as much due to the breach of the law by the defendant in error as to the negligence of his associate, the plaintiff in error. Both the plaintiff in error and the defendant in error combined to produce the injury. It follows that defendant in error cannot be relieved by the law from the consequences of his own disregard of the law.

The evidence shows that there was an organization among these young men for the purpose of carrying into effect the unlawful charivari. Defendant in error testifies that he was the first to reach the schoolhouse on the evening in question, and that his associates kept coming in, one or two at a time, until the whole party had arrived, including the plaintiff in error. A common purpose to participate in the unlawful transaction was thereby shown. Greenleaf, in his work on Evidence, vol. 1, § 111, says: "The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy in pursuance of the original concerted plan, and with reference to the common object, is,

in contemplation of law, the act and declaration of them all. . . . It makes no difference at what time anyone entered into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others in furtherance of such common design." In *Higgins v. Minaghan*, 78 Wis. 602, 11 L. R. A. 138, 47 N. W. 941, the same doctrine was recognized that where a party is present as an actual participant in a charivari, and aids and encourages the others, he is responsible for the acts, language, and conduct of each and every one constituting the charivari party, the same as if such acts were done by himself. It follows that the firing of the pistol by the plaintiff in error was as much the act of the defendant in error as of any other person engaged in the enterprise. The fact that the parties assembled at the schoolhouse were associated in the joint prosecution of the common design gave to the collective body the attribute of individuality by their mutual agreement, and the act of each member in furtherance of the common object was the act of all concerned. Under this view, to allow defendant in error to recover in this case would be to allow him to recover for an injury which was, in the eye of the law, as much his own act as the act of the plaintiff in error.

It is said, however, by the defendant in error, that the trial court gave, in behalf of the plaintiff in error, the instructions which he asked, embodying the view above stated. It is true that the court instructed the jury that whosoever wilfully disturbs the peace and quiet of any neighborhood or family by loud or unusual noises is, under the laws of this state, guilty of a misdemeanor, and subject to a fine on conviction thereof. The court also instructed the jury, in behalf of plaintiff in error, that if they should believe from the evidence "that, at the time of the injury complained of, the plaintiff and defendant, with others, were engaged in an unlawful enterprise or action, and in prosecuting such unlawful enterprise the plaintiff was unintentionally injured by the negligence of the defendant, then the plaintiff cannot recover for any injury received under such circumstances, while so unlawfully engaged." But the court gave twenty-five instructions in behalf of defendant in error, which ignored entirely the unlawful character of the enterprise in which these parties were engaged, and which based the responsibility of the plaintiff in error for negligence in the handling of his pistol, resulting in the injury to defendant in error, upon the supposition that none of the parties participating in the charivari were engaged in an unlawful transaction. The court used the following language in instruction numbered 23, given for the defendant in error, to wit: "The court instructs the jury that a charivari, so called, is not in itself unlawful." This instruction

was not only incorrect as a statement of the law, but it was directly contradictory of the instructions heretofore referred to, given in behalf of the defendant. In instruction 19 given in behalf of the defendant in error, the court said: "The lawfulness of the act from which the injury resulted is no excuse for the negligence," etc. In the same instruction the court also said: "The court further instructs the jury that, although you may find the defendant was in the exercise of a lawful right, yet he is bound to use such reasonable diligence and precaution that no injury may be done to others." Clearly, these instructions thus given for the defendant in error were erroneous in holding that plaintiff in error was engaged in the exercise of a lawful right while participating in the charivari. The instructions above referred to, given for plaintiff in error, tended to make the impression upon the minds of the jury that the charivari was an unlawful transaction, while all the instructions of the defendant in error, including those herein referred to, tended to make the impression upon the minds of the jury that the charivari was not an unlawful transaction. "Where the instructions set up for the jury contradictory rules for their guidance, which are unexplained, and following either of which would or might lead to different results, then the instructions are inherently defective, and calculated to confuse and mislead the jury." *Blashfield, Instructions to Jurors, § 73; Chicago, B. & Q. R. Co. v. Payne, 49 Ill. 499; Quinn v. Donovan, 85 Ill. 194.*

In the first and second counts of the declaration an assault is charged against plaintiff in error. "The intention to do harm is of the essence of an assault." 2 Greenl. Ev. 16th ed. § 83; 1 Hilliard, Torts, 3d ed. §§ 7-9, p. 181; *Paxon v. Boyer, 67 Ill. 132, 16 Am. Rep. 615; Razor v. Kinsley, 55 Ill. App. 605; Kennedy v. People, 122 Ill. 649, 13 N. E. 213.* In the case at bar there is no evidence in the record tending in the slightest degree to prove that plaintiff in error intended to do any harm to the defendant in error, or that the wound inflicted upon the defendant in error was in any way intentional or wilful. The sole ground upon which it is sought to base a right of recovery is that the plaintiff in error was careless and negligent in the handling of the revolver, which caused the injury to the defendant in error. In view of this absence of intention or wilfulness on the part of the plaintiff in error, he asked the court to instruct the jury to find for him upon the first and second counts of the declaration, but the instructions so asked were refused. We are of the opinion that the instructions to find for the defendant upon the first and second counts should have been given, and that it was error to refuse them.

The judgments of the Appellate Court and of the Circuit Court of Piatt County are reversed, and the cause is remanded to the latter court, with directions to proceed in accordance with the views herein expressed. 60 L. R. A.

Auguste RANFT, Appt.,
v.
Gustav F. REIMERS et al.

(200 Ill. 386.)

1. The sale of the good will of a business and the personal property used in conducting it, upon which appears the name of the seller, will not prevent him from resuming business under his own name.
2. One who has sold the good will of a business to persons who change the name under which it is conducted has a right, upon resuming business under the old name, to have mail directed to such name delivered to him.
3. One who sells a trade, good will, and business, covenanting to warrant and defend the same, cannot, after resuming business, solicit trade from his former customers to the injury of the buyer.
4. One who sells and warrants the good will of a business, a large part of the orders of which come by telephone, cannot, upon resuming business, appropriate the old telephone number to the injury of the buyer.

(December 16, 1902.)

A PPEAL by defendant from a judgment of the Appellate Court for the Second District, affirming a decree of the Circuit Court for Will County in plaintiffs' favor in a suit to enjoin violation of the implied warranty in a sale of the good will of a business. *Affirmed in part. Reversed in part.*

The facts are stated in the opinion.

Messrs. E. Meers and C. W. Brown for appellant.

Messrs. Donahoe & McNaughton, for appellees:

It is not necessary, in order to give a right to an injunction, that a specific trademark should be infringed; but it is sufficient that the court is satisfied that there is an intent on the part of the defendant to palm off her goods as the goods of the complainants.

McLean v. Fleming, 96 U. S. 245, 24 L. ed. 828; Woollam v. Ratcliff, 1 Hem. & M. 259; International Committee, Y. W. C. A. v. Young Women's Christian Assn. 194 Ill. 200, 56 L. R. A. 888, 62 N. E. 551.

If any words or numbers are used to deceive the public as to the brand of goods sold, the court will interfere to protect the public, even if the person asking it has not the exclusive right to use them.

Lee v. Haley, L. R. 5 Ch. 155; Wotherpoon v. Currie, L. R. 5 H. L. 508.

If the effect of the use of one's own name in the prosecution of a business is such as will appropriate the good will of a business belonging to another person, then a court of chancery will enjoin one from using it.

NOTE.—For name as part of good will of business, see also, in this series, *Vonderbank v. Schmitt (La.) 15 L. R. A. 462, and note; Snyder Mfg. Co. v. Snyder (Ohio) 31 L. R. A. 657; Knoedler v. Glaenzer (C. C. App. 2d C.) 20 L. R. A. 733; and Bingham School v. Gray (N. C.) 41 L. R. A. 243.*

Allegretti v. Allegretti Chocolate Cream Co. 177 Ill. 129, 52 N. E. 487; *Croft v. Day*, 7 Beav. 84; *Metzler v. Wood*, L. R. 8 Ch. Div. 606; *Fullwood v. Fullwood*, L. R. 9 Ch. Div. 176; *Levy v. Walker*, L. R. 10 Ch. Div. 436; *Massam v. Thorley's Cattle Food Co.* L. R. 14 Ch. Div. 748; *McLean v. Fleming*, 98 U. S. 245, 24 L. ed. 828; *Devlin v. Devlin*, 69 N. Y. 212, 25 Am. Rep. 173; *Filkins v. Blackman*, 13 Blatchf. 440, Fed. Cas. No. 4,786; *Stonebraker v. Stonebraker*, 33 Md. 252; *Shaver v. Shaver*, 54 Iowa, 208, 37 Am. Rep. 194, 6 N. W. 188; *Churton v. Douglas*, Johns. V. C. (Eng.) 174.

If a fraudulent intent is shown, then it is not necessary to show that any purchaser has in fact been misled.

Pillsbury-Washburn Flour Mills Co. v. Eagle, 41 L. R. A. 162, 30 C. C. A. 386, 58 U. S. App. 490, 86 Fed. 608; *Pillsbury v. Pillsbury-Washburn Flour Mills Co.* 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841.

Any conduct on the part of the vendor of a good will calculated to impair its advantages is a breach of the promise, implied in sales of every description, that the vendor will not disturb the vendee in the enjoyment of his purchase.

Hall's Appeal, 60 Pa. 458, 100 Am. Dec. 584; *Knoedler v. Bousso*, 47 Fed. 465; *Churton v. Douglas*, Johns. V. C. (Eng.) 174; *Hogg v. Kirby*, 8 Ves. Jr. 215; *Cruttwell v. Lye*, 17 Ves. Jr. 335; *Kyle v. Perfection Mattress Co.* 127 Ala. 39, 50 L. R. A. 628, 28 So. 545; *Mossop v. Mason*, 18 Grant Ch. (U. C.) 453; *Thynne v. Shove*, L. R. 45 Ch. Div. 577; *Hudson v. Osborne*, 39 L. J. Ch. N. S. 79; *Angier v. Webber*, 14 Allen, 211, 92 Am. Dec. 748; *Munsey v. Butterfield*, 133 Mass. 492.

The vendor of the trade and good will of a business is not entitled to canvass the old customers, and may be restrained by injunction from soliciting any person who was a customer prior to the sale of the trade, good will, and business to continue to deal with him, or not to deal with the vendee.

Myers v. Kalamazoo Buggy Co. 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; *Labouchere v. Dawson*, L. R. 13 Eq. 322; *Ginesi v. Cooper*, L. R. 14 Ch. Div. 596; *Leggott v. Barrett*, L. R. 15 Ch. Div. 306; *Trego v. Hunt* [1896] A. C. 7; *Althen v. Vreeland* (N. J. Eq.) 36 Atl. 479; *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932; *Scudder v. Kilfoil*, 57 N. J. Eq. 171, 40 Atl. 602; *Burkhardt v. Burkhardt*, 5 Ohio Dec. Reprint, 185; *Richardson v. Westjohn*, 6 Ohio Dec. Reprint, 1043.

Cartwright, J., delivered the opinion of the court:

From the year 1885 until his death, in 1891, John Ranft conducted a business of manufacturing and selling ginger ale, orange cider, lemon sour, and other like drinks, and bottling beer, under the name of Ranft Bottling Works, at No. 229 North Bluff street, in Joliet. Upon his death he left as his successor in the business his widow, Auguste Ranft, the appellant, who conducted the business from that time under the name of A.

Ranft Bottling Works. She was the sole proprietor of the business up to July 1, 1900. The trade name "A. Ranft Bottling Works," together with the letters "A. R." and the word "Trademark," were blown in the bottles used by her, and the billheads, stationery, and wagons, were marked "A. Ranft Bottling House," or "A. Ranft Bottling Works, Mrs. A. Ranft, Proprietor." On July 1, 1900, Gustav Reimers, one of the appellees, and brother of appellant, bought a one-half interest in the business, and they conducted it under the partnership name of "A. Ranft & Co.," but the marks on the bottles, stationery, and wagons remained the same. On July 15, 1901, the appellee Reimers sold out his interest to appellant, and the partnership was dissolved. After the dissolution, appellant prosecuted the business under the same name and in the same manner as before the partnership. She leased the premises where the business was carried on; and in the latter part of July, 1901, appellees, who had formed a partnership to go into the same business, purchased the premises, and called upon appellant to see if she would sell the machinery, property, and business to them. The negotiations resulted in an agreement by which she was to sell the property and business to them for \$6,000 at the end of the month of August. In pursuance of that understanding, appellant executed a bill of sale to appellees on August 31, 1901, of the following property: "All property and machinery now used in connection with the manufacture and bottling of pop, beer, etc., at the premises known as No. 229 North Bluff street, in the city of Joliet, Illinois, including about three hundred cases of pop bottles, fifty cases quart bottles, thirty cases siphon bottles (including all cases), six horses, four wagons, one top buggy, two sets double harness, four sets single harness, two bobsleds, one safe, one desk, a lot of extracts, all tools in barn used in connection with said manufactory, as well as the trade, good will, and business of said party of the first part at said described premises." The property was delivered, and from that time appellees carried on the business. They changed the sign over the door to read, "Reimers & Voitik Bottling House." They used the old bottles and wagons with the former name on them, but as they purchased new bottles they put on the words "Reimers & Voitik Bottling Works, Joliet, Ill.," and the initials "R. V.," and "Trademark." Shortly afterward appellant set up the same kind of business at No. 117 North Bluff street, about 600 feet from the former location. The business sold to appellees had been largely done through mail and telephone orders, and the telephone used in the premises was No. 1,343. Appellant directed the telephone company to install on her premises said telephone No. 1,343, and she directed the mail for the Ranft Bottling Works to be delivered to her. She procured bottles with the words "Ranft Bottling Works," and the letters "A. R." in the form of a monogram, and "Trademark," blown in

them, and on her wagons she placed the sign, "A. Ranft Bottling Works, Telephone 1,343." Appellees thereupon filed the bill in this case in the circuit court of Will county, praying for an injunction against appellant from using the tradename "Ranft Bottling Works," or any similar name, or the trademark "A. R.," in connection with her business; also from using the telephone number 1,343, or receiving mail matter addressed to "Ranft Bottling Works," or soliciting trade and custom of those who were customers and patrons of the business at the time of the sale. The bill was answered, and upon a hearing the court granted the relief prayed for, except as to the receipt of mail addressed to "Ranft Bottling Works." An appeal was taken to the appellate court for the second district, and one of the justices of that court having heard the case in the circuit court, and the others being divided in opinion, the decree was affirmed by operation of law.

It has been held that the right of a man to use his own name in connection with his own business is so fundamental that the intention to entirely divest himself of such right, and transfer it to another, will not readily be presumed, but must be clearly shown. Where it is so shown, the transaction will be upheld, but it will not be sustained upon doubtful or uncertain proof. *Hazleton Boiler Co. v. Hazleton Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339. In this case there was no agreement that complainants should have the right to use the name of the defendant, or the name in which the business was carried on, or that she should not use it. She testified (and it was not contradicted) that in selling complainants the bottles, cases, and wagons, she agreed that they might keep the then existing names on them, but when they bought new ones, or when the wagons were painted, they should not put the names on again. Furthermore, complainants did not assume the name which they sought to enjoin defendant from using, but substituted their own. They changed the sign on the building, and, as they bought new bottles, put on the new name and initials. Their counsel now say that they never insisted upon the right to use the name of the appellant. They do not claim that they acquired any right to its use under the contract. When the defendant established her new business under the name of "A. Ranft Bottling Works," complainants had changed the name of their business; and she had never divested herself of the right to use her name, or transferred it to them. There was no agreement on the part of defendant that she would not again engage in the business in Joliet or elsewhere. After the agreement for the purchase was made, and before the bill of sale was executed, complainants heard some rumor that she was intending to again engage in business; and they testified that they conferred with her about it, and she told them that she was tired of the business, and wanted to get out of it, and had no intention of resuming it. She denied that she 60 L. R. A.

had any such conversation with them, but they all testified that complainants asked defendant to sign an agreement that she would not go into the business again, and she would not give them any answer. No agreement of that kind was made or signed, and the bill of sale was subsequently executed without any stipulation of that character. In fact, it is not claimed that defendant was in any manner prohibited from re-engaging in the same business in Joliet, or that complainants had any right to restrain her from doing so; and the bill did not ask for an injunction against her conducting a new business at No. 117 North Bluff street, but only to prevent her from using the name "A. Ranft Bottling Works" or "Ranft Bottling Works" in such business. If the complainants have any right to any relief in this suit, it rests wholly upon the purchase of certain specific articles of personal property, with the name "A. Ranft Bottling Works" on them, together with the good will of the business carried on at No. 229 North Bluff street. It is not contended that the mere sale of the property and good will, without any agreement not to resume the same business, would prevent the defendant from again establishing the same business in Joliet; and this is in accordance with the authorities. That being so, and there being no agreement that the defendant should not use her own name, we think, under the authority of *Hazleton Boiler Co. v. Hazleton Tripod Boiler Co.* 142 Ill. 494, 30 N. E. 339, complainants had no right to an injunction against the use of the name or the words in question. Defendant had a right to the use of it, and complainants had changed the name of their business, so that there was no wrong in her directing the mail for Ranft Bottling Works to be delivered to her. There was no artifice or deception used by the defendant to mislead the public into the supposition that she was continuing the same business which she had sold to complainants, and there was no concealment of the fact that she was established in a new location. So far as the mail is concerned, there was no attempt to deceive or defraud the public by obtaining letters or trade intended for the complainants.

The business had been carried on for many years at No. 229 North Bluff street, and was well established in that location. The place had a good trade, and the good will was a large part of the consideration for the purchase. The visible property was probably not worth half the purchase price. The defendant covenanted to warrant and defend the property sold to complainants, together with this good will; and it was charged and proved that she had interfered with such good will by canvassing among those who were customers of the business when she sold it, and soliciting their trade, with the purpose and effect of largely destroying the value of that which she had sold for a valuable consideration. In England it seems to be settled that the vendor of a good will is not entitled to canvass customers and solicit them not to deal with the purchaser, but to

deal with the vendor. *Trego v. Hunt* [1896] A. C. 7. The vendor will be restrained from such conduct by injunction. In this country the authorities are not agreed. In some states it is held that the purchase of a good will does not carry with it any obligation not to lessen its value by interference with it unless there is an express agreement to that effect, provided the vendor does not hold himself out to the public as continuing the business which he has sold. In these states the seller may set up the same business in the same vicinity, and canvass the customers of the house, with the effect of destroying the good will. The English view, which we are inclined to regard as the more just and equitable, is adopted by other authorities. *Myers v. Kalamazoo Buggy Co.* 54 Mich. 215, 52 Am. Rep. 811, 19 N. W. 961, 20 N. W. 545; *Newark Coal Co. v. Spangler*, 54 N. J. Eq. 354, 34 Atl. 932. We do not think that the defendant ought to be allowed, after selling and warranting a good will to the complainants, to purposely endeavor to prevent their receiving the benefit of it, or to attempt to disturb them in its enjoyment. The locality chosen by her was not near enough to have that effect. But to

canvass old customers of the firm, and endeavor to dissuade them from continuing to deal with complainants, was a direct interference with the property which defendant sold, with the purpose of destroying it and preventing complainants having the benefit and advantage of it. The attempt to appropriate the telephone number which had been used in the business sold, and by which a large part of the orders had been accustomed to come, was of the same character.

We conclude that the decree was too broad, in restraining the defendant from the use of the name "A. Ranft Bottling Works" or "Ranft Bottling Works," but that it was justified as to the attempt to appropriate the telephone and telephone number, and as to soliciting trade and custom of the patrons and customers of the business sold by her to the complainants at the time of the sale.

The judgment of the Appellate Court and the decree of the Circuit Court are therefore reversed so far as relates to the use of said name or words, and the judgment of the Appellate Court is affirmed in all other respects. The cause is remanded to the Circuit Court. Appellant and appellees will each pay one half of the costs of the appeal.

UTAH SUPREME COURT.

Telitha Dean KARREN

v.

Fred W. KARREN.

(.....Utah.....)

1. A woman who consented to a decree of divorce against her to enable her husband to obtain a grant of property cannot, after her husband had married another woman, have the decree annulled, although, in con-

sideration of her consent, he promised to marry her after the grant was procured, and the decree was obtained by suppression of facts, and false testimony.

2. Under a statute permitting changes in divorce decrees in respect to disposal of children or distribution of property, such changes can only be made in the action in which the divorce is granted.

(July 5, 1902.)

NOTE.—Right of party obtaining or consenting to divorce to contest its validity.

- I. Scope, 294.
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- V. Collateral attack.
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I. Scope.

The primary object of this note is to collate all cases where the party obtaining, or actually consenting to, a divorce decree has afterwards attempted to question it, though cases showing an attempt by the defendant to question a decree collusively obtained are also necessarily included on account of their close relation to consent decrees. But cases of constructive consent, 60 L. R. A.

based upon subsequent recognition or acquiescence by acts in the decree, are excluded, as are also all cases in which the party attacking the decree did not actually consent thereto, and had been in no way instrumental in obtaining it, but was denied relief because of long delay in questioning the validity of the decree, which is treated by some of the courts as in the nature of a constructive consent by acquiescence.

II. Direct attack by party obtaining it.

a. In general.

The only authority found for a direct application by the party obtaining a divorce to have the same set aside as a matter of right or privilege, without an allegation of fraud, mistake, or surprise, is *Ficener v. Ficener* 8 Ky. L. Rep. 867, 3 S. W. 597. There, a wife obtained a divorce a vinculo, and, at the same term, a few days after, it was set aside at her instance, leaving the parties still husband and wife. This was done without notice to the husband, who afterwards came in and moved to set aside the order by which the judgment for divorce was set aside, which motion was not granted, the court stating that, after the term at which a judgment for divorce has been rendered it becomes final, the grounds for setting aside ordinary judgments at law or in equity not applying to

CROSS-APPEALS from a judgment of the District Court for Cache County in plaintiff's favor for a part of the relief demanded in an action to set aside a judgment granting a divorce; plaintiff appealing from so much of the decree as refused to set aside the divorce *in toto*, and defendant appealing from so much as awarded any relief. *Reversed on defendant's appeal.*

The facts are stated in the opinion.

Messrs. George Q. Rich and J. Z. Stewart, Jr., for appellant:

The action to set aside the divorce proceedings on the ground of fraud would, of course, be a direct attack, because fraud does not render a judgment or decree void, but voidable, and a voidable decree cannot be collaterally attacked.

5 Am. & Eng. Enc. Law, pp. 384, 387; 2 Pom. Eq. Jur. 2d ed. §§ 803, 915, 916; *Lar-*

mer v. Knoyle, 43 Kan. 338, 23 Pac. 487; *Oaswell v. Oaswell*, 120 Ill. 377, 11 N. E. 344.

The misrepresentations relied upon in the complaint in this action do not constitute fraud, because they do not possess the elements, and are mere promises for the future which respondent had no right to rely upon.

8 Am. & Eng. Enc. Law, p. 636; *Phillips v. Thorp*, 10 Or. 494; *Weeks v. Hill*, 38 N. H. 199; *Cross v. Cross*, 58 N. H. 373; *Bel-den v. Munger*, 5 Minn. 211, 80 Am. Dec. 407, Gil. 169; *Adams v. Adams*, 25 Minn. 72; *Muckenburg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Everhart v. Puckett*, 73 Ind. 409; *Stoutenburg v. Lybrand*, 13 Ohio St. 228; *Viser v. Bertrand*, 14 Ark. 267; *Kil-born v. Field*, 78 Pa. 194; *Blank v. Nohl* (Mo.) 19 S. W. 65; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Singer v. Singer*, 41 Barb.

judgments for divorce; but that during the term, however, and while the condition of both parties remains unchanged, there is no reason why the judgment may not be set aside at the instance of the complaining party, who may have relented in his desire that the separation be final. But the court said that the order in this case should not have been made without notice to the husband, and that, if he had persevered in his attempt to have the order set aside on that ground, it would have been done, and the wife would have been required to give some reason for setting aside the decree.

In the remaining decisions the courts uniformly refuse to grant relief, for various reasons, according to the circumstances.

In *Merritt v. Lockwood*, 45 Hun, 592, 10 N. Y. S. R. 875, a wife brought an action for absolute divorce, obtaining a decree which allowed her nothing for her support, and, after remaining quiet for twelve years and until after her husband's death, she brought an action to set aside the decree for fraud consisting in a failure to allow her alimony. The court denied her any relief, stating, however, that, had she objected at once and applied to open the decree, the application would have been natural; but that a delay of twelve years, and until after her husband was dead, afforded abundant grounds to deny the application.

It clearly appears that when complainant has been guilty of fraud or bad faith no relief may be expected.

So, in *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 481, an action to annul a divorce decree granted the petitioner upon a cross-complaint, on the ground of want of jurisdiction of the court on account of nonresidence of complainant therein, the court refused relief, stating that no one was deceived or defrauded in this instance unless it was the court, and that the same court will not set aside a decree thus rendered at the suit of one who is responsible for the imposition effected,—especially after more than three years of acquiescence and enjoyment of the fruits of the action; that "courts cannot be used that way."

And in *Carlisle v. Carlisle*, 96 Mich. 128, 55 N. W. 673, it is said, *arguendo*, that a decree cannot be avoided by a party guilty of fraud; nor can one who obtains a divorce, and accepts its benefits, afterwards question the jurisdiction of the court granting it.

So, in *Simons v. Simons*, 47 Mich. 253, 10 N. W. 360, the complainant in a divorce action filed a bill to set the decree aside, alleging that it was procured by collusion with her husband, while in her original bill for the divorce there was a sworn allegation that it was not founded

upon any collusion, agreement, or understanding whatever. The court held that, without this sworn allegation in her bill of complaint, it would not have been entertained, and, having thus given the court jurisdiction, and permitted the case to proceed to a final decree, she could not then be permitted to take advantage of her own wrong. In the language of the court: "Indeed, the whole matter was simply a shameless bargain, and, whether right or wrong, she must now abide by it."

If the decree, as it stands, is the result of carelessness or negligence in the complainant, no relief can be obtained by that party, although the question of his fraud or bad faith is not involved. On this principle, in *Champion v. Woods*, 79 Cal. 17, 21 Pac. 534, relief was denied to a wife, who, having obtained a decree of divorce on a complaint containing an allegation that there was no community property, two years later, and subsequent to her husband's death, instituted proceedings against his executor asking to have the decree in the divorce case canceled so far as the same affected her property rights, and that she be adjudged to be the owner of one half of property which she claimed was community property, on the ground that the statement in regard to community property contained in her petition for the original decree was induced by the representations of her husband, on whom she implicitly relied in regard to this matter, and that such representations were false and fraudulent. The court said that plaintiff's relations with her husband at the time of the divorce proceedings were such that it was negligence and inexcusable carelessness on her part to rely upon him in a matter of so much importance.

Neither may a complainant have relief against a decree when he expressly consented to the provisions of which he afterwards complains. This is clearly shown in *Rindge v. Rindge*, 22 Ind. 31, where, after the granting of a divorce decree at the suit of the husband for incompatibility of temper, adjudging that defendant be given certain property as alimony as previously agreed by the parties, the complainant at the same term moved for a new trial upon the ground of newly discovered evidence which would give him a divorce against his wife on the ground of adultery, and also alleging fraud upon her part on account of which the property so adjudged her was obtained; but the court overruled the motion, stating that, although a woman against whom a divorce is obtained on the ground of adultery is not entitled to alimony, here, however, the divorce had been obtained on other grounds; also, that the property so adjudged her was given by the court at

139; 3 Am. & Eng. Enc. Law, pp. 879, 880; 2 Bishop, Marr. & Div. ed. 1881, § 696, ed. 1891, § 102.

If the intention of F. W. Karren was to secure the property through fraud, respondent was equally guilty with him because, according to her complaint, it was in sole reliance upon these representations, and to enable him to procure the deed by those means, that she "neglected and failed to appear." No relief will be granted in such cases.

5 Am. & Eng. Enc. Law, p. 845; *Blank v. Nohl* (Mo.) 19 S. W. 65; 3 Am. & Eng. Enc. Law, p. 379; 1 Pom. Eq. Jur. 2d ed. § 401; *Webster v. Webster*, 54 Iowa, 153, 6 N. W. 170.

If a party has joined in obtaining a void decree, he cannot set up its invalidity against the other party, if such other party

has married again relying on the divorce. *Stewart, Marr. & Div.* § 419; 5 Am. & Eng. Enc. Law, p. 344.

In all cases great caution will be exercised, especially if the rights of third persons have intervened, or one party, relying upon the divorce, has remarried.

Stewart, Marr. & Div. § 423; 2 Bishop, Marr. & Div. § 751.

In an action to set aside a divorce no alimony will be granted.

2 Am. & Eng. Enc. Law, 2d ed. p. 99; *Kiefer v. Kiefer*, 4 Colo. App. 506, 36 Pac. 621; *Appleton v. Warner*, 51 Barb. 270; *Wilhite v. Wilhite*, 41 Kan. 154, 21 Pac. 173; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Singer v. Singer*, 41 Barb. 139.

Messrs. Nathan Tanner, Jr., and J. N. Kimball, for respondent:

The decree of divorce should be set aside

the plaintiff's instance, in pursuance of an agreement between the parties, and, whether such agreement was a proper one the court expressly states that it is not called upon to decide, only holding that, as plaintiff voluntarily agreed to suffer the decree for the property to go against him, his motion for a new trial should be refused.

b. Attempt by wife to vacate decree obtained in her name without her consent.

Decrees obtained by the husband in the wife's name without her knowledge or consent are vacated as being a fraud both upon her and upon the court.

Such a decree was vacated in *Olmstead v. Olmstead*, 41 Minn. 297, 43 N. W. 67, where the wife knew nothing of the proceedings until she heard of the granting of the decree, except that, in an interview had with her husband and while laboring under great excitement and distress, she had signed a paper without knowledge of its contents, which, after the decree was granted, she believed must have been the verification to the complaint. The court granted the application to vacate the decree, stating that it could not be tolerated that a party anxious to secure a divorce should bring about a judicial separation by an action against himself and commenced and managed by himself in his own interest, using his wife as a mere figurehead,—a fraud alike upon her and the court. In this case the husband had remarried within ten days after the entry of the decree; but the court said that parties who in such cases make haste to contract another marriage take the risk of the consequences of an appeal or other proceedings to vacate the judgment.

And in *Brown v. Grove*, 116 Ind. 84, 18 N. E. 887, a wife was given relief, after her husband's death, from a decree procured by him in her name without her knowledge or consent, the court stating that a husband who procures a petition to be filed in the name of his wife against himself without her knowledge, and answers the complaint filed by his own procurement, perpetrates a fraud upon her and upon the court; that the court abhors such conduct, and has inherent power to annul such a decree.

In *Bradford v. Abend*, 89 Ill. 78, 31 Am. Rep. 67, upon vacating a decree in a suit instituted by a husband against himself in his wife's name while she was insane and confined in an asylum in another state, the court gave as its reason that, being insane, the wife could not consent to the granting of the decree, and, also, that fraud would be presumed from the unequal position of the parties, whether any existed or not, and that, alone, would vitiate the decree. 60 L. R. A.

III. Application by both parties to set aside decree.

After an absolute decree of divorce had been granted and entered, both parties joined in a petition asking that the decree be vacated and the parties restored to their former rights and privileges. This relief the court granted, no third person being injured thereby, and it appearing upon the affidavit of complainant in the divorce action that charges against defendant made therein were, after the rendition of the decree, found to be untrue. This order, however, was expressly made without prejudice to the property rights which third persons might have acquired under the decree, and which the court stated must be protected. *Colvin v. Colvin*, 2 Paige, 385, 22 Am. Dec. 644.

IV. Direct attack by party who has consented to, or colluded in, its procurement.

a. Consent.

In *Brick v. Brick*, 65 Mich. 230, 31 N. W. 907, 33 N. W. 761, a defendant in a divorce suit appealed from a decree in plaintiff's favor, but, the printed record showing that the decree was entered upon the consent of defendant through his solicitor, the court held that it was binding upon the parties unless impeached for fraud or mistake.

It is said in the course of the opinion in *Scott v. Scott*, 17 Ind. 309, that, under the general chancery practice, in suits for divorce, a default, acknowledgment, or consent, by a defendant, was generally supposed to settle the case against him, so that he could not afterwards complain of any lawful disposition the court should make of the case.

And a wife who entered her appearance in a suit for divorce instituted by her husband, consented to a default, and accepted a certain sum of money as alimony, was held in *Mahe v. Title Guarantee & Trust Co.* 95 Ill. App. 365, to be bound by the decree upon attempting to have it set aside ten months later on the ground of fraud, where the husband had contracted a second marriage with a woman who, in good faith, had relied upon the validity of the divorce decree, although the wife's consent was obtained and the acceptance of the alimony induced by the coercion of her husband, and her inaction for the ten months succeeding the divorce, during which time she was living with her husband as his wife, was induced by his repeated assurances that the decree was fraudulent and had no effect upon their relations and by his promise to remarry her in order to allay her fears. The decision is based upon the ground that the wife,

in its entirety, because it appears from the findings that it was procured by default, which default was caused, and the respondent prevented from presenting a good and sufficient defense, by reason of appellant's misrepresentations to her; that it was also obtained upon testimony knowingly false, thus constituting a fraud upon the respondent, a fraud upon the court, and a crime against the laws of the state.

2 Bishop, Marr. & Div. §§ 744, 753; *Whitcomb v. Whitcomb*, 46 Iowa, 437; *Rush v. Rush*, 46 Iowa, 648, 26 Am. Rep. 179; *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193; *Freeman*, Judgm. 99, 100, 250, 489, 491.

The fact of his remarriage should make no difference.

Ibid.

knowing all that time that the decree was fraudulent, was barred from any relief against it by reason of her failing to defend, and delaying proceedings to vacate the decree until an innocent woman had become involved; and that, although she herself was deeply wronged, since one of two innocent parties must suffer, she who placed it in the power of her husband to commit the fraud must be the one. The court, however, stated that, had the question been one between the petitioner and her husband alone, and had the rights of an innocent third party not intervened, it would have no hesitancy in holding that, under all the circumstances, the petitioner might be entitled to relief, notwithstanding her failure to make defense to the divorce suit and her delay in filing her bill. To this decision there is a dissenting opinion to the effect that, it appearing that the plaintiff's acts in regard to the granting of the divorce were induced by the power and compulsion of her husband, and her inaction after its rendition being caused by his influence and her reliance on him, she ought not to be refused relief in order to save an innocent party, as her claims are grounded upon the fraud practised by the husband on the court, and a refusal to grant her relief involves a support of the fraud and a permitting of it to succeed. Although the wife's consent to the divorce proceedings is recognized as one of the grounds for refusing her any relief, the force of the decision as to this question is weakened by the greater prominence given to the other ground of laches.

But a wife was allowed, in *Megarge v. Megarge*, 2 N. Y. Week. Dig. 352, to vacate by motion a decree of absolute divorce rendered against her on the charge of adultery, where it appeared that the parties, mutually desiring a divorce, applied to an attorney and made arrangements to secure a decree on the ground of abandonment, and that the wife supposed the decree was granted on that ground, and therefore made no defense; but, by means of manufactured evidence, an absolute decree was fraudulently rendered against her on the ground of adultery. This case is of value here only by reason of the fact that no point was made against the wife on account of her consent. The relief was granted wholly on the ground of the fraud practised on her, the judge stating that courts have always intervened on motion to vindicate their own process and proceedings against oppressive, fraudulent, and collusive uses of them.

A year after the entry of a decree of divorce procured without the wife's knowledge and upon irregular and defective service, she gave her son power to employ counsel and either obtain a favorable settlement of her share of the property. 60 L. R. A.

Baskin, J., delivered the opinion of the court:

The material allegations of the complaint are as follows: "That heretofore, to wit, on the 17th day of September, 1900, in this [first district] court, a decree and judgment was entered in an action wherein said defendant was plaintiff, and this plaintiff was defendant, in terms dissolving the bonds of matrimony between this plaintiff and said defendant, and awarding said defendant the three children, issue of the marriage between plaintiff and defendant, viz.: . . . And plaintiff further alleges that the summons in said action was never served upon her, and that she had no legal knowledge of the pendency of said action; that said judgment was rendered against her by default, and upon a complaint" which charged her (the defendant) with having been guilty

erty, or set the decree of divorce aside. Upon a favorable settlement being obtained by the son, another decree was entered ratifying the original decree. After fifteen years, during which she had enjoyed the property obtained on the settlement and after the husband had married again, she commenced an action to set aside the decree on the ground of its invalidity, claiming that she was not fully and accurately advised as to her rights at the time of the previous transactions, and was now informed by counsel that said decrees of divorcement were wholly and utterly void. The court denied her right to contest the validity of the decree on the following grounds, viz.: That in the previous transactions it appeared that she clothed her son fully by oral directions, with the power which he exercised, and was fully aware of every step that he was about to take; also that, after the matter was concluded, she was fully informed of everything that had been done, and expressed her satisfaction with it, and that whether the first decree was valid or not, the second was a confirmation of it made with her consent; also, that the only misapprehension as to her rights under which she labored was a mistake of law caused by error in the judgment of her counsel and corrected in no other way than by the judgment of other counsel fifteen years afterwards, and that, as to such a mistake of law, equity will not grant relief; further, that, by receiving and enjoying the proceeds of the settlement, and by delaying to have the judgment of record set aside until a new family had grown up under its protection, she was estopped, both by confirmation and by acquiescence or laches. *De Horeu v. Hereu* (Ariz.) 56 Pac. 871.

Although a wife, at the time out of the state, signed an admission of personal service of the summons and complaint in divorce proceedings, and waived all other service, she was allowed to set aside the decree subsequently obtained upon her nonappearance for the reason that such service would not avail to give the court jurisdiction where the statute prescribed service by publication upon parties without the state, and the contention that she was estopped to question the decree by her admission of service was held to be of no force, since she could not waive the order of publication required by statute, except by entering her appearance, or causing it to be entered by her attorney. *Weatherbee v. Weatherbee*, 20 Wis. 499.

b. Collusion.

From the statement in the early case of *Prudam v. Phillips*, further reported *infra*, V. b, that, "if both parties colluded in the cheat upon the court, it was never known that either of

of adultery. "And that, after the commission of the adultery complained of in the complaint (in said action for divorce), the said defendant forgave her, and lived with and cohabited with her as his wife, and so lived and cohabited with her during the pendency of the action aforesaid, and thereafter left her in possession and custody of their home and children while he went to fill a mission in the Southern states. And she further alleges that the said defendant represented to her and told her that he was procuring said divorce because of the insistence of his parents, and that after said divorce was procured he would remarry her, and provide for her as he had hitherto done, and under no circumstances deprive her of the custody of the said children, or of the homestead on which they then resided. That, at the time of the bringing of said

suit, the title to said homestead was in the father of said defendant, and he, the said father, refused to make a deed to the said defendant of said homestead unless he would procure a divorce from this plaintiff. That, relying upon said representations of said defendant, and to enable him to procure the said deed to said homestead, she neglected and failed to appear and defend said action for divorce. That, notwithstanding said representations, the said defendant falsely and knowingly testified in court that he had not forgiven this plaintiff for her adultery, and falsely and knowingly obtained a decree awarding the custody of the said children to him, and falsely and knowingly testified in court that he had not lived or cohabited with this plaintiff after having knowledge of said adultery, and forcibly, and against her consent, took from her her children, and turned

them could vacate the judgment," seems to spring the rule which controls in a number of cases of attempts to vacate decrees collusively obtained.

This case and quotation are referred to in *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454, which was an action by a wife to have a decree of divorce obtained by the husband annulled on the ground of fraud and collusion, and the court says that by "collusion" it is not presumed that the petitioner meant to use it in its ordinary sense as collusion between the parties to the former proceeding, and so a fraud upon the law, because that would include herself as party to the fraud. The allegation was, therefore, understood as stating that the husband had colluded or combined with other persons to obtain false testimony, or otherwise aid him in fraudulently obtaining a decree.

In an attempt by the second husband of a woman divorced from her former husband by a collusive agreement, to have the decree vacated, the court states that such a fraud is not upon the individuals, but upon the law and court, and that no one has a strict right to the vacation of such a judgment; certainly not the parties thereto, who are *in pari delicto*, nor strangers to the record who are not affected thereby. *Ruger v. Heckel*, 21 Hun, 489.

Likewise, in *Smith v. Smith*, 48 Mo. App. 612, which was an appeal from a refusal to set aside a decree of divorce against a wife on her petition, the court, upon dismissing the appeal because the petition was not properly prosecuted, said that, were all other obstacles out of the way, it was exceedingly doubtful whether the wife, who claimed relief on the ground of her own collusion in bringing about the decree, would be entitled to relief on equitable grounds.

The point came up squarely in *Hubbard v. Hubbard*, 19 Colo. 13, 34 Pac. 170, where, more than a year after the granting of a divorce decree against a wife, procured fraudulently by her silence, in consideration of which she was to receive a certain amount of money, she, failing to realize the proceeds of her agreement, applied to set aside the decree. This application was denied, the court stating in regard to the contention that the decree should be set aside on the ground of public morals, that, should the relief asked for be granted, petitioner, profiting by her experience, might negotiate for another collusive divorce upon a cash in hand basis; also, that while courts should undoubtedly exercise care in dissolving the marriage relation, and decline to grant relief where collusion appears, nevertheless, that, after a decree has been rendered and acquiesced in for a long period of time, reasons which would in the first instance

have caused it to be withheld may not be sufficient to warrant setting it aside.

Relief was denied upon various grounds in *Brigham*, Petitioner, 176 Mass. 223, 57 N. E. 328, where, after a husband's death his former divorced wife presented a petition to set aside a divorce for adultery obtained by him fifteen years before. The ground upon which she asked for relief was collusion, consisting in her agreement to accept a sum of money, a check for which was put in escrow until the granting of the decree, in consideration of which she made no defense, and thus allowed the husband to obtain a decree nisi, subsequent to which he repudiated the money arrangement, whereupon she filed a petition alleging her collusion and asking that the decree be set aside; but again entering into a collusive arrangement not to proceed with the petition upon the receipt of a certain sum, her petition was dismissed upon her nonappearance, and the decree nisi made absolute. In regard to the collusive arrangements, petitioner alleged that they were entered into through fear of her husband and her confidential adviser, who was her alleged correspondent, and who played upon her fears as to her support and as to publicity, and upon her petition to set aside the decree nisi there were added threats of an indictment for perjury if she should deny the charge of adultery admitted by her omission to defend upon the granting of the decree. From that time she took no steps until after the husband's death, upon the ground, as alleged, that his great wealth while he lived could have been used to shut off evidence to prove her case. This petition was not sustained by the court, and no relief granted for the reason that petitioner had had her day in court and a chance to try all the issues involved; and that as to the collusion, she could not obtain a *locus standi* from her own fraud upon the court, when she acted under a pressure produced by an appeal to her need for money, to her fear of an indictment for perjury if she testified to what she alleged to be the truth, or to her or her confidential adviser's fear of publicity, as well as by any fear of violence there may have been, when the proportion of the different elements was left indeterminate, and it was not improbable that her want of money may have been the chief motive for her consent. Also, the court stated that in such a proceeding as this the utmost diligence and good faith are indispensable conditions to its being heard, so that, whether the refusal to hear petitioner was based upon her laches or collusion, either was a sufficient reason.

Turpin v. Turpin (Tenn. Ch. App.) 58 S. W. 763, goes no farther than to hold that, the col-

her out of her home, and left her without the means of support. That she is in indigent circumstances, and has no property or means with which to support herself or to pay the expenses of this action. That the defendant is a man of means, amply able to pay the expenses of this action, and to support this plaintiff."

The prayer of the complaint was that the decree of divorce be set aside; that the custody of the children be awarded to the plaintiff; and that alimony and certain sums of money for attorneys' fees and her support during the pendency of the action be awarded to her. The representations and false testimony of the defendant set out in the complaint, and the allegation in respect to the service of the summons in the divorce suit, were denied by the answer. In the third finding of fact, the trial court found

lusion being a fraud participated in by both parties, the court of a state where neither party resides will leave them as it finds them. A wife herein collusively arranged and agreed with her husband whereby he went to Washington and filed a bill for divorce against her to which she answered under oath that she was a resident of that state, thereby inducing the proper court of that state to take jurisdiction of the proceedings. Upon these facts appearing upon a proceeding by the wife in Tennessee to vacate the decree, the court held that she could not be heard to complain in that state when neither of the parties resided there, nor did reside there at the time the decree complained of was rendered. Further, the court said that it did not believe any case could be found which, under the facts averred, would afford her any relief.

The express point decided in *Kinnier v. Kinnier*, 53 Barb. 454, Affirmed in 45 N. Y. 535, 6 Am. Rep. 132, is that the second husband of a woman who collusively obtained a divorce from her former husband could not be heard to question that decree. As a basis for that decision it is held that neither of the parties to a collusive decree can possibly avoid it.—it is binding upon both, and, therefore, the subsequent remarriage of the wife was valid, so that her second husband, being also a stranger to the divorce decree, had no interest therein which would authorize him to impeach the judgment for fraud.

This case was affirmed in 58 Barb. 424, and also upon appeal in 45 N. Y. 535, where the court said that it was alleged in the complaint that, after the pleadings were in, a decree was taken *pro confesso*, by collusion; that the rule in regard to impeaching a decree for fraud was that there must be facts which prove it to be against conscience to execute the judgment, and which the injured party could not make available in a court of law, or which he was prevented from presenting by fraud or accident unmixt with any fraud or negligence in himself or his agents; that, according to this rule, the decree was binding upon the parties to it, as neither could assert that it was not a valid judgment for the reason that both were equally guilty of the fraud; and, being binding upon the parties, the second husband of the divorced wife certainly could not have been defrauded or injured by it.

Whether the relief asked for is granted seems to depend largely upon the point of view from which the court considers the matter. If the fact of the parties being *in pari delicto* appeals to the mind of the court, the relief is, as the cases above show, withheld; while, if the fraud practised upon the law and court presents itself

that the summons in the said divorce suit was duly served on the defendant in said action on the 30th day of July, 1900. Except in respect to the allegation relating to said summons, and the finding that the defendant herein, since the said decree of divorce, remarried on the 3d day of October, 1901, the other findings of fact are, in substance, the same as the aforesaid material allegations of the complaint. As conclusions of law from the findings of fact, the trial court found: "(1) That the plaintiff is not entitled to have the decree of divorce entered on the said 17th day of September, 1900, set aside, so far as it dissolves the bonds of matrimony between her and defendant. (2) That she is not entitled to recover attorneys' fees or suit money in this action. (3) That the plaintiff herein is entitled to have the said decree, so far as it

more strongly, the proceedings are set aside without regard to the fault of the petitioner, as in the cases following:

In *Mulkey v. Mulkey*, 100 Cal. 91, 34 Pac. 621, a proceeding to vacate a judgment of divorce obtained by default, the court stated that the facts set forth in the affidavit of petitioner showed either collusion between the parties or that the defendant was grossly misled and deceived by her husband as to the grounds of divorce, and that in either case the court should have been prompt to set aside the judgment and allow defendant to answer, so that the case might be heard and determined on its merits; and the decree was vacated by an order which allowed defendant a reasonable time in which to answer.

One of the grounds upon a motion, in *Hopkins v. Hopkins*, 39 Wis. 167, to set aside a divorce decree, or to modify it as to certain provisions, was an alleged collusive agreement. The court, however, held the proof of it to be insufficient, and refused to vacate the judgment on that ground, but from the opinion it is apparent that, had such an agreement been proved, the decree would have been vacated, as it would have been considered a fraud upon the court and therefore not to be sanctioned.

Another decision, influenced by similar reasons, is *Crocker v. Crocker*, Sheldon, 257, where, upon a motion by a wife to set aside a divorce previously adjudged to the husband, it appeared that a collusive agreement had been entered into between the parties, the wife, for a consideration, agreeing to make no defense to the divorce proceedings. The decree was accordingly obtained by the husband, and he immediately remarried, whereupon the wife obtained a decree of divorce from the husband upon the ground of adultery on account of his remarriage, service of process in which proceeding was not, however, made upon him. Upon these facts appearing, the court stated that its almost irresistible impulse was to strike the first decree from the records, obtained, as it was, upon a collusive agreement, but that such act would declare the marriage of the husband with the woman he married subsequent to the granting of the decree adulterous, and thus the rights of a perhaps innocent third person would be infringed; therefore, the court merely opened the decree and allowed the wife to serve an answer, omitting, however, all charges of adultery against her husband, and only for the purposes of her own defense, on condition that she cancel the decree she had obtained, which the court said was a reproach to the administration of the law and an insult to the court.

Another test by which the right to relief is

awards the custody of the children aforesaid to the said defendant, opened up and set aside, and is entitled to be allowed to answer in said divorce suit, setting up her rights, if any she has, to the said children, and for alimony and a division of the defendant's property. (4) That the plaintiff is entitled to have judgment, against the defendant, for her costs in this action." A decree in accordance therewith was made and entered. From this decree, both parties have taken an appeal.

The plaintiff contends that under the findings of fact she is entitled to a decree setting aside the decree of divorce, and the defendant contends that under the findings of fact the plaintiff is not entitled to any relief whatever. The findings of fact must support the judgment (8 Enc. Pl. & Prac. 643); and when it affirmatively appears

that they fail to do so the judgment will be reversed on appeal. *Maynard v. Locomotive Engineers' Mut. Life & Acci. Ins. Assn.* 14 Utah, 458, 47 Pac. 1030; *Walley v. Deseret Nat. Bank*, 14 Utah, 305, 47 Pac. 147.

From the findings, and the plaintiff's allegations that she, "relying upon the said representations of the defendant, and to enable him to procure a deed to said homestead, neglected and failed to appear and defend said action for divorce," it is clear that she freely consented to the institution of the divorce suit, and that the decree of divorce was obtained by the collusive agreement of the parties. The plaintiff, when she gave her consent, must have known that the contemplated divorce could only be procured by a suppression of the facts, and false testimony. It does not appear that she made any objections to the proceedings until after

governed, which is somewhat apparent in this last decision, but more clearly appears in the cases following, is whether public policy requires it.

Thus, in *Singer v. Singer*, 41 Barb. 139, where the defendant in a divorce obtained on the charge of adultery sought to vacate the same on the ground of collusion consisting in an agreement that the defendant would make no defense except to serve her answer denying the charge, the court, in its opinion, states that, independently of any other considerations, if the motion was made in due season, the court would order any judgment of divorce obtained by collusion or fraud to be set aside, not from any regard to the parties concerned, but from motives of public policy; but, it appearing that the judgment had been acquiesced in for several years, and that the plaintiff therein had married again, the court thought that some better reason than the mere gratification of personal feeling or the desire to obtain a further sum of money should clearly appear before the court would be warranted in granting such an application, and also, the collusion not appearing sufficiently clear for the satisfaction of the court, the motion to vacate was denied.

In *Firmin v. Firmin*, 40 Phila. Leg. Int. 251, it appeared upon a rule obtained by a wife to show cause why a decree of divorce should not be vacated, that a decree of separation from her husband on the ground of adultery was granted her in England with alimony, after which he came to the United States, and, upon default being made in the payment of the alimony, she followed and found him living with another woman. An agreement was thereupon entered into whereby she agreed to consent to a divorce in consideration of a sum of money, in pursuance of which arrangement the money was paid and divorce decree granted in favor of her husband on the ground of desertion. Subsequently the husband married the other woman, by whom he had several children. The court held that, since the decree was not void, but only voidable, the question, was simply whether public policy demanded that the divorce should be vacated; and that, where the wife had had the benefit of her agreement for nine years, and the intervening rights of children had arisen, the public interests would be best subserved by leaving the parties as they were. The court stated, however, that there was no question that the decree would have been vacated had the application been made promptly, as it was clearly collusive, — a thing which public policy forbids.

In *KARREN v. KARREN*, while the considerations of public policy are recognized by the court, the decision is, however, based upon the 60 L. R. A

principle that where parties are *in pari delicto* neither may complain of the fraud.

Prompt action is an element in favor of the petitioner, even though the divorce was collusively obtained, as in *Danforth v. Danforth*, 105 Ill. 603, upon a motion by a wife to vacate a divorce decree obtained against her, based upon an allegation of a collusive understanding between her attorney and her husband amounting to an agreement that no defense would be made by her, the court granted the relief asked, vacating the decree and letting in her defense, remarking that, it being the same term at which the decree was granted, it was still under the control of the court to amend, change, or vacate, as justice might require. It will be observed that in this case it does not appear that petitioner herself was a participant in the collusion, except by the act of her attorney.

The following cases, decided according to the peculiar circumstances of each, stand upon their own ground, not coming within any of the rules above observed:

In *Harft v. Harft*, 16 N. Y. Week. Dig. 461, a husband attempted to set a divorce decree aside which was obtained by virtue of a collusive agreement between him and plaintiff's attorney, but to which, however, plaintiff was not a party. The court refused the relief asked, not on the ground of the husband's collusion, but that, as plaintiff was entitled to the judgment, the fact that it was brought about by fraud and collusion between her attorney and defendant was no reason for setting it aside.

The defendant in a divorce proceeding had agreed, for a certain sum which she received, not to appear at the trial or contest plaintiff's suit for a divorce. At a subsequent term, after the decree was rendered, she made a motion to set it aside, which the court refused to grant, basing its decision not so much on the collusive agreement, however, as upon the statute (Rev. Stat. § 2185) providing that no petition for review of any judgment for divorce shall be allowed, and further holding that proceeding by motion for that purpose was within the prohibition of the statute. *Nave v. Nave*, 28 Mo. App. 505.

The facts show, in *Friend v. Friend*, 53 Mich. 543, 51 Am. Rep. 161, 19 N. W. 176, that, during the pendency of divorce proceedings, plaintiff's counsel and defendant, without plaintiff's knowledge, made an arrangement whereby a decree was entered with a small amount of alimony. Upon learning of the decree, plaintiff filed a bill to rescind it, which was granted. After employing new counsel, both parties proceeded with the proofs. In regard to the defendant, however, the court remarked that, if

the defendant, more than one year after the divorce, had remarried. This suit was instituted thirteen months after the divorce. While a decree of divorce obtained by collusion of the parties, or by the suppression of the facts, or false testimony, is a fraud upon the court, and against public policy, it would be more against public policy to disturb the decree at the instance of either of the parties who are in *pari delicto*, when, after the divorce, as in this case, one of the parties has remarried. "After a decree of divorce is rendered other marriages may be contracted and children born, and it is against public policy to vacate the decree, as such order would render innocent parties guilty of bigamy, and their children illegitimate. Accordingly, the courts have sometimes refused to vacate decrees of divorce." 7 Enc. Pl. & Pr. p. 138. But when the vacation of

a decree of divorce, obtained by collusion, is sought by a willing participant in the fraud, the court, on the principle of the maxim, *Ex dolo malo non oritur actio*, will refuse to disturb the decree, especially when the opposing party has remarried, and children have sprung from the second union. 2 Nelson, Div. & Sep. § 1055; 2 Bishop, Marr. & Div. § 1548; *Hubbard v. Hubbard*, 19 Colo. 13, 34 Pac. 170; *Simons v. Simons*, 47 Mich. 253, 645, 10 N. W. 360; *Orth v. Orth*, 69 Mich. 158, 37 N. W. 67; *Yorston v. Yorston*, 32 N. J. Eq. 495; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Greene v. Greene*, 2 Gray, 361, 61 Am. Dec. 454. In the latter case Shaw, Ch. J., said: "In using the term 'collusion' in the present case, we presume the libellant does not mean to use it in its ordinary sense, as collusion between the parties to the former proceeding [on di-

divorce cases stood on the same footing with all other cases, it would feel bound to consider defendant estopped by the decree entered in the first instance by his procurement, so far as the main issue was concerned; but, as the law forbids all collusive divorces, and requires each case to stand on its proper equities, the facts would be examined.

Bishop in vol. 2, § 1548, of *Marriages, Divorce, & Separation*, in regard to this *dictum* says that he does not think Campbell, J., who wrote the opinion, meant it as a denial of the doctrine that collusion cannot be brought forward by either of the parties to it.

An attempt was made in *Liem v. Liem*, 5 Kulp, 178, by respondent in a divorce proceeding, to vacate a decree granted upon default, on the ground that she had a good defense, and that the decree was entered by fraud on the part of the libellant in that he paid her, through counsel, \$100 on condition that she would not appear and make defense to the action. But the court refused to vacate the decree for the reason that respondent did not state what her defense was, and that there was no allegation of any collusion at the time the petition was filed, and the evidence was insufficient to establish the payment of the \$100 subsequently.

V. Collateral attack.

a. By party obtaining.

The doctrine followed with practical uniformity is that a party who has obtained a divorce is precluded from disregarding it and attempting by further proceedings to gain the same or different relief, on the principle, mainly, that the first divorce must be held to dissolve the relation of husband and wife, and also on the ground that a person who has invoked the jurisdiction of a court may not disregard or attack the decision. There is some authority, however, for saying that, when a decree is utterly void, it may be attacked or disregarded even by the party obtaining it, in a collateral proceeding. An instance of this doctrine is *Smith v. Smith*, 13 Gray, 209, where a decree of divorce obtained by a husband without the state for a cause not sufficient within the state was held no defense to a subsequent action for divorce by him within the state, as it was wholly void therein. The court stated that, if this were a mere private action, there would be strong reason for considering the husband estopped by his former proceeding; but that a suit for a divorce is of a very different character, being one in which the public have an interest; and that, since the decree was wholly void in 60 L. R. A.

Massachusetts, there was no ground for saying that the relation of husband and wife no longer subsisted between the parties. And, without saying that the law of estoppel did not apply in matters of divorce, the court held that it would not apply where its operation would result in giving effect to a void decree.

If the decree is voidable, merely, the party obtaining it is bound by it,—at least until properly vacated. So, in *Coddington v. Coddington*, 10 Abb. Pr. 450, upon a motion for temporary alimony in an action by a wife for absolute divorce, it appearing that a decree for limited divorce had previously been obtained by her in another state, with the privilege to both parties of marrying again, subsequently conferred by act of legislature, the court held that, although there might be some doubt as to the validity of the decree in this state, nevertheless, until it should have been adjudged invalid, the plaintiff, by whom it was obtained, must in any event be held to be bound by it, and not be permitted to charge her former husband with the crime of adultery upon his remarriage subsequent to it.

A very similar case is *Palmer v. Palmer*, 1 Swabey & T. 551, 29 L. J. Mat. N. S. 26, 2 L. T. N. S. 89, 8 Week. Rep. 504, which, however, seems to go farther and hold that, even if the decree were void, it precluded the party obtaining it. In this case after a husband came to America and was joined by his wife, she obtained a divorce *a vinculo* from him in Philadelphia, and he subsequently remarried. Upon her return to England the wife presented a petition for dissolution of marriage upon the ground of adultery, cruelty, and bigamy, but it was held that the husband's remarriage could not be treated as cause for a petition for dissolution of marriage by petitioner in England; that, either the American decree was valid in England, in which case the parties were at full liberty to marry again, or the American decree could not be recognized in England as valid; but, having been obtained at petitioner's instance, she had no right to complain of the consequences which might naturally be expected to follow it.

Another instance of a voidable decree is *Crabill v. Crabill*, 22 Or. 588, 30 Pac. 320, where a party obtaining a divorce decree subsequently commenced another action for the same purpose before the same judge who rendered the former decree, utterly ignoring the same and attempting to treat it as a nullity and thereby secure in the subsequent suit support and alimony not granted in the former decree. The court held that the former suit operated as an estoppel against her in the later action; that, if she was dissatisfied with the former decree by reason of any mistake

orce], and so a fraud upon the law, because that would include herself as party to the fraud. As said by Willes, Ch. J., in *Prudam v. Phillips*, reported in a note to *Hargrave's Law Tracts*, 456, "if both parties colluded in the cheat upon the court, it was never known that either of them could vacate the judgment." In the case of *Hubbard v. Hubbard*, 19 Colo. 13, 34 Pac. 170, the wife, who was the defendant in the divorce suit, after service on her of the summons, was induced to abstain from interposing any defense by the promise of her husband to pay to her, as soon as the decree of divorce was signed, \$3,000, and to have certain lots in Denver deeded to her. Upon the failure of the husband to keep his promise, the wife filed a petition, in which she set out the promise of her husband, and alleged that they were made by the plaintiff

for the purpose of inducing her to abstain from offering any evidence or making any defense to the action, and without any intention of performing the same. The petition was demurred to on the following grounds: "(1) That the petition does not state facts sufficient to entitle the defendant to maintain the same. (2) That it appears by the petition that the same is brought and presented by the defendant to set aside a decree of court obtained by consent, and in pursuance of a fraudulent and collusive purpose participated in by the defendant to deceive and defraud the court. (3) That it appears by the said petition that the same is presented for the purpose of enabling petitioner to take advantage of a certain corrupt, collusive, and illegal agreement therein set up." In the opinion of the court, sustaining the demurrer, Hayt, Ch. J., said:

or inadvertence, she could have remedied it or vacated it upon a proper showing; or, if there was any fraud or collusion practised upon her when the decree was procured, she might have resorted to equity to set it aside; but, it appearing that the court had jurisdiction of the parties and subject-matter, and there being no pretense in the pleadings of any fraud or mistake, the former decree was valid and binding on the parties.

A new ground of decision is presented in *Lacey v. Lacey*, 38 Misc. 196, 77 N. Y. Supp. 235, which was an action for a divorce on the ground of adultery. The defense was that the alleged adultery was not meretricious in that the plaintiff had theretofore procured a decree of divorce against the defendant in another state, in pursuance of which defendant had legally married the alleged correspondent. The plaintiff claimed that this decree was void and of no effect. The court based its decision sustaining the defense partly on the ground that, the courts of the state granting the decree appearing to have jurisdiction of the person and subject-matter, and this procedure appearing to have been regular and valid according to the law of that state, therefore, under art. 4, § 1, of the Constitution of the United States, to the effect that full faith and credit must be given in each state to the judicial proceedings of every other state, such decree was binding—certainly so far as plaintiff was concerned—in the courts of New York. As a further ground, it was held that, having invoked the jurisdiction of the court, plaintiff, in all equity and good conscience, should not be permitted to attack the authority of the decree which her own acts induced the court to grant her.

The collateral attack is often made in an attempt by the party obtaining the divorce to subsequently obtain an interest in the other's estate, thus involving a repudiation of the decree.

Such an attempt was made in *Milimore v. Milmore*, 40 Pa. 151, where, after acquiescing in and acting upon a divorce decree granted in her favor for more than seven years and until after her husband's death, the complainant therein alleged its invalidity on the ground that she caused the subpoena to be issued in vacation and but twelve days before the ensuing term, whereas an act of assembly required the interval to be at least thirty days and demanded dower in her husband's estate. The court held her estopped to question the validity of the decree, not only by her long acquiescence, but also for the reason that, the court granting the decree having jurisdiction of both the parties and the subject-matter, it was not void, but only voidable, if attacked in time by a party who had

the right to object, in a direct, and not a collateral, proceeding.

So, it was held in *Re Morrisson*, 52 Hun. 102, 5 N. Y. Supp. 90, that the legal representatives of a deceased husband may not question the validity of a divorce decree obtained by him; that were he living, having invoked the jurisdiction of the court and submitted himself thereto, he could not afterwards be heard to question such jurisdiction, and that his legal representatives occupy precisely the same position, not under the doctrine of estoppel, but upon the principle that, where a party has gone into a court and invoked its jurisdiction, he cannot subsequently attack the decree of the court obtained at his instance, because of the want of jurisdiction of somebody else.

Another decision based upon the same reasoning is *Re Swales*, 60 App. Div. 599, 70 N. Y. Supp. 220. The facts were that, after a woman had obtained an absolute divorce from her husband, without any appearance on his part, she subsequently married another man, with whom she lived for eighteen years and by whom she had a child; upon her first husband's decease she asked to be allowed to administer his estate, claiming to be his widow. The court held that this would not be allowed; that such a decree, while void against the nonappearing defendant, was valid so far as it affected the marital status of the plaintiff; and that, while it probably would not be technically correct to assert that plaintiff's acts constituted an estoppel, for the reason that they were not designed to and did not influence decedent to do anything which he would not otherwise have done, yet, that the case justified the application of a similar principle, *viz.*, that where a party has invoked the jurisdiction of any court, and submitted himself thereto, he cannot afterwards be heard to question such jurisdiction.

Asbury v. Powers, 23 Ky. L. Rep. 1622, 65 S. W. 603, goes upon the same theory. This was an action to determine which of two claimants was the widow of a decedent, for the purpose of administering his estate. It appeared that, twenty-five years before, the one who was his wife at that time commenced an action for maintenance in a court which had no jurisdiction of the parties, but, for the purpose of obtaining a hearing, she made an averment alleging the jurisdiction of the court; subsequently, an amended petition was filed asking for an enlarged decree, and, upon her appearing in court of her own volition, and, so far as the record showed, the court appearing to have jurisdiction, a decree was rendered in her favor. Upon these facts appearing, it was held that this claimant, having invoked the jurisdiction of the court,

"It is apparent upon the face of the petition that plaintiff in error was in no way misled or deceived as to the nature of the original action. She was duly served with process of summons and a copy of the complaint, and had at her service able counsel to defend her interests. Thus advised and prepared, she entered into a secret, collusive agreement with defendant in error, and for a promised consideration aided him by her silence to impose upon the court and procure a divorce. After the entry of the decree thus obtained, she remained silent for more than one year, and only upon failure to realize the consideration promised for her shameless bargain did she apply for relief." In 2 Bishop, Marr. & Div. § 1548, the doctrine is clearly stated as follows: "Mutual fraud, of which the common instance is collusion and which is available to third per-

sons in interest, as we shall see in the next subtitle, cannot be brought forward by either of the parties against the other as ground for reversing any step in the cause, or vacating the sentence. This doctrine is an inevitable result from the universal rule of our law that one in a court of justice cannot complain of his own wrong, or of another's wrong whereof he was a partaker. It would be a special novelty for a plaintiff to address the tribunal with, 'The defendant and I have been playing a trick on this court, but I discover that he has got the better of me, so please turn the tables on him.'" Also, in Broom, Legal Maxims, 711, thus: "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." In the opinion delivered by Mr. Justice Miner, in the case of *Short v. Bullion-Beck & C. Min. Co.* 20 Utah,

could not, after so great a lapse of time, impeach, in a collateral proceeding, a decree of divorce fixing the status of the parties.

In *Juller v. Juller*, 62 Ohio St. 90, 56 N. E. 661, a proceeding by a wife for assignment of dower in her husband's estate, ten years after she had obtained a decree of divorce from him which included a provision releasing all her dower rights in consideration of a certain sum agreed to be paid as alimony, she based her right to relief upon the allegation that such release of dower rights was inserted in the decree without her knowledge or consent, admitting, however, that her attorney, who was authorized to represent her in the bringing and the conduct of the suit,—had full knowledge of its contents as entered. The court states that, there being no fraud or collusion charged, and the decree being a public record with the provisions of which petitioner was, after the rendition, charged with constructive notice, she could not, ten years after it was granted, be released from its obligation upon the plea that she was ignorant of its provisions as entered of record, or that her attorney was without authority to have it so entered.

Likewise, in *Ellis v. White*, 61 Iowa, 644, 17 N. W. 28, in an action to partition certain lands by one claiming as the widow of decedent, the court held that her claim was not substantiated by facts showing to the satisfaction of the court that nearly thirty years before she had authorized an attorney to procure a decree of divorce, which had been done, and that alimony granted therein had been paid her, for which she had given a receipt. To plaintiff's contention that the court granting the decree did not have jurisdiction under the statute then in force, the court held that, without deciding whether the court had jurisdiction or not, the plaintiff could not now take advantage of the defect; that, having authorized her attorney to prosecute the case, and having received the money allowed her by the decree, she was estopped to insist now on want of jurisdiction of the court.

McKelvey v. McKelvey, 112 Mich. 274, 70 N. W. 582, was said by the court to be within the rule of *Owen v. Yale*, 75 Mich. 256, 42 N. W. 817, *infra*, V. b. A wife agreed to accept a deed of land and a certain amount of money in lieu of all interest in her husband's estate upon the granting of a divorce against him. The agreement took the form of a stipulation, and, although dower was not specifically mentioned, it provided that such payment and conveyance should be in full of all expenses and alimony against the husband. Afterwards she brought ejectment to recover dower in his lands, the 60 L. R. A.

prosecution of which was restrained by the court, citing *Owen v. Yale*, as above stated.

In an action by a wife to recover past-due instalments of money adjudged to her in a divorce decree obtained by the husband in North Dakota, the evidence showing that the decree was collusively obtained, it was held that the vicious agreement which led up to the divorce was not available to the husband in a collateral attack upon the decree; that the provision complained of was inserted in accordance with the collusive agreement consented to by the husband, and, the collusion being a fraud upon the court in which both parties were equally guilty, neither could afterwards allege the fraud to secure a further benefit. *France v. France*, 79 N. Y. Supp. 579.

A few decisions in New York have not been in line with the almost uniform doctrine above shown, being decided more in line with *Smith v. Smith*, 13 Gray, 209, *supra*, on the theory that the decree was void, and therefore might be attacked collaterally, even by the party obtaining it, without regard to the principle that the party obtaining a decree is afterwards estopped from questioning it.

The earliest case of this nature is *Todd v. Kerr* (1864) 42 Barb. 317, where a wife being a resident of New Jersey, obtained a legislative divorce against her husband, a resident of New York, without his agency, consent, or knowledge. The court held that she was not estopped to allege its invalidity in an action for dower against the heir at law of her deceased husband for the reason that its procurement did not influence her husband to do acts which he would not otherwise have done; and also, it being a void decree for want of jurisdiction, the husband was not bound by it, and therefore could not claim the advantage of it, and his heir at law, standing in his place, had no more rights.

Holmes v. Holmes, 57 Barb. 305, was a decision according to the rule of estoppel. Here, in an action for divorce *a vinculo*, defendant pleaded a prior divorce obtained in another state for cruel and inhuman treatment. Plaintiff demurred to this defense. The court overruled the demurrer, holding that the jurisdiction acquired by personal service of process upon defendant while out of the state was sufficient, being in accordance with the laws of that state, at least to preclude plaintiff from questioning it; that it would seem preposterous that he should attempt to invalidate a decree to which he was a party, which he procured to be made, and upon the faith of which defendant acted; and that, while every decree is liable to be impeached for fraud, collusion, or want of jurisdiction, those

20, 30, 45 L. R. A. 603, 606, 57 Pac. 720, 722, it was said: "If the plaintiff requires any aid from the illegal transaction in order to enable him to sue his claim, he cannot enforce it. Where a contract grows immediately out of, and is connected with, an illegal or immoral act, it will not be enforced. The test to determine whether the action arises *ex stirpe causa* is the plaintiff's ability to establish his case without any aid from the illegal transaction. If his cause or right to recover depends upon a transaction which is *malum in se*, or prohibited by law, and which he must prove, in order to make out his case, he cannot recover." Since the remarriage of the defendant his second wife has not borne any children, but it is conceded by counsel that she is *enceinte*.

are considerations which cannot arise upon a demurrer.

Upon appeal from this decision, however, in *Holmes v. Holmes*, 4 Lans. 388, the court cited *Todd v. Kerr* (1864) 42 Barb. 317, *supra*, and held that plaintiff was not estopped from denying the validity of the divorce obtained by him, as it was invalid and inoperative in New York; that courts will not allow either party to deny the existence of a marriage; that they have no power of themselves, either in form or effect, to dissolve their marriage contract, as would be done if effect should be given to the estoppel claimed on behalf of defendant.

Although *Smith v. Smith*, 13 Gray, 209, *supra*, is not referred to, from the fact of its being a prior decision, and from the similarity in the reasoning the inference is almost irresistible that it influenced the decision herein.

Upon the hearing of *Starbuck v. Starbuck*, 62 App. Div. 437, 71 N. Y. Supp. 104, in a long and exhaustive opinion the court came to the conclusion that a valid decree terminating the marriage relationship as against a citizen of this state required a voluntary appearance or such service of process as would be valid in actions *in personam*, and that, whatever effect was to be given the decree there in question, which was a decree granted in Massachusetts on the ground of extreme cruelty, since the service was insufficient and defendant did not appear, must be confined to the plaintiff and to the state in which it was granted; and that in this state it was without binding force or efficacy in any respect, for any purpose, and as to either party. In regard to the contention urged that plaintiff was attempting to assail the jurisdiction which she had invoked, the court stated that she did not attack the validity of the decree which she had obtained, but, when it was offered to defeat her claim, she merely asserted the limits of its validity. To this decision there was a dissenting opinion upholding the doctrine that the plaintiff, having invoked the jurisdiction of the Massachusetts court, could not afterwards in good conscience refuse to abide by its decree dissolving her marital bonds, and could not assert its invalidity for the purpose of claiming dower in the property of her divorced husband, acquired after the decree and his remarriage.

Upon the appeal to the court of appeals the decision (173 N. Y. 503, 66 N. E. 193), seems to have been rendered with a clearer insight into the principles really involved, and without being hampered by considerations which seemed momentous in the lower court, but which, viewing the case from its relation to all others of its class, were not involved in its decision. It was held that the decree which granted a divorce against the husband without the state on

Section 1212, Rev. Stat., provides that subsequent changes may be made in a decree of divorce, by the court, in respect to the disposal of the children or the distribution of property. Such changes must be applied for, and can only be granted, in the action in which the decree of divorce was granted. We think it is clear, both from the allegations of the complaint and the findings of fact, that the plaintiff is not entitled to any relief in this action.

The judgment of the lower court is reversed, with costs, and the action dismissed.

Miner, Ch. J., concurs. Bartch, J., concurs in result.

the ground of extreme cruelty, upon personal service without his appearance in the action or submission to the jurisdiction of the court, should have been admitted in evidence in behalf of the administratrix of the husband's estate in the action by the first wife to recover dower as his widow, as the defendants had a right to avail themselves of a decree obtained by their opponent, although she could not avail herself of a void decree which she had procured to be entered, under the well-established principle that where a party, by submitting himself to the jurisdiction of the court, has procured a judgment or decree to be entered, he cannot thereafter be heard to question it. Further, the opinion stated that there were a number of cases in which the courts of this state have refused to recognize the validity of divorces obtained in other states, upon grounds insufficient for that purpose in this state, when defendant resided here and was not personally served with process and did not appear in the action; but that, in none of these cases did the party procuring the decree seek a benefit by having it held invalid; that a party cannot avail himself of a defense or of a right to recover by means of an invalid decree or judgment which he himself has procured to be entered in his own favor.

The court states, in *Elliott v. Wohlfrom*, 55 Cal. 384, that it knows of no principle upon which the plaintiff in an action of divorce can be permitted to impeach the judgment rendered in it, for the purpose of recovering property from the defendant in that action which he could obtain on no other ground than that he had obtained the judgment through fraud. This was an action by the grantee of plaintiff in a prior divorce action to recover in ejectment against the grantee of the defendant in the divorce proceedings, and the case turned on the validity of the divorce decree. The court, in harmony with the above statement, held that, if the plaintiff in the divorce suit were the plaintiff in this action, and the defendant in that action were the defendant in this, the court would not permit the plaintiff to attack that judgment on the ground that he obtained it by fraud of which the defendant was not only innocent but ignorant, and that the grantees of these respective parties occupy in this respect no better or worse positions than their several grantors would, if this action were between them.

An unusual case, and one which, while not exactly a variance of the rule, because the circumstances are so dissimilar to others where the question arises, nevertheless is decided on the theory that the divorce attacked was void, and that the attack was therefore allowable, al-

though made by the party obtaining it, is *People v. Chase*, 27 Hun, 256. The defendant herein, in a prosecution against him for bigamy, defended on the ground that the two marriages alleged to have been contracted by him were absolutely void, as he had been previously married, and a divorce obtained by him from his first wife for desertion was void, inasmuch, as far as appeared from the evidence, she was not at the time a resident of the state wherein the decree was obtained, and process was not served upon her or actual notice of the proceedings given her. Under these circumstances the court, with regret, arrived at the conclusion that a conviction for bigamy could not be sustained, and judgment was reversed and a new trial ordered.

b. By party who has consented to, or colluded in, its procurement.

A woman who, while an infant, consented to a divorce decree containing a provision for alimony in lieu of dower, and acquiesced therein upon becoming of age, by receiving and enjoying all the privileges conferred upon her by the decree, was held, in *Bourne v. Simpson*, 9 B. Mon. 454, to have no right to dower in property sold after her husband's death, to pay his debts, under her claim that she was an infant when she consented to such decree.

After the granting of a consent decree of divorce upon stipulation of the parties, for desertion, with leave to both parties to remarry, and granting \$20,000 alimony to the wife, acted upon by the wife by her subsequent remarriage, she attempted to obtain dower in her former husband's estate; but, in a bill to quiet title against the claim of dower by the grantee of lands formerly owned by the husband, who was then deceased, the court held, in *Owen v. Yale*, 75 Mich. 256, 42 N. W. 817, that, although there was some doubt as to whether a divorce could have been granted on the grounds alleged, nevertheless, a consent decree cannot be appealed from, and it was not absolutely void whether erroneous or not; also, that the provision made was agreed to be in lieu of dower, and was a mutual agreement, which was, by consent, made a matter of record, and estopped both parties to it. Further, the court thought that it was not improper to show the wife's previous assent and understanding of the decree for the purpose of showing that it was not entered without her knowledge and approval.

There was, perhaps, no actual, specific, consent in *Kirrrigan v. Kirrrigan*, 15 N. J. Eq. 146, but both parties were before the court in a divorce proceeding instituted by the husband, and the wife appeared by counsel and received a sum of money decreed her as alimony. In subsequent divorce proceedings instituted by her, it was held that the above fact appearing, the wife would not be permitted to impugn the decree previously granted on the ground that it was fraudulently obtained, and her motion for alimony and counsel fees *pendente lite* was denied.

Very similar to the last case, as far as the nature of the consent is concerned, is *Mohler v. Shank*, 93 Iowa, 273, 34 L. R. A. 161, 61 N. W. 981. Some time after a husband was adjudged insane his guardian obtained a decree of divorce against the wife, upon the entry of which a certain amount was paid, agreed by her to be in full of any claim she might have against her husband's estate. After remarriage, and upon her former husband's death, she claimed a distributive share in his estate upon the ground that the divorce decree was void for want of jurisdiction, and that she was the widow of decedent. This claim the court refused to allow, holding that, although the decree was void,

the petitioner was estopped from attacking it, either directly or indirectly, by her knowledge of the proceedings at the time they were pending, shown by her appearance in the action; and, after the decree was entered, by her acceptance of the alimony according to a previous agreement, and by her subsequent marriage during the lifetime of her first husband; that there could not have been a more complete acceptance of the benefits of the decree.

But in *Hardy v. Smith*, 136 Mass. 328, the court held that no question of estoppel can arise between the parties to a void decree; that a party must be in a condition to assert a right before he can maintain it by estoppel. This decision was rendered upon the contention that a husband, by a written consent to a divorce and by receiving money therefor, was estopped from denying either such consent or the validity of the divorce in a collateral proceeding to secure an interest in his wife's estate, although the decree was wholly void for want of jurisdiction; and that, while the proceedings relating to the divorce might be incompetent to affect his status as husband of his deceased wife, they were competent to affect an incident of that relation, and to estop him from claiming any of the rights of a husband.

Upon a wife's filing a bill for a decree of divorce on the ground of extreme cruelty, the husband, without hope of a reconciliation, and desiring only to save his property, agreed, through his solicitor, that, although her evidence was not sufficient, nevertheless, he would withdraw from opposition, and complainant might take her decree if she would take it without costs as against him, and without alimony. Upon an attempt by the wife, after the rendition of the decree as agreed, to recover dower, allowed by statute against the estate of a husband after a divorce by the wife for extreme cruelty the same as though he were dead, the husband demurred and asked that the decree be declared void for fraud in that he was not informed as to the existence of the dower rights, and supposed that all claims against his property were extinguished by the agreement stated; but it was held that the solemn adjudication of the court upon the rights of the parties must stand unless impeached for fraud perpetrated by the party obtaining it upon the other party, and that it did not sufficiently appear that the husband was misled or defrauded in what was done, but the court thought, on the contrary, that he understood the same fully, and agreed and consented thereto. *Orth v. Orth*, 69 Mich. 158, 37 N. W. 67.

In *De Graw v. De Graw*, 7 Mo. App. 121, numerous elements seem to have contributed to the decision, including consent, collusion, fraud, and laches or acquiescence. The action was brought by the wife for a divorce. The husband set up a former divorce obtained by him and alleged to have been acquiesced in by the wife at the time of its rendition. The wife replied that her consent and withdrawal of opposition were the result of intimidation and threats, and that the decree was collusively obtained, and therefore void. The husband had remarried and had children by the second marriage. It was held that, the former divorce being not void but voidable only, the relief would not be granted on account of the fraud or collusion, where the divorce had been acquiesced in for years, its benefits enjoyed, and an innocent party involved.

The theory on which the courts have almost universally acted in cases of attempt by one of the parties to a divorce decree to impeach it collaterally on the ground of collusion was first advanced in *Prudam v. Phillips* (1737). The report of this case is taken from manuscript

notes of Mr. Ford, an eminent barrister, given by Mr. Hargrave in his *Law Tracts*, p. 456, also cited in a note to the *Duchess of Kingston's Case*, 20 How. St. Tr. 479. This was an action of assumpsit brought against defendant, who put in evidence a marriage with one M. Plaintiff showed a sentence annulling that marriage, whereupon it was agreed that, unless defendant could be admitted to show great fraud in obtaining the decree, it was conclusive. But the court asked who ever knew that a defendant could plead that a judgment obtained against him was fraudulent; that he must apply to the court, "and, if both parties colluded in the cheat upon the court, it was never known that either of them could vacate the judgment." And the court came to the conclusion that, whether defendant was imposed upon, or whether she joined in deceiving the court, she could not plead the matter, but must apply to the proper judge.

With the exception of the above case, which is the only English authority cited on this question, there is a dearth of English decisions which may, perhaps, be explained by the fact that until act of Parliament August 28, 1857 (20 & 21 Vict. chap. 85), absolute divorces were not common in England, being granted only by act of Parliament, thereby involving great expense, and were, therefore, exclusively a privilege of the aristocracy and the wealthy; also, during this time, in order to guard against collusion, it appears that, according to a standing order and the usage of the House of Lords, questions were put to a petitioner for divorce as to whether there had been any collusion, directly or indirectly, relative to the adultery charged, or in regard to the divorce endeavored to be obtained. In Scotland, for a similar purpose, the pursuer is in all cases required to take what is termed the "oath of calumny," declaring, among other statements, that there is no collusion between the parties or any other persons to obtain the decree; and, in regard to collusion, *Fergusson*, as reported in 3 Eng. Eccl. Rep. 482, says that the records of the consistorial court of Scotland do not, perhaps, exhibit a single attempt to detect this malpractice which has been successful in the result. And, too, it is stated as a rule in *Shaw v. Gould*, L. R. 3 H. L. 55, 37 L. J. Ch. N. S. 433, 18 L. T. N. S. 833, that, according to the law of Scotland, reduction of a decree of divorce upon the ground of collusion cannot be pronounced after a year and a day from its date,—this rule, however, refers, so far as appears, to a vacation of the decree at the instance of the court, not upon application of one of the parties; but it tends to show the inviolability of divorce decrees after they are once settled.

With the passage of the act above referred to, and its amendments, which transferred the jurisdiction over matrimonial causes to the probate and divorce division, the precautions against collusion were not relaxed, for it is provided that decrees nisi shall first be rendered, and in the interim of six months before the decree absolute is granted the searching eye of the Queen's proctor aims to discover any fraud or collusion which may exist, and upon very slight suspicion may intervene and investigate the proceedings; so that upon the rendering of the decree absolute there is small chance that it will ever be disturbed.

The phrase quoted from *Prudam v. Phillips*, that, "if both parties colluded in the cheat upon the court, it was never known that either of them could vacate the judgment," may be said to control the American decisions; although the opinions are not always couched in those terms; nevertheless, that is the result almost uniformly arrived at.

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One of the grounds by which complainant attempted to invalidate a divorce decree in *Milimore v. Milimore*, 40 Pa. 151, was that it was obtained by collusion; but the court held that it would be a monstrous doctrine to permit parties to tamper with judicial proceedings in such a manner, "to initiate them, carry them through, act upon them as valid, and afterwards allege that they were hired, coaxed, or maltreated into becoming parties to the fraud, and seek to invalidate them in a collateral proceeding by a plea of fraud;" adding "that is what cannot be done."

So, in *Davis v. Davis*, 61 Me. 395, in an action by a wife for dower to which she was entitled upon a divorce obtained by her against her husband, he attempted to impeach the divorce decree on the ground of collusion; but the court held that the parties to an action cannot impeach the judgment rendered therein in any collateral proceeding upon the ground that it was obtained by their fraud or collusion; that it was their business to see that it was not so obtained.

Four years after the granting of a divorce decree, collusively obtained against the wife with her knowledge and consent, and two years after the remarriage of the husband, the wife filed a bill against him in *Nichols v. Nichols*, 25 N. J. Eq. 60, for a divorce *a vinculo* on the ground of adultery, and for alimony and the custody of her children. Upon the appearance of the husband with the plea of the former decree, complainant replied that it was fraudulently obtained, and that the court was without jurisdiction to grant it; but it was held that the parties to a collusive divorce are bound by it,—at least, in the absence of some better reason than the mere gratification of personal feeling or the desire to obtain a further sum of money; also, that the only reason for intervention by the court would be in the interests of public policy, and, after the acquiescence of both parties in the decree for a space of four years, and the remarriage of one of them, it would not be allowed on that ground.

And in *Moor v. Moor* (Tex. Civ. App.) 63 S. W. 347, a divorced husband attempted to defend an action by his wife to partition community property upon the ground that he and petitioner were husband and wife, never having been legally divorced. But, it appearing that the husband employed counsel to institute in the name of his wife a suit against him for the divorce, and that, if the decree was fraudulently obtained, he participated in the fraud, and was in active collusion with the wife for the purpose of obtaining the divorce, it was held that, although they were not residents of the state at the time the decree was granted, nevertheless, having voluntarily appeared and submitted themselves to the jurisdiction of the court, the validity of the decree could not be collaterally attacked by either of the parties on the ground that neither of them was subject to the jurisdiction of the court, although the divorce might not be effectual to protect them against the state; that the party who invokes the aid of a court cannot be heard to question the jurisdiction.

It was held in *Dow v. Blake*, 148 Ill. 77, 35 N. E. 761, that a husband could not set up, as a defense to an action in another state, that a decree of divorce obtained from his wife had been obtained by collusion with her; nor could he urge such alleged collusion in the court of the state where the decree was granted as a reason for setting the same aside, under the well-settled principle that in a court of justice a man cannot complain of a wrong done by himself, or of another's wrong in which he was a partaker; and that, as such a defense was for-

bidden to him, it was as much forbidden to his administrator, after the husband's death.

To a similar effect is *Re Ellis*, 55 Minn. 401, 23 L. R. A. 287, 56 N. W. 1056, holding that where, in an action for a divorce in a court of another state, both parties voluntarily appear and submit to the jurisdiction, they are barred by the judgment, and the wife may not avoid the decree in a collateral proceeding for the purpose of being appointed administrator of her former husband's estate, by proof that, when the action was brought and judgment rendered, neither of them was a resident of the other state, but both were residents of Minnesota. The court states that, if the parties do consent to such void jurisdiction, why should they be heard to complain of the consequences to them of what they have done, and be permitted to escape those consequences by saying: "It is true that, by false oath made by one of us and connived at by the other, we committed a fraud in the Wisconsin court, and induced it to take cognizance of the case, but now we ask to avoid its judgment by proof of our fraud and perjury or subornation of perjury." And therefore, as far as their individual interests were concerned, the court thought that the parties must abide by the judgment they procured the court to render, and that what would bind them would, of course, bind those claiming through them or either of them. But the court said, in the course of the opinion, that, so far as the state of residence is concerned, it cannot be bound by its resident citizens appearing in and consenting to the jurisdiction of a court in another state in an action for divorce.

Nelson on Divorce & Separation, vol. 2, § 1056, calls the doctrine of this case novel and erroneous, and says: "So far as this opinion asserts the validity of this collusive decree, it is clearly wrong, because the fundamental principle of jurisdiction is overlooked. Jurisdiction over the subject-matter cannot be conferred by consent of the parties. The same result could have been reached by holding the decree void for lack of jurisdiction, and that the wife was estopped from attacking the decree by her fraud and collusion, by accepting the alimony awarded by it, and by permitting the decree to remain in force until the husband had married again."

In *Neely v. Neely*, 9 Ohio Dec. Reprint, 201, an action to set aside an entry of satisfaction appended to a divorce decree granted a husband, awarding alimony to the wife (plaintiff herein), and to enforce a decree for a balance claimed to be unpaid, the facts showed the fulfillment of an agreement entered into by the parties whereby the wife agreed to receive a certain sum in satisfaction of alimony irrespective of the amount to be ordered by the court, in consideration that no proof be offered against her to support the charge of adultery. Upon these facts appearing, the court held that, upon payment of the agreed amount at the time the decree was granted, the agreement was fully executed, and the wife could not afterward be heard to complain of the fraudulent contract, to which she was a party, to suppress testimony at the trial of the divorce action.

But in *Daniels v. Benedict*, 50 Fed. 347, a suit in equity by a wife against trustees of her deceased husband's will for a partition of his estate, she was allowed to treat an absolute divorce fraudulently rendered against her as a nullity, for the reason that she was prevented by fraud from presenting her case fully to the court, and the fraud, thus pertaining to matter extrinsic to the subject-matter of the divorce action, might be collaterally attacked. The wife was prevented from a full presentation of her case by agreement entered into between the parties whereby she agreed that a decree might

be rendered against her on the ground of desertion in consideration of a certain sum; but, it appearing that the agreement was urged upon her at a time when she was ill, penniless, and abandoned, and that the decree rendered was absolute on the ground of adultery, the court held that the parties were not *in pari delicto*, and that, in the furtherance of justice and a sound public policy, the wife, being comparatively the more innocent, would be aided. In regard to the contention that the statute of limitations barred any relief, the court stated that, this being an action to recover property which, if she had any rights at all therein, was held in trust for her, the statute had no application to such a relation; also, it appeared that as soon as she discovered the fraud she had brought suit to annul the decree, which suit was pending at the time her husband died, after which she brought this action.

The following significant statement is made by Chief Justice Cooley in *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260: "But it is said that, if the parties appear in the case, the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively." The point decided was, however, not the right of one of the parties to question the decree, but that the state of residence is not precluded from attacking a decree of divorce obtained in another jurisdiction by consent of the parties.

VI. Summary.

As a general rule, the party obtaining a divorce decree will not be relieved therefrom upon his application to set it aside, upon the broad principle that, having induced the court to render the judgment, he is estopped from afterwards attacking it, except, of course, for fraud upon himself, mistake, or surprise. The only decision found to the contrary, which is directly in point, is *Ficener v. Ficener*, 8 Ky. L. Rep. 867, 8 S. W. 597, *supra*, II. a.

Where the decree is obtained in the wife's name, but through the efforts of the husband, without her knowledge or consent, she may, of course, have it set aside as a fraud both upon her and upon the court.

There is but one instance (*supra*, III.) of the application of both parties to set aside the divorce proceedings; that attempt, however, was successful, the court conditioning only that the property rights which third persons might have acquired under the decree must be protected.

One consenting to a judgment of divorce places himself under the same rules that control the party obtaining it.

Closely connected with consent decrees, and often hard to be distinguished from them, are decrees collusively obtained. While the result, upon an attempt to vacate them, is the same according to the weight of authority, nevertheless, the principle by which that result is arrived at is somewhat different when the court decides that the transactions entered into partake of the nature of collusion rather than consent. Consent decrees are not considered reprehensible when there are valid grounds for the divorce, but collusion is a fraud upon the court and upon the law; so that the doctrine stated in the old English case of *Prudam v. Phillips*, *supra*, V. b. that, "if both parties colluded in the cheat upon the court it was never known that either of them could vacate the judgment," has come to be a rule of law. Sometimes, however, the fraud that has been practised upon the law presents itself so strongly to the mind of the court as to outweigh the guilt of the petitioner; so that a few decisions uphold setting aside a col-

lusive divorce even upon application of one of the parties, on the ground of public policy.

In collateral attacks by the parties obtaining decrees, the same rule controls as upon direct applications, only the cases present a distinction between void and voidable decrees; so that there is some authority for saying that, when a decree is utterly void for want of jurisdiction, it may be attacked or disregarded collaterally, even by the party obtaining it. While these cases seem reasonable, nevertheless, when the specific question arises as to the right of a party obtaining a decree to subsequently question it, the decisions holding him estopped by having invoked the jurisdiction of the court which rendered the judgment, without going into any inquiry as to the validity of the decree, seem nearer right in principle, and do, in fact, voice

the rule as laid down by the majority of the cases.

In regard to collateral attacks by the party consenting, the rule is the same as upon direct attacks, with the exception of one case, *Hardy v. Smith*, 136 Mass. 328, *supra*, V. b, holding that no estoppel can arise between the parties to a void decree.

The rule of *Prudam v. Phillips*, above referred to, controls almost without exception in collateral attacks upon collusive decrees, the only decision allowing the applicant any relief being *Daniels v. Benedict*, 50 Fed. 347, *supra*, V. b; and in that case the court held that the parties were not *in pari delicto*, the wife having been coerced into entering into the collusive agreement when she was ill, penniless, and abandoned. M. M. M.

INDIANA SUPREME COURT.

Nathan G. DIXON, *Appt.*,

v.

James H. POE.

(.....Ind.....)

1. An act the title to which relates to the issuance of checks by merchants in payment of wages assigned to them cannot be expanded to include persons and corporations generally by the use of the words "or any other person" after the word "merchants" in the body of the act, where the Constitution makes void so much of the act as is not expressed in the title.
2. An act requiring the redemption in money of checks issued in payment of assigned wages, which is applicable only to merchants on the one hand and coal miners on the other, is void as class legislation.

(November 25, 1902.)

A PPEAL by defendant from a judgment of the Circuit Court for Sullivan County in favor of plaintiff in an action to recover wages assigned to defendant in consideration of a store order. *Reversed*.

The facts are stated in the opinion.

Messrs. John T. Hays and Will H. Hays, for appellant:

The act of the legislature is unconstitutional and void.

Grafty v. Rushville, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609; *Re Bank of Commerce*, 153 Ind. 460, *sub nom. Bank of Commerce v. Wiltsie*, 47 L. R. A. 489, 53 N. E. 950, 55 N. E. 224; *McClelland v. State*, 138 Ind. 321, 37 N. E. 1089; *Re Leach*, 134 Ind. 665, 21 L. R. A. 701, 34 N. E. 641; *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 274;

NOTE.—For other cases in this series as to requiring the payment of wages in lawful money, see *State v. Loomis* (Mo.) 21 L. R. A. 789, and cases in note; *Avent-Beattyville Coal Co. v. Com. (Ky.)* 28 L. R. A. 273, and note; *State v. Haun* (Kan.) 47 L. R. A. 369; and *Harblson v. Knoxville Iron Co. (Tenn.)* 56 L. R. A. 316.
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State v. Klein, 126 Ind. 68, 3 Inters. Com. Rep. 573, 25 N. E. 873; *Roby v. Smith*, 131 Ind. 342, 15 L. R. A. 792, 30 N. E. 1093; *Henderson v. London & L. Ins. Co.* 135 Ind. 23, 20 L. R. A. 827, 34 N. E. 565; *Loesch v. Koehler*, 144 Ind. 278, 35 L. R. A. 682, 41 N. E. 326; *Godcharles v. Wigeman*, 113 Pa. 431, 6 Atl. 354; *Millett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 258; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Luman v. Hitchens Bros. Co.* 90 Md. 14, 46 L. R. A. 393, 44 Atl. 1051; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 55 S. W. 627; *Chicago v. Netcher*, 183 Ill. 104, 48 L. R. A. 261, 55 N. E. 707; *Denver v. Bach*, 26 Colo. 530, 46 L. R. A. 848, 58 Pac. 1089; *Ex parte Jentszsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 853, 32 N. E. 364; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Ritchie v. People*, 155 Ill. 101, 29 L. R. A. 79, 40 N. E. 454; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *State v. Haun*, 61 Kan. 148, 47 L. R. A. 369, 59 Pac. 340; *Johnson v. Goodwear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304; *Ruhrstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41; *Gillespie v. People*, 188 Ill. 176, 52 L. R. A. 283, 58 N. E. 1007; *Union Seacer-Pipe Co. v. Connelly*, 99 Fed. 354; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 568; *State v. Jackman*, 69 N. H. 318, 42 L. R. A. 438, 41 Atl. 347; *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006.

Mr. James B. Filbert, for appellee:

The act of the legislature is an act within the powers vested in the legislature, and is constitutional.

Hancock v. Yaden, 121 Ind. 366, 6 L. R. A. 576, 23 N. E. 253.

Dewling, J., delivered the opinion of the court:

This action was brought by the appellee against the appellant under the act of act of March 11, 1901 (Acts 1901, p. 548; Burns's Rev. Stat. 1901, § 7448a), to recover from the appellant the amount of wages assigned by one Walsh, an employee in a coal mine in this state, to the appellant, in consideration of the issue to him of four metallic tokens calling for and payable in goods at the store of the appellant in this state. The complaint stated facts sufficient to bring the case within the statute, and a demurrer to it was overruled. An answer was filed by appellant, alleging that the wages assigned were already earned at the time of such assignment; that appellant had for years owned and carried on a general retail store in this state; that the four metallic tokens expressed the agreement of the appellant to pay in merchandise, at his store, at the usual cash price, the amount stamped on each of them; that Walsh, the miner, knew this, and agreed to accept merchandise in payment of the sum represented by said tokens; that the appellee had notice of these facts when he became the owner of the said tokens; that appellant has at all times been ready and willing to pay said tokens in merchandise, according to his agreement, but that neither Walsh nor the appellee has at any time demanded payment of said tokens in merchandise. A demurrer to the answer having been sustained, the appellant refused to plead further, and, upon proof of his complaint, judgment was rendered in favor of the appellee. The errors assigned are: (1) That the court erred in overruling the demurrer to the complaint, and (2) in sustaining the demurrer to the answer.

The question presented is the validity of the act of March 11, 1901, prohibiting the issuing of tokens, payable otherwise than in lawful money of the United States, upon an assignment of wages, earned or unearned, by any employee or laborer in any coal mine in this state, and making any such tokens issued in violation of the act, in the hands of any owner, immediately due and payable in lawful money to the extent of the wages assigned. The objections taken to the act by the appellant are that it contravenes § 1, art. 1, of the state Constitution, which declares that life, liberty, and the pursuit of happiness are unalienable rights; and that it violates § 23, art. 1, of the Constitution, which prohibits the general assembly from granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not belong equally to all citizens. We do not deem it necessary to determine the question whether the act before us unduly restricts the right

of the citizens of this state to contract, or whether its practical effect may not be to take private property without due process of law. We shall consider the act solely with reference to that clause of the Constitution which interdicts class legislation, or the grant to any citizen or class of citizens, of special privileges or special immunities. The body of the act mentions and includes "any merchant or dealer in goods or merchandise, or any other person," upon the one hand, and "any employee or laborer for wages who labors in and about any coal mine in this state" upon the other. So far, then, as the classification first mentioned is concerned, it is comprehensive enough to include all of the citizens of the state, treating all alike, conferring no special privileges or immunities upon any, and subjecting none to restrictions in trade or business, to deprivation of property rights, or to penalties which are not equally and impartially imposed upon all other citizens similarly situated. But an examination of the title of the act discloses that its subject, as expressed therein, is not coextensive with the act itself. It is in these words: "An Act Concerning the Issuance of Checks, Tickets, Tokens, or Other Devices Payable in Merchandise, or Anything Other Than Lawful Money by Merchants, in Payment for the Assignment or Transfer of Wages of Employees in Coal Mines, and Repealing All Laws in Conflict Therewith." So that, as the title refers only to merchants who issue "checks, tickets, tokens, or other devices," no persons, natural or artificial, can be brought within the scope of the act who do not belong to the particular class designated in the title as "merchants." Const. art. 4, § 19; *Meuchter v. Price*, 11 Ind. 199; *State v. Bowser*, 14 Ind. 195; *State v. Young*, 47 Ind. 150. The statute, therefore, must be treated as an enactment operative only upon two classes of persons,—merchants and employees in coal mines. All other persons, copartnerships, and corporations in the state may issue checks, tickets, tokens, or other devices payable in merchandise, or anything other than lawful money, in payment for the transfer of the wages of employees in coal mines, but no merchant in this state is permitted to do so. The mechanic, the farmer, the professional man, the banker or broker may lawfully take an assignment of the wages of the coal miner, and, in consideration of such transfer, may issue to the miner a check, ticket, or token payable only in merchandise, work, produce, professional services, or depreciated notes or currency. The merchant must redeem his check, ticket, or token in gold, silver, United States treasury notes, or other lawful money of the United States. By confining the prohibitory terms of the statute to merchants, and exempting all other persons, natural and artificial, from their operation; by declaring void the agreement of the merchant, but leaving the same kind of contract valid as to the farmer, mechanic, or banker; by permitting one class of citizens to pay their debts in merchandise, but requiring an-

other, under precisely the same circumstances, to pay in lawful money only,—the act undeniably confers valuable privileges on the mechanic, farmer, professional man, banker, and broker, and denies them to the merchant. Total immunity from the restrictions, inconveniences, and losses resulting and intended to result from the statute is granted to one class, and is impliedly withheld from another. Is a distribution of the citizens of the state in an act concerning the transfer of a claim for wages, which puts the merchants of the state in one class and all other citizens in another, a reasonable and constitutional arrangement? Could an act of the legislature which authorized a judgment without stay of execution or exemption upon an account or claim due to any merchant be upheld against the objection that this was a privilege granted to merchants as a class, and which could not, upon the same terms, be enjoyed by the other citizens of the state? Or would an act stand which fixed the amount of property to be set off to every merchant as exempt from execution at \$1,000, while it limited exemptions to the other citizens to \$600? Such a classification would be regarded by every one as unnatural, and in violation of the provision of the Constitution prohibiting such distinctions. Again, is the classification of the supposed beneficiaries of the act a reasonable and legal one? They are described as “any employee or laborer for wages who labor in and about any coal mine in this state.” This classification seems to rest upon no sound or proper basis. Laborers and employees engaged in a particular industry, who are no less intelligent and no less competent to care for their own interests than laborers and employees pursuing other occupations, are by the statute singled out and authorized to avoid their express agreements, when, under like circumstances, such other laborers and employees enjoy no such privilege. The law does not embrace all of the class to which it is naturally related. It creates a preference, and establishes an inequality among a class of citizens all of whom are equally meritorious. It applies to persons in certain situations, and excludes from its effect other persons who are not dissimilar in these respects. Leaving the miner and the merchant free to deal with all other citizens, the act disqualifies them from contracting with each other. *State ex rel. Van Riper v. Parsons*, 40 N. J. L. 1; *Indianapolis Street R. Co. v. Robinson*, 157 Ind. 232, 236, 61 N. E. 197; *Breuer v. McClelland*, 144 Ind. 423, 17 L. R. A. 845, 32 N. E. 299; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *State v. Garbroski*, 111 Iowa, 496, 56 L. R. A. 570, 82 N. W. 959; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *Brown v. Russell*, 166 Mass. 14, 32 L. R. A. 253, 43 N. E. 1005; *Fraser v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Bank of the State v. Cooper*, 2 Yerg. 599, 24 Am. Dec. 517.

60 L. R. A.

It is said by Judge Cooley (Const. Lim. 393): “The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before unknown to the law, could be sustained notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons; and, if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their ‘pursuit of happiness,’ and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived.” The statute under review does undertake to provide that persons following the lawful trade of merchants shall not have capacity to make certain contracts, or to receive certain transfers of personal property which are entirely permissible to others. It also, and in a manner quite as offensive to the Constitution, confers privileges and immunities upon employees and laborers in coal mines which are not possessed by other citizens of this state employed as laborers in other occupations. We do not wish to be understood as saying that statutes free from any constitutional infirmity may not be enacted which apply exclusively to merchants, coal miners, bankers, physicians, dairymen, druggists, or persons engaged in other particular occupations. Such a classification may, in some cases, be a legitimate one. But in every instance of this kind where such statutes have been upheld the classification has rested upon some quality, condition, or state of things peculiar to the occupation itself, or upon some consideration of public policy, which made it proper or necessary to regulate, control, license, tax, or prohibit it. *State ex rel. Walker v. Green*, 112 Ind. 462, 14 N. E. 352; *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *Eastman v. State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *Blair v. Kilpatrick*, 40 Ind. 312; *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Ferner v. State*, 151 Ind. 247, 51 N. E. 360; *Cory v. Carter*, 48 Ind. 327, 17 Am. Rep. 738; *State ex rel. Burroughs v. Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750; *Parks v. State* (Ind.) 59 L. R. A. 190, 64 N. E. 862.

We have found no case sustaining a stat-

ute which prohibited an individual engaged in a particular, lawful occupation, and not under special disability, such an infancy, insanity, or the like, from doing an act not necessarily connected with his business, which every other citizen was by law permitted to do. The only case referred to by counsel for appellee in support of their contention that the act of 1901, *supra*, is valid, is *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576, 23 N. E. 253. The question there was whether the legislature could prohibit men from contracting in advance to accept payment in something other than the lawful money of the country for the wages they might earn in the future. It was held that the acts prohibiting such contracts were within the scope of legislative power. The acts referred to in that case applied to any owner, corporation, association, company, firm, or person engaged in mining coal, ore, or minerals, or quarrying stone, or in manufacturing iron, steel, lumber, staves, heading barrels, brick, tile, machinery, agricultural implements, or any article of merchandise; and, as its beneficiaries, it embraced "any persons" executing a contract or agreement to waive his or her legal right to demand or receive from such owner, corporation, etc., at least once every two weeks, pay-

ment of the amount due to such persons for labor performed, in lawful money of the United States. Acts 1887, p. 13; Acts 1889, p. 191; Elliott's Supp. §§ 1599, 1610. No question as to an improper classification seems to have been made, and the act applied to all persons and corporations in this state engaged in mining, quarrying, or manufacturing, and to every one in their employment. The point decided in that case was the power of the legislature to restrict the right to contract for a waiver of the benefit of the statute. The question before us under the act of 1901 is the constitutionality of the classification adopted. *Hancock v. Yaden*, 121 Ind. 366, 6 L. R. A. 576, 23 N. E. 253, has no application to this question, and throws no light upon it. It is with great reluctance that we declare an act of the legislature invalid; but the act of 1901, *supra*, so plainly violates the rule of the Constitution forbidding the grant of special privileges and immunities to a favored class of citizens, and subjecting another class to special disabilities and restrictions, that we have no choice but to adjudge it void.

Judgment reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

MINNESOTA SUPREME COURT.

C. L. PEMBERTON, *Appt.*,

v.

William B. DEAN *et al.*, *Respts.*

(.....Minn.....)

*Defendants, wholesale and retail dealers in hardware, purchased from the manufacturer thereof an emery wheel, upon which the manufacturer had placed a placard, which it is assumed constituted a warranty as to the speed capacity of the wheel. Defendants placed it in their stock, and sold it to plaintiff in the same condition it was when received from the manufacturer, but without any express representation as to its capacity or otherwise. *Held*, that defendants, by such sale, did not adopt the warranty of the manufacturer as their own.

(December 12, 1902.)

APPEAL by plaintiff from an order of the District Court for Ramsey County denying a motion for new trial after judgment in defendants' favor in an action to recover damages for alleged breach of warranty of an emery wheel. *Affirmed*.

The facts are stated in the opinion.

Messrs. Humphrey Barton and John E. Samuelson, for appellant:

This action being one for a breach of con-

*Headnotes by BROWN, J.

NOTE.—The above case is one which seems to have no exact precedent. The effect of a manufacturers' warranty remaining on an article when sold by a dealer does not seem to have been hitherto brought in question. 60 L. R. A.

tract or warranty, there must be privity of contract existing between the parties.

15 Enc. Pl. & Pr. 524, and note; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 543; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621; *Curtin v. Somerset*, 140 Pa. 70, 12 L. R. A. 322, 21 Atl. 244.

Respondents cannot shield themselves with the rule of *caveat emptor*. Here was an article that was manufactured and placed upon the market for sale, to be used for the particular and specific purpose for which it was made; and in such a case there is an implied warranty that it is fit for such use or purpose.

Cosgrove v. Bennett, 32 Minn. 371, 20 N. W. 359; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440.

There was an express, unequivocal warranty that the emery wheel was good for 1800 revolutions per minute. The seller allowed the warranty to remain upon the wheel; the purchaser bought and conducted himself in accordance with that warranty. The respondents cannot, therefore, now come in and say: We did not mean to warrant when we left the warranty there.

There may be circumstances in which silence would have the legal characteristics of actual misrepresentation.

French v. Vining, 102 Mass. 132, 3 Am. Rep. 440.

The warranty upon the wheel was not the warranty of the manufacturer as far as ap-

pellant was concerned, but a direct warranty of respondents.

McClintock v. Emick, 87 Ky. 160, 7 S. W. 903; *Tyler v. Moody*, 23 Ky. L. Rep. 584, 54 L. R. A. 417, 63 S. W. 433; *Cameron v. Mount*, 86 Wis. 477, 22 L. R. A. 512, 56 N. W. 1094; *Pulsford v. Richards*, 17 Beav. 94; *Taylor v. Ashton*, 11 Mees. & W. 415; *Smout v. Ilbery*, 10 Mees. & W. 10.

The warranty being expressly made, it makes no difference whether the warrantor knew whether it was true or false, as he will be bound by his warranty exclusive of such knowledge.

Tyler v. Moody, 23 Ky. L. Rep. 584, 54 L. R. A. 417, 63 S. W. 433; *Shippen v. Bowen*, 122 U. S. 576, 30 L. ed. 1172, 7 Sup. Ct. Rep. 1283; *Cameron v. Mount*, 86 Wis. 477, 22 L. R. A. 512, 56 N. W. 1094; *Kuehn v. Wilson*, 13 Wis. 105.

The injuries were the immediate and proximate result of the breach of the warranty.

Dushane v. Benedict, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; *Sutherland, Damages*, 2d ed. § 675, p. 1523; *Tyler v. Moody*, 23 Ky. L. Rep. 584, 54 L. R. A. 417, 63 S. W. 433; *Marsh v. Webber*, 16 Minn. 418, Gil. 375; *Paine v. Sherwood*, 21 Minn. 225; *Frohreich v. Gammon*, 28 Minn. 476, 11 N. W. 88, 28 Am. & Eng. Enc. Law, p. 748; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13; *Sinker v. Kidder*, 123 Ind. 528, 24 N. E. 341; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Mullett v. Mason*, L. R. 1 C. P. 559; *Bradley v. Rea*, 14 Allen, 20; *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658; *Page v. Parker*, 43 N. H. 371, 80 Am. Dec. 172; *Sherrod v. Langdon*, 21 Iowa, 519; *Cameron v. Mount*, 86 Wis. 477, 22 L. R. A. 512, 56 N. W. 1094.

Messrs. **Stringer & Seymour**, for respondents:

Schubert v. J. R. Clark Co. 49 Minn. 331, 15 L. R. A. 818, 51 N. W. 1103, is decisive of the case at bar.

The manufacturer is responsible for his express warranty in whatever manner he has caused it to be placed in the channels of open trade with design that it shall reach the purchaser.

28 Am. & Eng. Enc. Law, p. 767.

An express warranty precludes an implied warranty.

J. I. Case Plow Works v. Niles & S. Co. 90 Wis. 590, 63 N. W. 1013.

Reliance on the warranty must be shown.

Torkelson v. Jorgenson, 28 Minn. 383, 10 N. W. 416; *Richardson v. Coffman*, 87 Iowa, 121, 54 N. W. 356; *Handy v. Waldron*, 18 R. I. 567, 29 Atl. 143.

Respondents could not be held under any implied warranty.

McKinnon Mfg. Co. v. Alpena Fish Co. 102 Mich. 221, 60 N. W. 472; *White v. Steltoh*, 74 Wis. 435, 43 N. W. 99; *Eagan v. Call*, 34 Pa. 236, 75 Am. Dec. 653; *Brantley v. Thomas*, 22 Tex. 270, 73 Am. Dec. 264; *Stevens v. Smith*, 21 Vt. 90; *Gentilli v. Starace*, 133 N. Y. 140, 30 N. E. 660; *Livingston use of Sellers v. Stevenson*, 163 Pa. 262, 29 Atl. 715; *Doane v. Dunham*, 79 Ill. 131; *Armstrong v. Bufford*, 51 Ala. 410, 60 L. R. A.

An implied warranty never arises except where the article purchased is known to the dealer to be intended for a specific and particular purpose, and where the buyer trusts to the judgment or skill of the dealer.

Torkelson v. Jorgenson, 28 Minn. 383, 10 N. W. 416; *Walker v. Pue*, 57 Md. 155; *Morris v. Bradley Fertilizer Co.* 12 C. C. A. 34, 28 U. S. App. 87, 64 Fed. 56; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120, 58 N. W. 232.

When the vendor is not the manufacturer, and the purchaser knows this fact, the former is not responsible for latent defects, in the absence of proof of an express warranty or of fraud and deceit upon the part of the seller.

Gentilli v. Starace, 133 N. Y. 140, 30 N. E. 660; *Sprague v. Blake*, 20 Wend. 61; 15 Am. & Eng. Enc. Law, 2d ed. p. 1236; *Otto v. Alderson*, 10 Smedes & M. 476; *American Forcite Powder Mfg. Co. v. Brady*, 4 App. Div. 97, 38 N. Y. Supp. 545; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *White v. Miller*, 71 N. Y. 118, 27 Am. Rep. 13.

In sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity or thing sold, and the seller is guilty of no fraud, and is neither the manufacturer nor the grower of the thing he sells, the maxim *Caveat emptor* applies.

McQuaid v. Ross, 85 Wis. 492, 22 L. R. A. 187, 55 N. W. 705; *Benjamin, Sales*, § 644; *Barnard v. Kellogg*, 10 Wall. 388, 19 L. ed. 987; *Jones v. Just*, L. R. 3 Q. B. 202; *Eagan v. Call*, 34 Pa. 236, 75 Am. Dec. 653; *Eaton v. Waldron*, 67 Hun, 551, 22 N. Y. Supp. 504; *Ranger v. Hearne*, 37 Tex. 30; *Pattison v. Jenkins*, 33 Ind. 87; *Gilson v. Bingham*, 43 Vt. 410, 5 Am. Rep. 289; *Morris v. Bradley Fertilizer Co.* 12 C. C. A. 34, 28 U. S. App. 87, 64 Fed. 55; *Horwich v. Western Brewery Co.* 95 Ill. App. 162; *Higgins v. Olish*, 34 N. S. 135; *Onida Mfg. Soc. v. Lawrence*, 4 Cow. 440.

Only where there is knowledge or information, and that knowledge or information is not communicated to the seller, does silence have the effect and quality of deceit.

Schubert v. J. R. Clark Co. 49 Minn. 331, 15 L. R. A. 818, 51 N. W. 1103.

The law leaves the purchaser to make his own contract, and to bear the burden of his own neglect, carelessness, and inattention.

Doane v. Dunham, 79 Ill. 131; *Gentilli v. Starace*, 133 N. Y. 140, 30 N. E. 660; *McQuaid v. Ross*, 85 Wis. 492, 22 L. R. A. 187, 55 N. W. 705; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440.

Brown, J., delivered the opinion of the court:

Action to recover damages for the breach of a warranty alleged to have been given on the sale by defendants to plaintiff of a certain emery wheel. The court below dismissed the action at the trial, and plaintiff appealed from an order denying a new trial.

The facts are as follows: At the time stated in the complaint, and for a number of years prior thereto, plaintiff was, and had been, engaged in the business of blacksmithing, in and about which business it was necessary to make use of an emery wheel for the purpose of sharpening tools. On the 1st of October, 1901, he purchased of defendants such a wheel, and removed it to his place of business, and there made use of it. About October 30th of the same year, when engaged in operating the wheel in sharpening tools, the same broke, and a piece therefrom struck plaintiff, and severely injured his person. The complaint alleges that defendants represented and warranted, at the time of the sale of the wheel, that the same was well made, of good material, and capable of making 1,800 revolutions per minute; and that plaintiff relied upon such representations and warranty in making the purchase. This action was brought for damages, on the theory that the injury to plaintiff was the direct result of a defect in the wheel, and that defendants were liable as for a breach of the alleged warranty.

The only question we deem necessary to consider is whether the evidence establishes the allegations of the complaint that defendants warranted the wheel at the time of the sale. It was not manufactured by defendants, who were wholesale and retail dealers in heavy hardware, and kept wheels of the kind in stock for sale to the trade; but was manufactured by the Northampton Emery Wheel Company, of Massachusetts, from which company defendants purchased it, with others, in the usual course of trade. A printed card was placed by the manufacturers upon the face of the wheel, which contained the words "Northampton Emery Wheel Co.," the word "Speed," and opposite thereto the figures "1,800," indicating, as claimed by plaintiff, that the wheel was capable of being safely operated at the rate of 1,800 revolutions per minute. There were other words upon the card, together with the word "Warranted." This card was upon the wheel at the time it was purchased by plaintiff, and the contention of plaintiff is that the same constituted and amounted to a warranty on the part of defendants in respect to its quality and speed capacity; that, although it may have been placed upon the wheel by the manufacturers, defendants adopted it as their own by making the sale

without removing it therefrom. Conceding that the printed matter upon the face of the wheel was sufficient to constitute a warranty, we are unable to concur in the contention that it was the warranty of defendants. A warranty consists in representations and statements of and concerning the condition and quality of personal property, the subject of sale, made by the person making the sale to induce and bring it about. So far as the evidence in the case at bar shows, nothing whatever was said between the plaintiff and defendants concerning the condition or quality of this wheel, whether it was capable of making 1,800 revolutions per minute, or any other number of revolutions, or as to whether it was fit and suitable for any particular purpose. Attention was not called by either party to the alleged printed warranty, and, for aught that appears from the record, the same was not noticed by either at the time of the sale. Clearly, under such circumstances, the placard cannot be held to be the warranty of defendants, and to hold that they adopted the representations purporting to be thus made would be going far beyond any case to which our attention has been called. Whether the manufacturers would be liable to plaintiff upon this warranty, either upon the ground of neglect in the manufacture of the wheel or for a breach of warranty, is wholly irrelevant to the question. If it be granted that the manufacturers would not be liable, it by no means follows that defendants are. We are clear that the mere sale of the wheel by defendants with the printed matter pasted thereon, without other act or ceremony, did not amount to an express warranty on their part. The allegations of the complaint are not, therefore, sustained by the evidence, and the court correctly dismissed the action.

Neither can plaintiff recover upon the theory of an implied warranty. It may be, and doubtless is, true that there is an implied warranty in all cases where an article is manufactured and sold for a specific purpose that such article is fit and suitable for the purposes intended for it. But that rule can have no application to the case at bar, for plaintiff relies in his complaint, not upon an implied, but upon an express, warranty; and, besides, defendants were not the manufacturers of the wheel.

The order appealed from is affirmed.

NEBRASKA SUPREME COURT.

Alois WEBER, Sr., *Plff. in Err.*,
v.

Charles H. LOCKMAN *et al.*

(.....Neb.....)

*A master may be liable in damages

*Headnote by AMES, C.

NOTE.—As to liability of master for injuries caused to third person by servant's disobedience of orders, see also, in this series, Consolidated Ice Mach. Co. v. Kelfer (Ill.) 10 L. R. A. 696. 60 L. R. A.

caused by negligence committed by his servant while in the course of his employment, although the latter may be at the time acting without the knowledge, or contrary to the known wishes, of the former.

(November 19, 1902.)

ERROR to the District Court for Cedar County to review a judgment in favor of plaintiffs in an action brought to recover damages for personal injuries caused by the negligence of defendant's son, for which de-

fendant was alleged to be responsible. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. J. C. Robinson, for plaintiff in error:

If the act is done while the servant is at liberty from his service, and pursuing his own ends exclusively, there can be no question of the master's freedom from all responsibility, even though the injury complained of could not have been committed without the facilities afforded to the servant by his relation to his master.

1 *Shearm. & Redf. Neg.* 4th ed. § 147; *Schouler, Dom. Rel.* 4th ed. § 491; *Davis v. Houghtellin*, 33 Neb. 582, 14 R. A. 737, 50 N. W. 765; *Western U. Teleg. Co. v. Mullins*, 44 Neb. 732, 62 N. W. 880; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 273; *Morier v. St. Paul, M. & M. R. Co.* 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952; *Johanson v. Pioneer Fuel Co.* 72 Minn. 405, 75 N. W. 719; *Keating v. Michigan C. R. Co.* 97 Mich. 154, 56 N. W. 346; *Reaume v. Newcomb*, 124 Mich. 137, 82 N. W. 806; *Schulwitz v. Delta Lumber Co.* 126 Mich. 559, 85 N. W. 1075; *Golden v. Neubrand*, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537; *Dolan v. Hubinger*, 109 Iowa, 406, 80 N. W. 514; *Winkler v. Fisher*, 95 Wis. 355, 70 N. W. 477.

Where a minor son, who lives with his father, and is under his father's control, commits certain wrongful acts, but the said acts were not authorized by the father, were not done in his presence, had no connection with his business, were not ratified by him, and he received no benefit from them, the father is not liable for the resulting damage.

Edwards v. Urume, 13 Kan. 349; *Baker v. Morris*, 33 Kan. 580, 7 Pac. 267.

Messrs. R. J. Millard and C. H. Whitney, for defendants in error:

Whether the servant was acting within the scope of his employment and in furtherance of his master's business is a question of fact, to be determined by the jury from the evidence before them.

Hoverson v. Noker, 60 Wis. 511, 50 Am. Rep. 381, 19 N. W. 382; *Barnowsky v. Helson*, 89 Mich. 523, 15 L. R. A. 33, 50 N. W. 989; *Theisen v. Porter*, 56 Minn. 555, 58 N. W. 265; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Whitman v. Pearson*, L. R. 3 C. P. 422; *Broderick v. Detroit Union R. Station & Depot Co.* 56 Mich. 261, 56 Am. Rep. 382, 22 N. W. 805; *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922.

And whether he acted negligently.

Theisen v. Porter, 56 Minn. 555, 58 N. W. 265.

Where a servant, in the prosecution of his master's business, deviates from his instructions as to the manner of doing it, or even acts directly contrary thereto, the master is still liable, if the act was bona fide done in furtherance of his business.

Cosgrove v. Ogden, 49 N. Y. 255, 10 Am. Rep. 361; *Ellegard v. Ackland*, 43 Minn. 60 L. R. A.

352, 45 N. W. 715; *Fitzsimmons v. Milwaukee, L. S. & W. R. Co.* 98 Mich. 257, 57 N. W. 127; *Cleveland v. Newson*, 45 Mich. 62, 7 N. W. 222.

The master is liable for the tortious acts of his servant, even though he exceeds his authority or disobeys express instructions. *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19.

The master is liable for the act of his servant, done in the course of his employment about his master's business.

Broderick v. Detroit Union R. Station & Depot Co. 56 Mich. 261, 22 N. W. 802; *Schaefer v. Osterbrink*, 67 Wis. 495, 58 Am. Rep. 875, 30 N. W. 922; *Potulni v. Saunders*, 37 Minn. 517, 35 N. W. 379; *Mulvehill v. Bates*, 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959; *Joslin v. Grand Rapids Ice Co.* 50 Mich. 516, 45 Am. Rep. 54, 15 N. W. 887; *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543; *Theisen v. Porter*, 56 Minn. 555, 58 N. W. 265.

Mr. Benjamin M. Weed also for defendants in error.

Ames, C., filed the following opinion:

This is a proceeding in error to review a judgment in an action for damages for personal injuries. The facts out of which the cause of action arose are substantially undisputed, and are these: The plaintiff in error, *Alois Weber, Sr.*, was living upon and cultivating a farm upon which there was a herd of cattle belonging to him. As a part of the business thus being carried on, it was necessary, or desired, to drive the cattle to a place some 5 or 6 miles from home, and put them there in a pasture. There were employed upon the farm, besides the plaintiff in error, his son, *Alois, Jr.*, and a hired servant named *Schweimer*. At the breakfast table on a Sunday morning it was proposed to drive the animals to pasture on that day, so as to avoid interruption of work during the coming week, but the elder *Weber* objected to this course solely on account of the character of the day. There was no further discussion of the matter until about 2 o'clock in the afternoon, when *Alois, Jr.*, and *Schweimer* mounted some horses, and, turning the cattle into the public highway, drove them to the designated place of destination. *Weber, Sr.*, was at or shortly before this time in his house asleep, and did not know of the conduct of the young men until after they had departed from the premises with the cattle. After the animals had been turned into the pasture, *Alois, Jr.*, abandoned the direct road home, and made a detour of about a mile for the purpose of seeing and visiting with some young men of his acquaintance. Owing to the delay thus occasioned, he did not resume his journey homeward until nightfall, when he did so accompanied by another young man, also on horseback. When he was within 1½ or 2 miles from home, and apparently upon the direct road thither, he had been overtaken by darkness, and, both horses having become unmanageable from fright or some other cause, ran rapidly

along the road and down a hillside near the residence of the defendant in error, whom they encountered in the highway, and whom the horse ridden by Alois ran over, causing the injuries on account of which the judgment was recovered. The court left it to the jury to say: First, whether the accident was attributable solely to the negligence of Alois; and, second, whether, if so, such negligence should be imputed to the plaintiff in error as a master in the course of whose service it occurred. The first question was one peculiarly within the province of the jury, and will not be further considered. The correct answer to the second question is, we think, not difficult. The purpose of the elder Weber to have the cattle driven to the pasture as a part of the business he was carrying on is not in dispute. The only objection he made was as to the time when they should be driven, but he does not appear to have positively forbidden it to be done on the day mentioned. Even if he had done so, he would not thus have deprived the act of its character of having been done in his service. Disobedience in this regard would not have been different, as respects its effect upon his liability, than would disobedience to his directions as to the manner of driving the animals or the route to be taken. Such disobedience is universally held not to excuse a master from responsibility for the negligence of his servants. *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361; *Ellegard v. Ackland*, 43 Minn. 352, 45 N. W. 715; *Fitzsimmons v. Milwaukee, L. S. & W. R. Co.* 98 Mich. 257, 57 N. W. 127; *Cleveland v. Newson*, 45 Mich. 62, 7 N. W. 222. The same principle applies to what occurred after the delivery of the cattle at the pasture. The boy was

a minor, riding his father's horse. It was his duty, after having executed his mission, to return the animal to his father's stables. Whatever negligence there was in departing from the direct route, or in delaying his return until after nightfall, or in the management of the horse at the time of the accident, was committed in the performance of this duty and service. And, besides, it does not appear that his departure from the direct route was in itself negligent, or that his visit to the young people in any way contributed to an accident which did not occur until after the visits had ended and he had resumed his homeward journey, and thus returned to the strict line of his employment. If the fact of delay until after nightfall contributed to the mishap, it was that mere fact, and not the occasion for it, which did so. If it was negligent for the boy to ride after dark, it is immaterial what induced him to incur the risk. We are satisfied that the answer given by the jury to this question is the only one which the evidence in the record is capable of supporting. The conclusion thus reached renders unnecessary the consideration of assignments of error in the giving and refusal of instructions. The question of negligence was rightly left to the jury, and the inference that it occurred in the service of the plaintiff in error is inevitable.

It is recommended that the judgment of the district court be affirmed.

Albert and Duffie, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, it is ordered that the judgment of the District Court be affirmed.

NEW YORK COURT OF APPEALS.

Louis BECK, Respt.,
v.
CATHOLIC UNIVERSITY OF AMERICA,
Appt.,
And
Augustus C. DEXTER et al., Respts.

(172 N. Y. 387.)

Consent to the erection of buildings on the land within the meaning of the mechanics' lien law, so as to make the property liable for liens after the contract has been forfeited and the vendor has resumed possession, is not shown by a clause in an executory land contract "that the vendee shall have a right to immediate possession" for the purpose of erecting buildings.

(November 11, 1902.)

NOTE.—For a case in this series holding that the insertion in a contract for sale of real estate of a clause requiring vendee to erect buildings thereon sufficiently shows vendor's consent to such erection, so as to render his interest in 60 L. R. A.

A PPEAL by the defendant University from a judgment of the Appellate Division of the Supreme Court, First Department, affirming a judgment of a Special Term for New York County in favor of plaintiff in an action brought to enforce a mechanic's lien. *Reversed.*

Statement by the Court:

The action was to foreclose a mechanic's lien upon real property owned by the appellant, situated on Riverside drive, in the city of New York. It consisted of six lots, which the appellant, by an executory contract, sold to the defendant Dexter for \$100,000. Dexter employed the plaintiff to erect a building for a restaurant thereon, and out of this employment the plaintiff's claim arose, for which he filed a mechanic's

the property liable for liens for labor and material, see *Miller v. Mead* (N. Y.) 13 L. R. A. 701. With this case is a note reviewing the cases on the New York mechanics' lien law.

lien, and which he sought by this action to foreclose. Several of the defendants filed liens against the property, which they also sought to enforce in this action. In December, 1897, Dexter defaulted in payment under his contract, his right to the property ceased, and the university took possession thereof. The building upon the premises was constructed while Dexter was in possession. The plaintiff recovered a judgment awarding him a lien thereon for \$9,020.32, the defendant, Hamilton, for \$614.56, and the defendants, Mackey and Smith, for the sum of \$785. The judgment of the special term was affirmed by a divided court.

Mr. Joseph M. Proskauer, with *Messrs. James, Schell, & Elkus*, for appellant:

The mere acquiescence in the erection or alteration of a building, with knowledge, is not sufficient evidence of consent, which the statute requires.

DeKlyn v. Gould, 165 N. Y. 282, 59 N. E. 95; *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292; *Coven v. Paddock*, 137 N. Y. 188, 33 N. E. 154; *DeKlyn v. Simpson*, 34 App. Div. 442, 54 N. Y. Supp. 345.

The contract contained merely a permission, not a consent.

Where the owner merely gives permission to build, and has no interest in the building, and does not look to it for profit, and does not care whether the building is erected or not, under such circumstances no consent can be inferred.

Vosseller v. Slater, 25 App. Div. 368, 49 N. Y. Supp. 478; *Havens v. West Side Electric Light & P. Co.* 49 N. Y. S. R. 771, 20 N. Y. Supp. 764.

Mr. Dahlgren neither assumed to bind the university, nor did the university ever grant him any authority, and the few stray statements relied upon by the respondents to indicate his assumption of authority are, as the mere declarations of the agent, insufficient to prove the fact of his agency.

Marvin v. Wilber, 52 N. Y. 270; *Duffus v. Schuinger*, 79 Hun, 541, 29 N. Y. Supp. 930; *Wakefield Rattan Co. v. Tappen*, 80 Hun, 219, 30 N. Y. Supp. 38; *Gould v. Sterling*, 23 N. Y. 463; *Stringham v. St. Nicholas Ins. Co.* 4 Abb. App. Dec. 315.

The university was not the owner within the meaning of the mechanics' lien law. The university was a vendor out of possession.

Vosseller v. Slater, 25 App. Div. 368, 49 N. Y. Supp. 478.

Mr. Alfred B. Cruikshank, with *Messrs. Cannon & Cannon*, for respondent Beck:

Mr. Dahlgren's authority to consent to the erection of the building in question fully appears, and was sufficient to bind the university.

Hyatt v. Olark, 118 N. Y. 563, 23 N. E. 891; *Story, Agency*, § 140.

The facts in the case establish the owner's consent.

Laws 1873, chap. 489; *Hackett v. Badeau*, 63 N. Y. 476; *Nellis v. Bellinger*, 6 Hun, 560; *Burkitt v. Harper*, 79 N. Y. 273; *Husted v. Mathes*, 77 N. Y. 388; *Otis v.* 60 L. R. A.

Dodd, 90 N. Y. 336; *Kealey v. Murray*, 40 N. Y. S. R. 23, 15 N. Y. Supp. 403; *Schmaltz v. Mead*, 125 N. Y. 188, 26 N. E. 251; *Miller v. Mead*, 127 N. Y. 544, 13 L. R. A. 701, 28 N. E. 387; *Vosseller v. Slater*, 25 App. Div. 368, 49 N. Y. Supp. 478; *National Wall Paper Co. v. Sire*, 163 N. Y. 122, 57 N. E. 293; *Coven v. Paddock*, 137 N. Y. 188, 33 N. E. 154; *Butler v. Flynn*, 51 App. Div. 225, 64 N. Y. Supp. 877; *Steeves v. Sinclair*, 56 App. Div. 448, 67 N. Y. Supp. 776; *Rice v. Culver*, 172 N. Y. 60, 64 N. E. 761; *Cornell v. Barney*, 26 Hun, 134.

The lien law is a remedial statute, and must be construed liberally to secure the beneficial intents and purposes thereof.

Laws 1897, chap. 418, § 22; *National Wall Paper Co. v. Sire*, 163 N. Y. 126, 57 N. E. 293.

Consent may be shown, either by special agreement, or by acts from which it may be fairly implied.

Husted v. Mathes, 77 N. Y. 390; *National Wall Paper Co. v. Sire*, 163 N. Y. 129, 57 N. E. 293.

A strong and almost conclusive evidence of consent is the receipt by the owner of the benefit to his property.

Butler v. Flynn, 51 App. Div. 225, 64 N. Y. Supp. 877; *Steeves v. Sinclair*, 56 App. Div. 448, 67 N. Y. Supp. 776; *Husted v. Mathes*, 77 N. Y. 388; *Burkitt v. Harper*, 79 N. Y. 273; *Schmaltz v. Mead*, 125 N. Y. 188, 26 N. E. 251; *National Wall Paper Co. v. Sire*, 163 N. Y. 122, 57 N. E. 293; *Kealey v. Murray*, 40 N. Y. S. R. 23, 15 N. Y. Supp. 403.

Messrs. Louis S. Phillips and Wilfrid N. O'Neil for other respondents.

PER CURIAM:

The judgment appealed from should be reversed. The mechanics' liens involved in this action were filed against property now owned by the Catholic University of America. The appellant insists that the labor and materials furnished, for which liens were filed, were not furnished either with its consent or at its request, although its property has been held liable therefor. It is not even pretended that the university requested the performance of the labor or the furnishing of the materials employed in the erection of the building upon the appellant's land. Nor do we think there was any such consent as is contemplated by the statute relating to the subject. We fully concur with the learned appellate division in the opinion that no consent by the university was established by the parol evidence in the case, as it was not proved that Dahlgren was a general agent of the university, nor was he shown to have been authorized by it to do anything concerning the erection of such building. Consequently no inference of authority or consent can be drawn from the testimony as to his acts or declarations. The only ground upon which the appellate division held that the university consented to the erection of buildings on its land is that the contract of sale effected such consent. The provision upon which that court relied as constituting

consent was as follows: "It is further understood and agreed that the vendee shall have the right of immediate possession to the property hereinbefore mentioned and described for the purpose of erecting buildings thereon." Obviously, the only effect of that provision was to give the vendee the right of possession, which he would not otherwise have had, and it cannot be regarded as a consent under the provisions of the lien law to the erection of the building constructed by Dexter. It is to be observed that, while there was consent by the vendor that the vendee should have the right of possession for the purpose of erecting buildings thereon, there was no consent whatever to the construction of the particular building erected. It is quite evident that the university had knowledge of the fact that the defendant Dexter intended to improve the property by the erection of a building thereon. There was, however, no proof of any knowledge upon its part as to the character of the building to be erected, of the erection of the building constructed, or that the university acquiesced therein. Proof of the existence of that knowledge was insufficient to establish a consent, under the lien law, to the erection of any building which the vendee should conclude to or did erect. The decision of the learned appellate division in that respect is in direct conflict with the later decisions of this court. *Vosseller v. Slater*, 25 App. Div. 368, 372, 49 N. Y. Supp. 478, Affirmed in 163 N. Y. 564, 57 N. E. 1127; *Havens v. West Side Electric Light & P. Co.* 49 N. Y. S. R. 771, 20 N. Y. Supp. 764, Affirmed in 143 N. Y. 632, 37 N. E. 827; *Hankinson v. Vantine*, 152 N. Y. 20, 29, 46 N. E. 292; *De Klyn v. Gould*, 165 N. Y. 282, 286, 59 N. E. 95; *Rice v. Culver*, 172 N. Y. 60, 64 N. E. 761.

The *Vosseller Case* was quite similar to the case at bar. It was there held that the property of the vendor was not subject to a mechanic's lien upon the buildings erected or altered by the vendee. In that case it was said: "It would be a most unusual statute, and of doubtful validity, which should provide that in case a vendor sells real estate by an ordinary executory contract of sale, knowing that the vendee intended to erect a building thereon, the vendor's interest should be charged with a lien for the expense of erecting a building, and so improve the vendor out of his estate." In that case, as in this, there was no provision in the contract which required the vendee to make the improvements which were made upon the premises. In the *Havens Case* it was held that the mere fact that a landlord may know that his tenant contemplates making certain improvements, or applying the property to certain purposes, cannot make the former liable for the expense of such work. The *Hankinson Case* is to the effect that a mere general consent of an owner that the lessee in occupation may, at his own expense, make alterations in a building occupied by him, does not constitute a consent by the owner that a third party shall furnish labor or materials for the al-

terations, so as to make such labor and materials the basis of a mechanic's lien upon the building, especially in the absence of any notice or knowledge on the part of the owner from which such consent can be implied. After reviewing several authorities in this court, it was there said: "Thus it seems that the requirements of this statute as to consent are not met by a mere general agreement to the effect that a third person may, at his own expense, make alterations in a building occupied by him. The statute requires more. It requires either that the owner shall expressly consent to the particular alteration made, or that, with a knowledge of the particular object for which they are employed, he acquiesces in the means adopted for that purpose." In the *DeKlyn Case* it was decided that the consent necessary under the mechanic's lien law, to render the owner liable for work done or materials furnished, will not be implied from a mere acquiescence by the owner in the alterations, in the absence of any affirmative act or declaration on his part which might have misled the lessee or contractor. It was there said: "The owner's interest in his real estate is not liable in every case in which, to his knowledge, labor and materials are furnished for erections upon his real property or alterations in the existing erections. . . . Consent is not a vacant or neutral attitude in respect of a question of such material interest to the property owner." In *Rice v. Culver* the authorities relating to the subject were quite exhaustively examined, and we held that, to constitute the consent mentioned in the statute, the owner must either be an affirmative factor in procuring the improvement to be made, or, having possession and control of the premises, assent to the improvement in the expectation that he will receive the benefit of it. This review of the authorities discloses that the consent relied upon by the respondent was insufficient to justify the court in holding the land of the university liable to the liens sought to be enforced in this action. Therefore there was in this case no evidence to justify the trial court in finding that the labor and materials performed and furnished by the lienors were furnished with the consent of the university. It thus appearing that there was no evidence which, according to any reasonable view, supports the finding of the trial court, and as the affirmation by the appellate division was not unanimous, the question whether there was any evidence to support that finding raises a question of law which the court of appeals may review. *Ostrom v. Greene*, 161 N. Y. 353, 55 N. E. 919.

While there were several other questions presented upon the argument and in the briefs of counsel, still, as the judgment must be reversed upon the ground that there was no valid consent by the owner which made its land liable for the liens placed thereon, no discussion of those questions seems necessary. It may, however, be remarked that the admission of the evidence as to the acts and declarations of Dahlgren was clearly er-

roneous, and the judgment might well be reversed upon that ground.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Gray, O'Brien, Martin, Vann, Cullen, and Werner, JJ., concur. Parker, Ch. J., absent.

PEOPLE of the State of New York, *Respt.*,

v.

Frank P. ELLIOTT, Appt.

(172 N. Y. 146.)

Reading on a second trial of a criminal case testimony of a witness who died after the first trial, at which accused was present and represented by counsel, who was accorded the right of cross-examination, does not infringe the right of the accused to be confronted with the witnesses against him, in the presence of the court.

(October 7, 1902.)

APPPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Third Department, affirming a judgment of the Chenango County Court convicting him of rape. *Affirmed.*

The facts are stated in the opinion.

Mr. John P. Wheeler, for appellant:

It was error to admit the evidence of Dr. Brooks, given on the former trial.

People v. Murphy, 101 N. Y. 126, 54 Am. Rep. 661, 4 N. E. 326.

Mr. Wordsworth B. Matterson, for respondent:

It was not error to be permitted to read the evidence of Dr. Brooks, taken upon the former trial.

N. Y. Code Civ. Proc. §§ 830, 3333, 3335, 3336; N. Y. Code Crim. Proc. §§ 392, 398.

Bartlett, J., delivered the opinion of the court:

This defendant has been twice tried. The judgment of conviction at the first trial was reversed by this court. 163 N. Y. 11, 57 N. E. 103. At the second trial a judgment of conviction was entered upon the verdict of a jury, which on appeal was affirmed by the appellate division, and we are now called upon to pass on that determination.

The learned counsel for the defendant presents three grounds for the reversal of this judgment. Error in challenging the

NOTE.—For a case in this series holding that a deposition taken in the presence of an accused may be used on his trial, where, because of death or other good cause, the presence of the witness cannot be had, see *Territory v. Evans* (Idaho) 7 L. R. A. 646.

For a case holding that the constitutional right of an accused to confront the witnesses against him does not exclude the use of a certificate of marriage, see *State v. Behrman* (N. C.) 25 L. R. A. 449.
60 L. R. A.

jury; failure of the trial judge to follow the decision of this court on the first appeal, in charging the jury; the admission of the testimony of Dr. Brooks, who was dead at the time of the second trial. The appellate division decided that none of these grounds presented reversible error, and we are of the same opinion, but deem it proper to further consider the question whether Dr. Brooks's testimony was properly read on the second trial.

The Code of Criminal Procedure (§ 8, subd. 3) provides that in a criminal action the defendant is entitled "to produce witnesses in his behalf, and to be confronted with the witnesses against him in the presence of the court, except that where the charge has been preliminarily examined before a magistrate, and the testimony reduced by him to the form of a deposition in the presence of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, . . . the deposition of the witness may be read upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found in the state." There seems to be no provision of the Code of Criminal Procedure authorizing, in terms, the reading on a second trial of the testimony of a deceased witness sworn at the first trial. The Code of Civil Procedure (§ 830) provides as follows: "Where a party or witness has died . . . since the trial of an action . . . the testimony of the decedent, . . . taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing, or upon any subsequent trial or hearing, of the same subject-matter in an action . . . between the same parties who were parties to such former trial or hearing or their legal representatives, by either party to such new trial or hearing or to such subsequent action . . . subject to any other legal objection to the competency of the witness, or to any other legal objection to his testimony or any question put to him. The original stenographic notes of such testimony, taken by a stenographer who has since died or become incompetent, may be so read in evidence by any person whose competency to read the same accurately is established to the satisfaction of the court, . . . presiding at the trial of such action. . . ." The section quoted refers to the death of a witness after the trial of an "action." Section 3333 of the Code of Civil Procedure defines "action" as follows: "The word 'action' as used in the New Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." This definition renders it clear that § 830 of the Code of Civil Procedure, above quoted, refers to both civil and criminal actions. Section 8 of the Code of Criminal Procedure provides that the defendant shall be confronted with the wit-

nesses against him in the presence of the court. This is merely a re-enactment of the Bill of Rights, which provides, in § 14, that the accused shall be confronted with the witnesses against him. 2 Rev. Stat. Banks's ed. 1561. The Constitution of this state, unlike the Federal Constitution, has no similar provision.

The question has been much discussed whether the reading of testimony, reduced to a deposition in a preliminary examination, where the accused was represented by counsel and exercised the right of cross-examination, or testimony taken at a former trial, where the deponent or witness was dead at the time of the subsequent trial, could be read in evidence. It has also been matter of discussion whether the precise testimony taken at a former trial should be read in evidence from the minutes, or, in case of their destruction, the substance thereof given by a witness who heard the testimony delivered at the first trial. In the case of *People v. Williams*, 35 Hun, 516, the question of the constitutionality of § 8, subd. 3, of the Code of Criminal Procedure, was under consideration. Judge Daniels said (p. 518): "It is manifest from the authorities permitting the deposition or evidence of a deceased witness to be read upon a trial of the accused that it has not been deemed essential that he should be confronted by the witness against him upon the trial itself; but if the evidence be taken in the course of the proceeding in his presence, and with the right or privilege of cross-examination secured to him, that will be sufficient to allow the deposition to be read, in case of the decease of the witness making it, between the time when it may be taken and the time of the trial. And if this article of the Constitution should be held to be applicable to the case, it would not, therefore, exclude the deposition received in evidence on the trial of the defendant." The Constitution here referred to is the Federal Constitution, for, as already observed, the state Constitution has no provision for the right of confrontation. In *People v. Penhollow*, 42 Hun, 103, it appeared that a witness on the part of the people at the first trial of this indictment was dead at the time of the second trial, and the district attorney offered to read in evidence her testimony as previously given. To the reception of this proof the defendant objected on the ground that it was incompetent and unconstitutional, being in violation of the 6th article of the Amendments of the Constitution of the United States, which provides that in all criminal prosecutions the accused shall be confronted with the witnesses against him. The court said (p. 105): "This provision has no application to criminal trials in the state courts for a violation of state laws. This right secured to the accused is limited in its application to citizens of the United States on trial in the Federal courts, charged with a violation of the Constitution of the United States or of the laws of Congress. . . . Our own state Constitution does not contain any provision securing to the accused the

right and privilege of being confronted by the witnesses against him. In the Bill of Rights, adopted by the legislature, there is a provision similar to the one embraced in the Constitution of the United States, and expressed in the identical words." The learned judge here quotes § 14 of the Bill of Rights, and proceeds as follows: "The accused was confronted by the witness on the former trial, and he had an opportunity of making a cross-examination, and that satisfies the requirements of the statutes. The right secured to the accused, it is to be observed, is 'to be confronted with the witnesses against him.' This language does not require that the accused shall in all cases be confronted with the witnesses against him upon a pending trial of the indictment. The courts have held that the statute is satisfied, in cases of necessity, if the accused has been once confronted by the witness against him in any stage of the proceedings upon the same accusation, and has had an opportunity of a cross-examination, by himself or by counsel, in his behalf." In *Brown v. Com.* 73 Pa. 321, 13 Am. Rep. 740, the question was considered whether the testimony taken by the commonwealth, on a hearing before a justice of the peace, of a person charged with murder, was admissible on the trial. Chief Justice Read, in a very careful and able opinion, considered the question at some length, citing many authorities, and reached the conclusion that the testimony was admissible. A like question was before the court in *Com. v. Richards*, 18 Pick. 434, 20 Am. Dec. 608. The learned court said: "It has been contended for the defendant that the admission of such evidence is directly against the 12th article of the Bill of Rights, which provides that in criminal cases the subject shall have a right 'to meet the witness against him, face to face.' Now, the defendant did meet the witness who has deceased, face to face, and might have cross-examined him before the magistrate touching this accusation. . . . We think it to be very clear that testimony of what a deceased witness did testify on a former trial, between the same parties on the same issue, is competent evidence. The rule is thus well stated in 2 Lilly's Abr. 745: 'If one who gave evidence on a former trial be dead, then, upon proof of his death, any person who heard him give evidence and observed it shall be admitted to give the same evidence as the deceased witness gave, provided it were between the same parties.' I cite the passage for the expression 'shall be permitted to give the same evidence' which the deceased gave. It is to be the same, not a part, not the effect or substance, but the whole evidence which the deceased witness gave, touching the matter or issue in controversy. 1 Phillips, Ev. chap. 7, § 7; *Miles v. O'Hara*, 4 Binn. 111; *Pyke v. Crouch*, 1 Ld. Raym. 730; *Melvin v. Whiting*, 7 Pick. 79; Bull. N. P. 242 *et seq.*" In *People v. Newman*, 5 Hill, 295, the supreme court of this state held that in a criminal action the public prosecutor will not be allowed to use the testimony given by the witness at a

former trial on the same indictment, though he be absent from the state. It is stated in a *per curiam* opinion as follows: "It seems to be settled in this court that nothing short of the witness's death can be received to let in his testimony given on a former trial. *Powell v. Waters*, 17 Johns. 176; *Wilbur v. Selden*, 6 Cow. 162. And see *Jackson ex dem. Potter v. Bailey*, 2 Johns. 17; *Beals v. Guernsey*, 8 Johns. 446, o Am. Dec. 348; *White v. Kibling*, 11 Johns. 128; *Crary v. Sprague*, 12 Wend. 41, 44, 45, 27 Am. Dec. 110. But if the rule were otherwise in respect to civil cases, we are of opinion that it should not be applied to criminal proceedings. . . . It is not now necessary, however, to decide that point; the present case being one of mere absence from the territorial jurisdiction of the court." In the case of *United States v. Macomb*, 5 McLean, 286, Fed. Cas. No. 15,702, the circuit court of the United States, seventh circuit, held that where, at the preliminary examination, a witness, since deceased, testified in relation to the offense, the accused being present and his counsel accorded the right of cross-examination, on a trial before a jury, under an indictment for the same offense, witnesses might be permitted to testify as to what the deceased swore to on the preliminary examination. Judge Drummond in that case made an exhaustive examination of the authorities, and reasons the question on principle at length. Mr. Underhill, in his work on Criminal Evidence (§ 261), says: "In criminal as in civil procedure, the evidence of a witness at a prior trial may be proved as evidence in a subsequent trial of the accused for the same offense if the witness is dead, or has become incompetent by reason of mental derangement. His testimony is admissible either for or against the party in whose favor he originally testified." *State v. Taylor*, 61 N. C. (Phill. L.) 508, 513; *Hair v. State*, 16 Neb. 601, 605, 21 N. W. 464; *State v. McNeil*, 33 La. Ann. 1332; *O'Brian v. Com.* 6 Bush, 563, 571; *State v. Johnson*, 12 Nev. 121, 123; *State v. Able*, 65 Mo. 357; *Sullivan v. State*, 6 Tex. App. 319, 32 Am. Rep. 580. In 1 Greenl. Ev. 16th ed. § 163g, this language is used: "The death of the witness has always and as of course been considered as sufficient to allow the use of his former testimony." Citing a number of cases in England and several states of the Union. See also Abbott, Trial Brief Crim. Cas. § 664, and cases cited; 1 Phillpotts, Ev. Cowen & H. Notes, p. 571, note 437, p. 578, note 442.

It seems to have been the universal rule that the evidence of a deceased witness could be read on the second trial in civil cases. It has been debated to some extent whether the rule should be extended to criminal trials. It is safe to say that the great

weight of authority is in favor of such extension. The object of all trials, civil, and criminal, is to arrive at the truth and do justice; and it would certainly tend to an opposite result if testimony carefully taken upon a former trial at which the accused was represented by counsel, who was permitted the right of cross-examination, is to be excluded by the mere accident of the death of the witness, which is liable to occur in all prolonged litigations. In this state the discussion of the question seems to have been confined to the lower courts, and mainly in the earlier cases. There is little doubt that the practice in civil cases in this regard has been adopted by the criminal courts as matter of course, which accounts for the fact that the question has not been presented to this court so far as we are advised. The legislature, in enacting § 830 of the Code of Civil Procedure, already quoted, evidently sought to codify what was an existing general rule in both civil and criminal cases. If this legislation could properly be regarded as violating the right of confrontation, as contained in the Bill of Rights, it would amount only to a modification of the rule as laid down in the former legislation. There is, however, no ground for such criticism, as it is very clear that the right of confrontation has been carefully guarded in this and other states, by only admitting such testimony or depositions as were taken in the presence of the accused, represented by counsel, exercising the full right of cross-examination.

While unable to find reversible legal error in this record, we feel constrained to repeat what we said on the first appeal (163 N. Y. 12, 57 N. E. 104),—that "in a case like the one before us, where the indictment charges a heinous and unnatural offense, it is most difficult to secure an absolutely fair trial." There are features of this case, common to both trials, where evidence was procured for the people at the fearful cost of a mother voluntarily subjecting a mere child to the alleged repetition of an unthinkable and horrible offense by the father. This is a phase of the case we do not feel justified in passing over without comment. It was an unconscionable and brutal act on the part of the child's mother, in seeking to secure her husband's conviction by resorting to a mode of procedure that shocks the moral sense of every right-thinking person. The case of the people is subjected to the gravest suspicions, under the circumstances.

The judgment of conviction should be affirmed.

Parker, Ch. J., and O'Brien, Martin, Vann, and Cullen, JJ. (and Gray, J. in result), concur.

MICHIGAN SUPREME COURT.

Thaddens W. BACON, *Relator*,
v.

BOARD OF STATE TAX COMMISSIONERS.

(126 Mich. 22.)

1. The constitutional requirement of uniformity and equality in taxation is not violated by taxing shares of stock in foreign corporations and exempting those in domestic corporations, whose property is taxed within the state; and it is immaterial that the property, including the capital stock of the foreign corporations, is taxed at their domicile.
2. The use of the word "citizens" in Comp. Laws 1897, § 3831, subdiv. 9, providing that all shares in foreign corporations owned by citizens of the state shall be taxed, is not limited to its political sense so as to

exempt stock owned by inhabitants who are not citizens, and thus make the statute void for lack of uniformity.

3. The provision of the Federal Constitution that full faith and credit shall be given in each state to the public acts of every other state does not prevent the taxation of stock in a foreign corporation owned by residents of the state because the property of the corporation is taxed at its domicile.

(Grant, J., dissents.)

(February 27, 1901.)

APPPLICATION for a writ of mandamus to compel respondents to reduce an assessment of taxes against relator. *Denied*. The facts are stated in the opinion.

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I. Scope of note.

This note is confined to two classes, only, of cases relating to the taxation of corporations organized for gain. One class includes those

wherein a tax is resisted upon the ground that it lays upon its subject more than a fair share of the public burden. The other embraces those in which the authorities assert that an exemption claimed by such a corporation unwarrantably relieves it from its due proportion of such burden. In both classes some provision of the Federal, or a state, Constitution is relied upon to defeat either the tax or the claim to immunity in dispute.

The analogous cases involving the taxation of national bank stockholders under the permission given by the act of Congress in that behalf, to tax them equally with other capitalists, have not been included.

Neither does this note deal with license taxes on trades, occupations, etc., followed by either artificial or natural persons, even where the nature of the calling is corporate only. The cases of this character herein referred to do but throw light upon the main theme.

The ground covered by the previous notes in this series, so far as in point, is not, in general, again traversed. The reader should consult, in particular, the notes on the constitutional equality of privileges, immunities, and protection, to the case of Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579; on the constitutionality of a provision in a tax law for deducting debts from credits and other property, to the case of Florer v. Sheridan (Ind.) 23 L. R. A. 278; on the state taxation of national banks, to the case of McHenry v. Downer (Cal.) 45 L. R. A. 737; on the taxation of corporate franchises in the United States (div. VIII.), to the case of Louisville Tobacco Warehouse Co. v. Com. (Ky.) 57 L. R. A. 93, 98; on the taxation of capital stock of corporations in the United States (divs. VIII., X., and XI.), to the case of State Bd. of Equalization v. People (Ill.) 58 L. R. A. 589, 603, 605.

II. Natural justice.

Before the United States was born, Adam Smith wrote that the subjects of every state ought to contribute towards the support of government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the estate. In the obser-

Mr. Joseph Walsh, with Messrs. Avery Brothers, for relator:

When the New York statutes and the Michigan statutes and constitution are read together the conclusion must necessarily be reached that the stock of petitioner is not subject to taxation in this state.

Stock of a like character issued by a corporation within the state is exempt; and if the legislature did undertake and did mean by paragraph 9 of section 3831 of Miller's Compilation to tax the stock of petitioner, then in doing so it violated article 14 of section 11 of the Constitution in this, that it provided an unequal rule of taxation.

The Michigan statute in effect gives a preference to stocks issued by Michigan corporations.

Taxes are, within the meaning of the constitution, equal and uniform when no per-

son or class of persons in the state taxed is taxed at a higher rate than are other persons in the same district upon the same value or thing and when the objects of taxation are the same by whomsoever owned or whatever they may be.

Norris v. Waco, 57 Tex. 635.

Taxation is not necessarily unconstitutional and void when double; but the intention must be so clearly expressed when the result is double taxation that there can be no possible doubt that the legislature intended to tax twice.

Cooley, Taxn. 2d ed. p. 227; *Kimball v. Milford*, 54 N. H. 406.

The law of 1893, § 3831, Miller's Compilation, has the element of doubt and uncertainty in it as to the intent of the legislature.

The word "inhabitant" is defined as fol-

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lows: "One who resides actually and permanently in a given place and has his domicile there."

Black, Law Dict. p. 622.

The word as used in the statute of 1889 and also in paragraph 5, of section 3831, was intended to and does include all residents of the state. Under the law of 1889 a citizen of the state of Michigan who was not an inhabitant could not be taxed.

Evidently for this reason the word "inhabitant" was eliminated and the word "citizen" substituted so as to reach the class of persons who are citizens of the state, domiciled elsewhere, or who return for the purpose of voting at elections but reside for the most part in a foreign jurisdiction.

When the legislature substituted the word "citizen" for "inhabitant" in one part of the

same section of the statute and both parts of the section were dealing with property beyond the jurisdiction of the state, the two words were to have a distinct and separate meaning.

Every statute which undertakes to appropriate in any manner the property of private persons for public purposes must be strictly construed.

Picquet v. Swan, 5 Mason, 35, Fed. Cas. No. 11,134.

The word "inhabitant" sometimes means "citizen," but that depends upon the subject-matter with which the law is dealing.

State v. Primrose, 3 Ala. 546; *Bull v. Warren*, 36 Conn. 85; *Parker v. Overman*, 18 How. 137, 15 L. ed. 318; *Kelly v. Houghton*, 9 Sawy. 19, 23 Fed. 417.

The word "citizen" as used in this statute was intended to reach a large class of

and the constitutionality of similar statutes has been affirmed in Minnesota and Florida. *Cameron v. Chicago*, M. & St. P. R. Co. 63 Minn. 384, 31 L. R. A. 553, 65 N. W. 652; *Dell v. Marvin*, 41 Fla. 221, 45 L. R. A. 201, 26 So. 188.

The Texas supreme court, on one occasion, after deciding that the statute then before it was not repugnant to any provision of the state Constitution, took up the appellant's contention to the effect that it was so discriminatory in its character, being directed against one class of citizens only, and was so opposed to the principles of republican government, that it could not be presumed that the people intended to have conferred the power on the legislature to pass it; and replied to this contention by saying that the ablest and most conservative writers on constitutional law seem to entertain grave doubts as to the wisdom and propriety of the judicial department venturing upon the dangerous ground of declaring a statute void because it is unjust or oppressive, or is supposed to affect the natural rights of the citizen because violative of the fundamental principles of republican government, unless it appears that these principles are placed beyond legislative control by the terms of the Constitution. This is founded on the reason that these principles are so susceptible to the varying demand growing out of public necessity and expediency that they cannot always be incorporated in the Constitution, and it is only, generally, where they have found expression in that instrument that the "principles of republican government" constitute a guide for our action or restraint on legislative power. *Gulf, C. & S. F. R. Co. v. Elms (Tex.)* 17 L. R. A. 286, 18 S. W. 723.

The case just cited, apparently, was a decision in the same suit elsewhere reported in 87 Tex. 19, 26 S. W. 985, and afterwards reversed on error by the Supreme Court of the United States in 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255.

There is, declared another court, no paramount and supreme law which defines the law of nature, or settles those great principles of legislation which are said to control state legislatures in the exercise of the powers conferred upon them by the people in the Constitution. If it is once admitted that there exists in this court a power to declare a state law void which conflicts with no constitutional provision; if we assume the right to annul laws for their supposed injustice or oppressive operation,—we become the makers, and not the expounders, of constitutions; our opinion will not be a judgment on what was the pre-existing law of 60 L. R. A.

the case, but upon what it is after we shall have so amended and modified it as to meet our ideas of justice, policy, and wise legislation by a direct usurpation of legislative powers and a flagrant violation of the duty enjoined on us by the judiciary act. *Bennett v. Boggs, Baldwin*, 60, Fed. Cas. No. 1319.

III. Need of constitutional guards against inequality.

The constitutionality of a legislative act is to be determined solely by reference to those limitations which the Constitution imposes. *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75.

Because a tax bears heavily upon a corporation or class, it is not, for that reason alone, unconstitutional. *State Board v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578. In that case, *Scudder, J.*, discussing the constitutionality of the New Jersey railroad and canal tax law of 1884, asks: Is this law invalid so that it cannot be executed without violating the fundamental law of the state? And then adds: If it be not thus controlled and annulled, it is the duty of this court to give it effect. It is not our province to say whether the law is impolitic, or even oppressive and unjust in its provisions, so long as it does not violate the constitutional rights of these corporations in the enforcement of what is designed to be strictly a tax law. The judicial power cannot legitimately question the policy, or refuse to sanction the provisions, of any law not inconsistent with the fundamental law of the state. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people.

In considering the constitutional provisions on the subject of taxation, it must not be forgotten that the Constitution is not so much a grant of specific powers as a limitation on the exercise of general powers. *State v. United States & C. Exp. Co.* 60 N. H. 219.

In the absence of any provision in the state Constitution requiring, either expressly or by necessary implication, uniformity and equality of taxation, a taxing statute which is open to the charge of imposing unequal burdens of taxation, and not taxing uniformly those in the same class, cannot be adjudged void as contrary to natural justice. *State v. Travelers' Ins. Co.* 73 Conn. 255, 57 L. R. A. 481, 47 Atl. 299, Affirmed in 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673.

The 14th Amendment to the Constitution of the United States was not intended to compel

persons who are citizens of the state and reside elsewhere.

Evans v. Davenport, 4 McLean, 574, Fed. Cas. No. 4,558; *White v. Clements*, 39 Ga. 232.

There can be no departure from the plain meaning of a statute on grounds of its unwisdom or public policy.

Handy v. Meridian Twp. 114 Mich. 454, 72 N. W. 251.

There is a strong presumption in favor of a construction that will not do injustice.

Osborn v. Charlevoix Circuit Judge, 114 Mich. 655, 72 N. W. 982.

The property or business of a non-resident must not be taxed at a higher or a different rate than that of a resident.

Halloway v. Police Jury, 16 La. Ann. 203; *Marshalltown v. Blum*, 58 Iowa, 184, 43 Am. Rep. 116, 12 N. W. 266; *Simrall v.*

Covington, 90 Ky. 444, 9 L. R. A. 556, 14 S. W. 369; *Farris v. Henderson*, 1 Okla. 384, 33 Pac. 380; *Nashville v. Althrop*, 5 Coldw. 554; *Duer v. Small*, 4 Blatchf. 263, Fed. Cas. No. 4,116; *Jones v. Columbus*, 25 Ga. 610; *Knowlton v. Rock County*, 9 Wis. 410; *Primm v. Belleville*, 59 Ill. 142; *O'Kane v. Treat*, 25 Ill. 558; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Railroad Tax Cases*, 13 Fed. 722; *Pittsburgh, C. & St. L. R. Co. v. State*, 49 Ohio St. 189, 16 L. R. A. 380, 30 N. E. 435; *State v. North*, 27 Mo. 484.

Mr. Horace M. Oren, Attorney General, for respondent:

By clear, unambiguous and unmistakable language, the state has manifested its intention to tax the stock of foreign corporations owned and held within this state.

Comp. Laws 1897, § 3831.

No difference is made between foreign cor-

porations and domestic corporations in the states to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states whose object is to secure equality of taxation, and which are usually accompanied by qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require, which are necessary for the encouragement of needed and useful industries and the discouragement of intemperance and vice, and which every state in one form or another deems it expedient to adopt. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 83 L. ed. 892, 10 Sup. Ct. Rep. 538.

It was afterwards said of this decision that it put at rest the whole argument of a right, under the Federal Constitution, to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law. *Merchants' & Mfrs. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

The statement of Miller, J., in *Memphis Gas-light Co. v. Shelby County Taxing Dist.* 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205, that the Constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the states; that is left to the state constitutions and state laws,—is quoted and adopted by Gray, J., in *New Orleans City & L. R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406.

IV. Absolute equality unattainable.

The doctrine that perfect equality of taxation is in practice beyond the reach of human endeavor has been subscribed to generally by the Federal and state courts throughout the United States. The Supreme Court of the United States has frequently expressed such a view. Absolute equality in taxation, it declared in one case, can never be attained. That system is the best which comes the nearest to it. The same rules cannot be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems with reference to the valuation of different kinds of property are adopted. The courts permit this. *Tap-*

pan v. Merchants' Nat. Bank, 19 Wall. 490, 22 L. ed. 189.

Perfect equality and perfect uniformity of taxation, as regards individuals or corporations or the different classes of property subject to taxation, it declared in another case, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all citizens, and of those who are not citizens in all the localities of a large state, the application being made by men whose judgment and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfection of human nature, and of the evidence upon which human judgment is founded. *State Railroad Tax Cases*, 92 U. S. 601, *sub nom.* *Taylor v. Secor*, 28 L. ed. 669.

The better part of this statement is quoted with approval by Chancellor Runyon of the New Jersey court of errors and appeals in a similar case decided in that state. *State Board v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578.

"Perfect uniformity and perfect equality of taxation in all the aspects in which the human mind can view it is a baseless dream, as this court has said more than once." *Head Money Cases*, 112 U. S. 580, *sub nom.* *Edye v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247.

This court, said Lamar, J., in still another case, has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed, and the various species of property selected, either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property irrespective of its nature or condition or class will be destructive of the principles of uniformity and equality in taxation and of a just adaptation of property to its burdens. *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 8 Intern. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

And Brewer, J., in dissenting from a recent judgment of the court sustaining the constitutionality of the Illinois succession tax, said: If this were a question in political economy I should not dissent, but it is one of constitutional limitations. Equality in right, in protection, and in burden is the thought which has run through the life of this nation and its con-

porations whose property, capital stock or franchises are taxed in the state of its existence, or in the state in which such property is located, and those which are not so taxed, the conclusion follows, that no distinction exists.

Graham v. St. Joseph Twp. 67 Mich. 652, 35 N. W. 808; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547.

Where an exemption from taxation is claimed, the construction must be in favor of the tax and against the exemption.

Delaware Railroad Tax, 18 Wall. 225, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 894; *Cooley, Taxn.* 2d ed. 205; *Lake Shore & M. S. R. Co. v. Grand Rapids*, 102 Mich. 374, 29 L. R. A. 195, 60 N. W. 767; *Manistee & G. R. R. Co. v. Auditor General*, 115 Mich. 291, 73 N. W. 240;

Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014.

This stock is in the nature of a chose in action. It is intangible personalty, whose situs follows the domicile of the owner, and it is there subject to taxation.

Cooley, Taxn. 2d ed. 22, 23; *Cook, Stock & Stockholders*, § 565; *State Tax on Foreign-held Bonds*, 15 Wall. 300, *sub nom. Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 179; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558.

It is uncontrovertible that this stock has its situs in Michigan for the purposes of taxation. That being the case it necessarily follows that the laws of the state of New York, either by taking or exempting from taxation the property, franchises and capital stock of the corporation in which they are held, can have no effect on the power or

stitutional enactments from the Declaration of Independence to the present hour. Of course, absolute equality is not attainable, and the fact that a law, whether tax law or other, works inequality in its actual operation, does not prove its unconstitutionality. But when a tax directly, necessarily, and intentionally creates an inequality of burden, it then becomes imperative to inquire whether this inequality, thus intentionally created, can find any constitutional justification. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1087, 18 Sup. Ct. Rep. 594.

Exact uniformity, said the Pennsylvania supreme court, is theoretically possible, but it is practically unattainable by any system of classification yet devised in this state. *Com. v. National Oil Co.* 157 Pa. 516, 27 Atl. 374.

And again: We recognize the difficulty complained of,—the want of exact uniformity in the distribution of the burdens of taxation; but substantial uniformity is all that is required by the Constitution, or attainable in practice. *Com. v. Mill Creek Coal Co.* 157 Pa. 524, 27 Atl. 375.

And the supreme court of Minnesota puts it thus: Perfect equality in taxation is perhaps impossible, made so by the failure of property owners to disclose all their taxable property to the assessor, and the inability of the latter to discover it when not voluntarily listed; in consequence of which, taxes are not borne in proportion to the amount of property owned by each taxpayer. But all laws providing for their assessment and collection should have that object in view. This does not require that all persons shall be taxed alike. The nature and character of property and of property rights subject to taxation as respects personality render absolute uniformity impracticable, and necessitate a resort to different methods for bringing intangible property to the tax list. *State v. Canda Cattle Car Co.* 85 Minn. 457, 89 N. W. 66.

Of course, said the Colorado supreme court, ament a taxing statute of that state, instances of injustice will sometimes result under the statute before us; but this is necessarily true of all statutes providing methods for the assessment and taxation of property. Exact uniformity and mathematical accuracy in valuations are absolutely impossible. Nothing that can be devised by human reason will secure such exactness or accuracy. *People ex rel. Iron Silver Min. Co. v. Henderson*, 12 Colo. 369, 21 Pac. 144, 60 L. R. A.

V. Constitutional provisions.

a. The Federal Constitution.

The pertinent parts of the Federal Constitution with which this note is concerned are the first clause of § 2 of article 4, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, and the second sentence of § 1 of the 14th Amendment, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

The 5th Amendment, providing that no person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation,—has been held all along to limit only the power of the United States, but not that of the states. *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Fox v. Ohio*, 5 How. 411, 12 L. ed. 213; *Withers v. Buckley*, 20 How. 84, 15 L. ed. 816; *North Missouri R. Co. v. Maguire*, 49 Mo. 490, 8 Am. Rep. 141. Affirmed in 20 Wall. 46, 22 L. ed. 287; *Ellenbecker v. Plymouth County Dist. Ct.* 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; *State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246.

The reader must never lose sight, in considering the cases discussed in this and kindred notes, of the radical distinction between the United States Constitution and the Constitutions of the respective states. The former, unlike the latter, is a grant of power, not a bundle of restraints upon power inherent. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. (10th Amendment.)

b. The state Constitutions.

The Constitutions of the several states, with two exceptions, all contain one or more special provisions designed to secure uniformity and equality of taxation. In Connecticut and New York the only guaranties a taxpayer has against disproportionate taxation must be sought for in the Constitution of the United States.

Many Constitutions except from the operation of the uniformity and equality rule and the general requirement that all property be taxed *ad valorem* certain classes of property, some

authority of the state of Michigan to tax the same.

Bonaparte v. Baltimore City Appeal Tax Ct. 104 U. S. 592, 26 L. ed. 845; *Cooley*, Taxn. 2d ed. 57; *Cook, Stock & Stockholders*, 505; *Coe v. Errol*, 116 U. S. 524, 29 L. ed. 717, 6 Sup. Ct. Rep. 475; *Sturges v. Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Dwight v. Boston*, 12 Allen, 316; *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460; *McKeen v. Northampton County*, 49 Pa. 519, 88 Am. Dec. 515; *Great Barrington v. Berkshire County*, 16 Pick. 572; *Worth v. Ashe County*, 82 N. C. 420, 33 Am. Rep. 692; *Seaward v. Rising Sun*, 79 Ind. 351.

Whether or not duplicate taxation results from the taxation of this stock does not affect the question.

more, some less. They include, in general, all property devoted to governmental and other public purposes, national, state, and local, all property exclusively used for religious, charitable, educational, literary, and scientific purposes, and hospitals, libraries, and burial grounds. Ala. art. 11, § 6; Ark. art. 16, § 6; Cal. art. 13, § 1; Fla. art. 16, § 18; Ind. art. 10, § 1; Kan. art. 11, § 1; Minn. art. 9, § 3; Nev. art. 10, § 1; N. D. art. 11, § 176; Ohio, art. 12, § 2; Or. art. 9, § 1; Pa. art. 9, § 1; S. C. art. 9, § 1; Tenn. art. 2, § 28; Utah, art. 13, § 3; Wash. art. 7, § 2; Wyo. art. 15, § 11.

Utah provides (art. 13, § 3) for the exemption of ditches, canals, and flumes used for irrigation; and Colorado (art. 10, § 3) for the exemption of irrigation works for a limited period; while Florida provides (art. 16, § 16) for exempting the property of any corporation that constructs a ship or barge canal across the peninsula. Nevada (art. 10, § 1) and South Carolina (art. 9, § 1) except mines and mining claims, and provide that only the proceeds thereof shall be taxed; and Colorado (art. 10, § 3) exempts mines for ten years. California (art. 13, § 1) exempts growing crops, and Tennessee (art. 2, § 28, 30), products of the soil in the hands of the producer and first buyer, and, except to pay inspection fees, articles manufactured from the produce of the state. Delaware (art. 8, § 1) permits the legislature, by general laws, to exempt from taxation such property as, in its opinion, will best promote the general welfare.

A few Constitutions provide for exempting a limited amount of personal property to each taxpayer. Kan. art. 11, § 1; Minn. art. 9, § 3; Tenn. art. 2, § 28.

A few others authorize the deduction of debts from credits. Cal. art. 13, § 1; Utah, art. 13, § 3; Wash. art. 7, § 2.

In several states all laws exempting property other than that specifically mentioned in the Constitution are declared void. Ark. art. 16, § 6; Colo. art. 10, § 6; Ga. art. 7, § 2, ¶ 4; Ky. Bill of Rights, § 3; Mo. art. 10, § 7; Pa. art. 9, § 2; S. D. art. 11, § 7; Tex. art. 8, § 2.

A common provision, sometimes of limited application to corporations and corporate property, is that the power of taxation shall never be surrendered or suspended by legislative act or any grant or contract to which the state shall be a party. Ark. art. 16, § 7; Cal. art. 13, § 6; Colo. art. 10, § 9; Ga. art. 7, § 2, ¶ 5; Idaho, art. 7, § 8; Ky. § 175; La. art. 205; Me. art. 9, § 9; Miss. art. 7, § 182; Mo. art. 10, § 2; Mont. art. 12, § 7; N. D. art. 11, § 178; Pa. art. 9, § 3; S. D. art. 11, § 3; Tex. art. 8, § 4; Wash. art. 7, § 4; Wyo. art. 15, § 14.

Cooley, Taxn. 2d ed. 223, 224; *Cook, Stock & Stockholders*, 3d ed. § 567; *Taggart v. Sanilac County*, 71 Mich. 28, 38 N. W. 639.

It is doubtful whether this is a case of double taxation, as the property taxed is not twice charged with the same burden.

Sturges v. Carter, 114 U. S. 521, 29 L. ed. 243, 5 Sup. Ct. Rep. 1014; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198; *VanAllen v. The Assessors*, 3 Wall. 573, sub nom. *Churchill v. Utica*, 18 L. ed. 229; *Delaware Railroad Tax*, 18 Wall. 206, sub nom. *Minot v. Philadelphia, W. & B. E. Co.* 21 L. ed. 888; *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818.

It is the duty of the legislature to select

Mississippi excepts manufactures and other new enterprises of public utility for a limited time under certain conditions; and the North Dakota provision is qualified by another section (art. 11, § 176) authorizing the commutation of all but real-estate taxes on railroads for a percentage of gross earnings.

Another common provision is a prohibition against the grant to any person or persons of privileges, immunities, or emoluments not equally open to all. Ark. art. 2, § 18; Cal. art. 1, § 21; Conn. art. 1, § 1; Ind. art. 1, § 23; Ky. Bill of Rights, § 3; Mass. Bill of Rights, chap. 1, pt. 1, art. 6; N. C. art. 1, § 7; Or. art. 1, § 20; S. D. art. 6, § 18; Tex. art. 1, § 3; Va. art. 1, § 6; Wash. art. 1, § 12.

Some states forbid their legislatures to release or discharge any county, city, township, or district, or the inhabitants thereof, or the property therein, from their or its proportionate share of state taxes. Ill. art. 9, § 6; Neb. art. 9, § 4.

Others command laws to be passed taxing all moneys, credits, investments in bonds, joint-stock companies, or otherwise. Minn. art. 9, § 3; N. C. art. 5, § 3; Ohio, art. 12, § 2; S. D. art. 9, § 4 (the latter state by uniform rule).

Utah (art. 13, § 2) and Montana (art. 12, § 17) declare that stocks in any company or corporation are not taxable when the property represented by them has been taxed.

Certain states define property, for the purposes of taxation, as inclusive of moneys, credits, bonds, stocks, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership. Cal. art. 13, § 1; Mont. art. 12, § 17; Utah, art. 13, § 2.

Some require that the notes and bills discounted or purchased, moneys loaned, and all other property, effects, and dues of every description of all banks and bankers, be taxed so that property employed in banking shall always be subject to a taxation equal to that imposed on the property of individuals (Minn. art. 9, § 4; Ohio, art. 12, § 3; S. D. art. 11, § 4); and one (Miss. art. 7, § 181) empowers its legislature to provide for the taxation of banks and banking capital, by taxing the shares according to the value thereof augmented by accumulations, surplus, and unpaid dividends, and diminished by real estate separately taxed as such.

Tennessee (art. 2, § 28) requires that all property, real, personal, or mixed, shall be taxed; Florida (art. 16, § 16), that the property of all corporations shall be taxed; South Carolina (art. 12, § 2), that corporate property shall be subject to taxation; Utah (art. 13, § 10) that all corporations or persons in the state, or doing business therein, shall be subject to taxation for state, county,

the subjects of taxation, and this necessarily includes the right to classify such subjects of taxation and apply to each class such rules, regulations and exemptions as that body deems necessary.

Foreign corporations and shares in the same are properly placed in one class and subject to one set of rules and exemptions, and domestic corporations naturally and properly fall within another class.

The shares in foreign corporations are taxed once, the shares in domestic corporations, or their representatives, are once taxed.

The statutes of the foreign states can have no effect in this state, either to prevent taxation or to make uniform and equal rules of taxation ununiform and unequal.

Cooley, Taxn. 2d ed. 100; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654.

school, municipal, or other purposes on the real and personal property owned or used by them within the territorial limits of the authority levying the tax; and Colorado (art. 10, § 10) has the same requirement, omitting the words "or persons."

Iowa declares that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals (art. 8, § 2); Ohio, that it shall be so subject forever (art. 13, § 4); Mississippi that the property of all such private corporations shall be taxed in the same way and to the same extent as that of individuals (art. 7, § 181); Alabama, that the property of private corporations, associations, and individuals shall forever be taxed at the same rate (art. 11, § 6); Kentucky, that all property, whether owned by natural persons or corporations, shall be taxed unless constitutionally exempt, and that corporate property shall pay the same rate of taxation paid by individual property (§ 174); Texas, that all property of natural persons or corporations, other than municipal, shall be taxed (art. 8, § 1); and South Dakota (art. 11, § 2) and Washington (art. 7, § 3) both command their legislatures to provide by general law for the assessment and levying of taxes on all corporate property as near as may be by the same methods as are provided for assessing and levying taxes on individual property. On the other hand, North Dakota (art. 11, § 179) prescribes the assessment of individual property by local assessors, and the assessment and apportionment on a mileage basis by a state board of equalization of the franchise, roadway, roadbed, rails, and rolling stock of railroads, unless commuted by a gross earnings tax.

Kentucky leaves its legislature free to provide by law how railroads and railroad property shall be assessed, and how taxes thereon shall be collected (§ 182); Missouri declares that all railroad corporations in the state, or doing business therein, shall be subject to taxation for state and local purposes, not only on the real and personal estate they own or use, but also on their earnings, franchises, and capital stock (art. 10, § 5); Montana provides for assessing the franchise, roadway, roadbed, rails, and rolling stock of railroads operated in more than one county by a state board of equalization, and an apportionment upon the mileage basis (art. 12, § 16); and Texas commands railroad property of every description within any city or incorporated town to bear its proportionate share of municipal taxation (art. 8, § 5). North Dakota permits the commutation of railroad taxes, leaving aside those on real estate, for a tax on 60 L. R. A.

The rule of classification making a distinction between domestic and foreign corporations and the shares in domestic and foreign corporations is a proper one.

Insurance Co. v. New Orleans, 1 Woods, 89, Fed. Cas. No. 7,052; *State v. Lathrop*, 10 La. Ann. 402; *Hughes v. Cairo*, 92 Ill. 339; *State v. Fosdick*, 21 La. Ann. 434; *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Lee v. Sturges*, 46 Ohio St. 153, 2 L. R. A. 556, 19 N. E. 560; *Sturges v. Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; *Graham v. St. Joseph Twp.* 67 Mich. 652, 35 N. W. 808.

Constitution, art. 14, § 11, does not require all property to be taxed, but simply that "taxes shall be levied on such property as shall be prescribed by law" according to "an uniform rule of taxation." This

gross earnings (art. 11, § 176), while Illinois (art. 9, § 6) and Nebraska (art. 9, § 4) forbid the commutation of state taxes in any form whatever.

Louisiana forbids property to be assessed in excess of its cash value (art. 203), and opens its courts to taxpayers to test the correctness of their assessments (*Ibid.*). And Virginia provides that the capital invested in all business operations shall be assessed and taxed as other property, and that assessments upon all stock shall be according to the market value thereof (art. 10, § 4).

Several states expressly authorize the imposition of special taxes, to which the rule of uniformity and equality governing property taxes in general does not apply. These embrace taxes upon incomes and occupations, license, privilege, and franchise taxes, and other excises. Ark. art. 21, § 6; Cal. art. 13, § 11; Ill. art. 9, § 1; Ky. § 174; La. art. 206; Mass. chap. 1, art. 4, § 1; Mich. art. 14, § 10; Mo. art. 10, § 21; Mont. art. 12, § 1; Neb. art. 9, § 1; N. C. art. 5, § 8; Tenn. art. 2, § 28; Tex. art. 8, § 1; Utah, art. 13, § 12; Va. art. 10, § 4; W. Va. art. 10, § 1.

Louisiana authorizes license discrimination between foreign and domestic corporations, but requires companies in the same kind of business to be treated uniformly (art. 217); Georgia, a specific tax on domestic animals by nature or habit destructive of property (art. 7, § 2); Minnesota, assessments for local improvements and water supply according to the front-foot rule and supposed benefits (art. 9, § 1); Mississippi, the imposition of privilege taxes on building and loan associations in lieu of other taxes, except on real estate (art. 7, § 181), and also provides that domestic insurance companies shall not be required to pay a greater tax in the aggregate than is required of foreign insurance companies doing business in the state, except to the extent that their ad valorem taxes exceed the privilege taxes imposed upon such foreign corporations (*Ibid.*); and Illinois declares that specification of objects and subjects of taxation shall not deprive the general assembly of the power to tax other subjects or objects in such manner as may be consistent with the principles of taxation fixed in the Constitution (art. 9, § 2).

Subject to the foregoing rather numerous qualifications, the aim to subject all taxpayers to equal burdens is manifest in nearly all the state Constitutions.

Maryland declares in her Bill of Rights (art. 15) that every person in the state, or holding property therein, ought to contribute his propor-

section leaves it within the plenary power of the legislature to select the subject of taxation, and merely requires that the tax on the subjects selected shall be uniform.

People ex rel. St. Mary's Falls Ship Canal Co. v. Auditor General, 7 Mich. 90; *Chipewewa County v. Auditor General*, 65 Mich. 408, 32 N. W. 651; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82; *Walcott v. People*, 17 Mich. 68; *State, Stratton, Prosecutor, v. Collins*, 43 N. J. L. 562.

Property owned by citizens domiciled outside the state would be properly taxable only in the states of domicile of the owners, and the construction contended for by relator would, to that extent, give the act an extraterritorial effect, and the law would to that extent be of questionable validity. The

tion of public taxes for the support of the government according to his actual worth in real or personal property; Massachusetts in hers (pt. 1, subd. 10), that each individual of society is obliged to contribute his share to the expense of his protection; New Hampshire in hers (pt. 1, art. 12), that every member of the community is bound to contribute his share of such expense; Rhode Island in hers (art. 1, § 2), that the burdens of the state ought to be fairly distributed among its citizens; South Carolina, in hers (art. 1, § 36), that each individual of society should contribute his share to the expense of his protection; and Vermont (art. 9), that every member of society is bound to contribute his proportion towards such expense.

Nearly always taxes are commanded to be assessed ad valorem, and property to be taxed according to its value. Ala. art. 11, § 1; Ark. art. 16, § 6; Cal. art. 13, § 1; Ky. §§ 172, 174; La. art. 203; Me. art. 9, § 8; Mich. art. 14, § 12; Minn. art. 9, § 8; Mo. art. 10, § 4; N. J. art. 4, § 7, subd. 12; N. C. art. 5, § 3; N. D. art. 11, § 176; Ohio, art. 12, § 2; S. C. art. 1, § 36; S. D. art. 11, § 2; Tenn. art. 2, § 28; Tex. art. 8, § 1; Utah, art. 13, § 2; Va. art. 10, § 1; Wash. art. 7, § 1; W. Va. art. 10, § 1.

Illinois and Nebraska both (art. 9, § 1, of each) order their legislative bodies to provide needful revenue by levying a tax by valuation. Minnesota requires all property on which taxes are laid to have a cash valuation (art. 9, § 1), and Kentucky says its value shall be estimated at the price it would bring at a fair voluntary sale (§ 172); but most of the states simply direct that value to be ascertained as provided by law. Cal. art. 13, § 1; La. art. 203; Tex. art. 8, § 1; Utah, art. 13, § 2; Va. art. 10, § 1; W. Va. art. 10, § 1; or in such manner as the legislature shall direct (Neb. art. 9, § 1; Tenn. art. 2, § 28), making the same equal and uniform throughout the state (Ark. art. 16, § 6); or, by some person or persons to be elected or appointed in such manner as the legislature shall direct, and not otherwise (Ill. art. 9, § 1); or else by such rules of appraisement and assessment as may be prescribed by general law (S. D. art. 11, § 2).

In general the legislature is directed to prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal. Colo. art. 10, § 3; Fla. art. 9, § 1; Idaho, art. 7, § 5; Ind. art. 10, § 1; Mont. art. 12, § 1; Nev. art. 10, § 1; Or. art. 9, § 1; S. C. art. 9, § 1; Utah, art. 13, § 8; Wash. art. 7, § 2; Wyo. art. 15, § 11.

In order that the assessments of public charges on polls and estates may be made with equality, 60 L. R. A.

presumption is against extraterritorial effect in statutes.

Pittsburgh, C. O. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114.

The legislature has used the word "citizen" with a meaning, embracing all persons within this state possessing property of the character mentioned, subject to taxation. The word is properly used in this sense, and numerous cases have held that the word "citizens" is synonymous with the word "inhabitants" or "residents."

Risewick v. Davis, 19 Md. 82; *State ex rel. Owens v. Trustees of Section 29*, 11 Ohio, 24; *McKenzie v. Murphy*, 24 Ark. 155; *Cooper v. Galbraith*, 3 Wash. C. C. 546, Fed. Cas. No. 3,193; *State, Pitter, Prosecutor, v. Ross*, 23 N. J. L. 520; *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 35 Am.

It is directed by the organic law in Massachusetts (chap. 1, § 1, art. 4) and New Hampshire (part 2, art. 4) that there be a new valuation of estates every few years. And Louisiana provided that, in order to arrive at equality and uniformity, the general assembly should, at its first session after the Constitution was adopted, provide a system of equality and uniformity in assessments based upon the relative value of property in different portions of the state, and declared that the valuation put upon property for the purposes of state taxation should be taken as the proper valuation for the purposes of local taxation in every subdivision of the state (art. 203).

Several states provide that all taxes or taxation shall be equal and uniform (Or. art. 1, § 32; S. D. art. 6, § 17; Tenn. art. 2, § 28; Tex. art. 8, § 1; Va. art. 10, § 1; W. Va. art. 10, § 1; Wyo. art. 1, § 28); others that laws shall be passed taxing by a uniform rule all property (N. C. art. 5, § 8; N. D. art. 11, § 176; Ohio, art. 13, § 2); that all taxes upon real and personal estate shall be apportioned and assessed equally (Me. art. 9, § 8); that all taxes to be raised in the state shall be as nearly equal as may be (Minn. art. 9, § 1); and be equalized and uniform throughout the state (*Ibid.*); that property shall be assessed for taxes by uniform rules (N. J. art. 4, § 7 subd. 12); and that all property shall be uniformly assessed for taxation (Wyo. art. 15, § 11).

In some cases the legislature is directed to provide for a uniform and equal rate of taxation (Fla. art. 9, § 1); or, of assessment and taxation (Ind. art. 10, § 1; Kan. art. 11, § 1; Mont. art. 12, § 1; Nev. art. 10, § 1; Or. art. 9, § 1; S. C. art. 9, § 1; Utah, art. 13, § 3; Wash. art. 7, § 2).

Some states provide that every person and corporation shall pay a tax in proportion to the value of his, her, or its property (Ill. art. 9, § 1; S. D. art. 11, § 2; Utah, art. 13, § 8; Wash. art. 7, § 2), and one adds "and franchisees" (Neb. art. 9, § 1).

Three declare that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. Tenn. art. 11, § 28; Va. art. 10, § 1, and W. Va. art. 10, § 1.

Wisconsin declares that the rule of taxation shall be uniform, but adds that taxes shall be levied upon such property as the legislature shall prescribe (art. 8, § 1), and Michigan says the legislature shall provide a uniform rule of taxation, except on property paying specific taxes; and that taxes shall be levied on such property as shall be pre-

Rep. 536; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 500, 38 L. ed. 249, 14 Sup. Ct. Rep. 401; *Shaw v. Quincy Min. Co.* 145 U. S. 447, sub nom. *Ex parte Shaw*, 36 L. ed. 770, 12 Sup. Ct. Rep. 935; *Field v. Adreon*, 7 Md. 209.

Tax laws are not subject to a strict construction but are regarded as being remedial in their nature in imposing upon each person his portion of the burdens of government.

State, Paulison, Prosecutor, v. Taylor, 35 N. J. L. 184; *Auditor General v. Hutchinson*, 113 Mich. 245, 71 N. W. 514; *Muirhead v. Sands*, 111 Mich. 487, 69 N. W. 826; *Clark v. Moswyer*, 5 Mich. 461; *United States v. Hodson*, 10 Wall. 395, 19 L. ed. 937; *Cliquot's Champagne v. United States*, 18 L. ed. 116; *Taylor v. United*

States, 3 How. 197, 11 L. ed. 559; *United States v. 36 Barrels of High Wines*, 7 Blatchf. 459, Fed. Cas. No. 16,468.

Long, J., delivered the opinion of the court:

Relator is a citizen of this state, a resident of the city of St. Clair, and the owner of a number of shares of stock of the New York Central & Hudson River Railroad Company, of the state of New York. He is assessed upon the tax roll of said city \$50,000 for personal property. This assessed valuation includes the shares of stock held by him in said railroad company. The real estate of said company, and its capital stock in excess of the real estate, are taxed in the state of New York. The stock owned in the state of New York is not taxed. The relator appeared before the board of state tax

scribed by law (art. 14, § 11). Massachusetts (chap. 1, § 1, art. 4) and New Hampshire (pt. 2, art. 5) clothe their respective general courts with power and authority to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and residents and estates within, their jurisdictions.

A number of states require that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Colo. art. 10, § 3; Del. art. 8, § 1; Ga. art. 7, § 2, ¶ 1; Idaho, art. 7, § 6; Mo. art. 10, § 3; Mont. art. 12, § 11; Pa. art. 9, § 1.

A few, direct taxation or taxes upon property to be uniform or equal within the same territory. Ga. art. 7, § 2, ¶ 1; Ky. § 171; La. art. 203.

Several states require taxes to be levied and collected under general laws. Colo. art. 10, § 3; Del. art. 8, § 1; Ga. art. 7, § 2, ¶ 1; Idaho, art. 7, § 6; Ky. § 171; Mo. art. 10, § 3; Mont. art. 12, § 11; Pa. art. 9, § 1. And one, property to be assessed for taxes under general laws. N. J. art. 4, § 7, subd. 12.

VI. Inclusiveness of equal rights, privileges, immunities, and protection of the laws.

The first attempt at a comprehensive definition of that part of art. 4, § 2, of the Constitution of the United States which declares that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, was made by Mr. Justice Washington in *Coryell v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230. In enumerating some of the particular privileges and immunities of citizens which are clearly embraced by the general description of privileges deemed to be fundamental, he includes an exemption from higher taxes and impositions than are paid by the other citizens of the state.

Attempt will not be made, said the Supreme Court of the United States afterwards, to define the words "privileges and immunities," or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of the citizen of one state to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449.

Grant, it was added, that states may impose discriminating taxes against citizens of other states, and it will soon be found that the power 60 L. R. A.

conferred upon Congress to regulate interstate commerce is of no value, as the unrestricted power of the states to tax will prove to be more efficacious to promote inequality than any regulation which Congress can pass to preserve the equality of right contemplated by the Constitution among citizens of the several states. *Ibid.*

Inequality of burden, it was further said, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system. *Ibid.*

And, again: The people of the several states live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress and the treaties made by the proper authority, is the supreme law of the land, and that supreme law requires equality of burden, and forbids discrimination in state taxation when the power is applied to citizens of other states. *Ibid.*

For a state to impose different and greater burdens or impositions on the property of citizens of other states than on the same property belonging to its own subjects would directly conflict with the constitutional provision that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. By exempting its own citizens from a tax or excise to which citizens of other states were subject, the former would enjoy an immunity of which the latter would be deprived. *Oliver v. Washington Mills*, 11 Allen, 268.

By the Constitution of the United States, the citizens of each state are entitled to all the privileges and immunities of citizens of the several states, and that means that the citizens of all the states shall have the peculiar advantage of acquiring real as well as personal property, and that that property shall be protected and secured by the laws of the state in the same manner as the property of the citizens of the state is protected. It means, such property shall not be liable to any taxes or burdens to which the property of citizens is not subject. *Campbell v. Morris*, 3 Harr. & M'H. 535.

A statute, which, in effect, exempts from taxation all the personal estate of a resident of the state except the excess in value of such estate over debts owing beyond the owner's non-taxable bonds, stocks, and deposits; and taxes a nonresident's property circumstanced the same; and which, in so far as it does this, gives an immunity from taxation to a resident that it denies to a nonresident,—discriminates in favor of the resident against the nonresident

commissioners at a meeting held in said city August 20, 1900, and made application to have said assessment reduced by reason of the fact that, as the property and franchises of said corporation are taxed in the state of New York, the stock is not taxable in this state. The board refused to reduce said assessment, and the matter is presented to this court upon petition for mandamus to compel such reduction.

The questions raised by the parties involve the construction of certain subdivisions of section 3831, Comp. Laws 1897. Those provisions are as follows: "For the purposes of taxation, personal property shall include: . . . (5) All goods, chattels and effects belonging to inhabitants of this state situate without this state, except that property actually and permanently invested in business in another state shall not be in-

taxpayer, and thus denies to citizens of other states an immunity granted to its own citizens. Such discrimination and denial are clearly forbidden by the Constitution of the United States providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. *Sprague v. Fletcher*, 69 Vt. 60, 37 L. R. A. 840, 37 Atl. 239.

It was in the *Slaughter-House Cases*, 16 Wall. 76, 21 L. ed. 394, that the Supreme Court of the United States was first called upon to construe the prohibition in the 14th Amendment against denying the equal protection of the laws; but those cases involved, not a question of taxation, but an exercise by the state of Louisiana of the police power.

By that amendment unequal exactions in every form, or under any pretense, are absolutely forbidden, and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid. It is not possible to conceive of equal protection under any system of laws where arbitrary and unequal taxation is permissible. *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722.

The prohibitions of that amendment protect the citizen against a denial of the equal protection of the laws and a deprivation of property without due process of law, under the power of taxation. The state may not single out a class of citizens, and subject that class to oppressive discrimination in exercising the taxing power, without infringing upon the constitutional guaranties. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168.

VII. Status of corporations.

a. Citizenship.

It was settled by the decision of the Supreme Court of the United States in *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, that corporations are not citizens within the meaning of the provision in the Federal Constitution declaring the citizens of each state entitled to all the privileges and immunities of citizens in the several states; that that provision applies only to natural persons, members of the body politic, owing allegiance to the state, and not at all to artificial beings created by the legislature, and possessing only the attributes with which they have been endowed by the legislature.

The soundness of this decision has been approved, and its doctrine adopted, by both state and Federal courts generally. *Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529, Affirmed in 10 Wall. 410, 19 L. ed. 972; *Liverpool & L. Life* 60 L. R. A.

cluded. . . . (7) All shares in corporations organized under the laws of this state when the property of such corporations is not exempt or is not taxable to itself, or when the personal property is not taxed. . . . (9) All shares in foreign corporations, except national banks, owned by citizens of this state."

It is contended by counsel for relator:

1. That the statute, in providing for taxation on foreign stocks, is unconstitutional, in that it is not uniform and equal. The argument is that because, under this statute, an individual holding stock issued by a domestic corporation which pays taxes on its capital stock is not taxed on such individual stock so held by him, the same rule must be applied to persons owning stock in a foreign corporation whose capital stock is taxed. One owning shares in a corporation

& F. Ins. Co. v. Massachusetts, 10 Wall. 566, *sub nom.* *Liverpool & L. Life & F. Ins. Co. v. Oliver*, 19 L. ed. 1029; *Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246; *Warren Mfg. Co. v. Etna Ins. Co.* 2 Paine, 504, Fed. Cas. No. 17,206; *Tatem v. Wright*, 23 N. J. L. 429; *State ex rel. Baltimore & O. Teleg. Co. v. Delaware & A. Teleg. & Teleph. Co.* 7 Houst. (Del.) 269, 31 Atl. 714; *Slaughter v. Com.* 13 Gratt. 767; *State v. Lathrop*, 10 La. Ann. 398; *Phoenix Ins. Co. v. Com.* 5 Bush, 68, 96 Am. Dec. 331; *Com. v. Milton*, 12 B. Mon. 212, 54 Am. Dec. 522; *Woodward v. Com.* 9 Ky. L. Rep. 670, 7 S. W. 613; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 521; *Scottish Union & Nat. Ins. Co. v. Harriott*, 109 Iowa, 606, 80 N. W. 665; *Utey v. Clark-Gardner Lode Min. Co.* 4 Colo. 371.

Neither is a corporation a citizen of the United States within the meaning of that clause of the 14th Amendment to the Constitution of the United States forbidding the states to make or enforce any law abridging the privileges or immunities of citizens of the United States. *Insurance Co. v. New Orleans*, 1 Woods, 85, Fed. Cas. No. 7,052. (This decision, though open to destructive criticism upon other grounds, is doubtless sound to the extent of the proposition just stated.)

b. Personality.

1. Within the 14th Amendment.

While corporations are not citizens, they are persons to whom the states are not at liberty to deny the equal protection of the laws. This is now well settled, but, as the proposition has not commanded the same unreserved acceptance, and sometimes has been denied, it will be well to refer to the cases by more than their titles.

Corporations are persons, to whom a state cannot deny the equal protection of its laws without coming in conflict with the 14th Amendment of the United States Constitution. *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1332.

Under the designation of "person" in that clause of the 14th Amendment inhibiting states from depriving any person within their jurisdiction of the equal protection of the laws, there is no doubt that a private corporation is included. *Pembina Consol. Silver Min. & Mill Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

Corporations are persons within the meaning

is substantially the owner of an aliquot part of the property of the corporation, although the legal title to such property is vested in the corporation, and not in him. The value of his shares can never vary greatly from the value of the property they represent. This is as true of shares of stock in foreign corporations as in those of domestic corporations. The law taxes both, with the exception of cases where the property of the corporation is taxed in this state. Stated thus (and this is the effect of subdivisions 7 and 9, taken together), there is no want of uniformity of method or rule; and there is no impropriety in thus stating it, for the constitution cannot be supposed to have been framed with a view to what other states might do. It has no jurisdiction over corporations of other states; and when its citizens embark in foreign corporate enter-

prises, and pay money to them, taking certificates of stock therefrom, this state cannot tax the property of such corporation in its possession outside of this state. Yet, substantially, its citizens have as much property as before; and, if not taxed in another state, there is no reason why it should not be taxed here, like the stock of domestic corporations. The state has said, in effect, to its citizens, "If you invest your property in corporations, you shall be taxed upon the shares, except where the property of the corporation is taxed to the corporation by this state." We may doubt the abstract justice of this; but we believe the state has the power to tax the shares of residents in foreign corporations, and that this power is not affected by the action of another state in imposing taxes upon the corporations. Michigan owes much to the investment of

of the 14th Amendment. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

It is contended by counsel, as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the 1st section of the 14th Amendment of the Constitution of the United States, forbidding the denial by a state to any person within its jurisdiction the equal protection of the laws. *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207.

It is conceded that corporations are persons within the meaning of the 14th Amendment to the United States Constitution forbidding states from depriving any person within their jurisdiction of the equal protection of the laws. *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593.

Private corporations are persons within the meaning of the 14th Amendment, and as such may not be denied the equal protection of the laws. *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1061, 12 Sup. Ct. Rep. 255; *Covington & L. Twp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *United States v. Northwestern Exp. Stage Transp. Co.* 164 U. S. 686, 41 L. ed. 599, 17 Sup. Ct. Rep. 206.

It is well settled that corporations are persons within the provisions of the 14th Amendment of the Constitution of the United States. *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, Reversing 87 Tex. 19, 26 S. W. 985.

The rights and securities guaranteed to persons by the 14th Amendment to the Constitution of the United States cannot be disregarded in respect of the artificial entities called corporations, any more than they can be in respect of the individuals who are the equitable owners of the property belonging to such corporations. A state has no more power to deny to corporations the equal protection of the laws than it has to deny it to individual citizens. *Ibid.*

It is well settled that a corporation is a person within the meaning of the 14th Amendment to the United States Constitution; that it is entitled to the equal protection of the laws; and that no state can to any extent deny it. *Schofield v. Louisville & N. R. Co.* 92 Ky. 233, *sub nom. Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L. B. A. 579, 17 S. W. 567.

That corporations are persons within the meaning of the 1st section of the 14th Constitutional Amendment, and that they may invoke the benefit of those provisions of the Constitution which guarantee to persons the enjoyment 60 L. R. A.

of property, or afford them the means for its protection, or prohibit legislation injuriously affecting it, has been emphatically affirmed in comparatively recent cases. *Hammond Beef & Provision Co. v. Best*, 91 Me. 431, 42 L. R. A. 528, 40 Atl. 338.

Corporations, as well as individuals, are entitled to the equal protection of the laws under the 14th Amendment. *Luman v. Hutchens Bros. Co.* 90 Md. 14, 46 L. R. A. 393, 44 Atl. 1051.

A corporation is a person within the meaning of the 14th Amendment to the United States Constitution. *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115.

It follows from the foregoing that the decision in *Insurance Co. v. New Orleans*, 1 Woods, 85, Fed. Cas. No. 7,052, that only natural persons are embraced in the clause of the 14th Amendment to the Federal Constitution forbidding any state to deny to any person within its jurisdiction the equal protection of the laws, and that corporations are not included; and the like decision in *State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L. R. A. 856, 25 Atl. 246,—are both against the whole current of authority, and must be condemned as unsound.

It was held in *Central P. R. Co. v. State Bd. of Equalization*, 60 Cal. 35, that a corporation was, not a person within the meaning of the 14th Amendment forbidding states to deny to any person within their jurisdiction the equal protection of the laws; but that case is thoroughly discredited.

It was expressly disapproved on this point in *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722, and was reversed in *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073, although, in reversing, the Supreme Court of the United States refused to express itself concerning the repugnancy of the statute involved to the 14th Amendment as a denial of the equal protection of the laws. It was subsequently overruled in *San Benito County v. Southern P. R. Co.* 77 Cal. 520, 19 Pac. 827.

2. Within statutes.

It was and is a logical necessity to hold corporations to be persons within the 14th Amendment, so as to be entitled to the equal protection of the laws in respect of the burdens of taxation, because the courts generally hold them to be persons within the taxing statutes. For the illumination cast upon this point, the reader will pardon a brief digression to the cases of this character.

foreign money in her corporations which she taxes, and it is probably to her interest that moneys so invested be not taxed again elsewhere; but she is powerless to prevent it, though it goes without saying that the property, in effect, is taxed twice. There are the questions of policy and abstract justice involved, both protesting against double taxation; but the legislatures of the states are judges of both policy and propriety, so long as the constitutions have not forbidden it, and the weight of authority supports the claim that, in the absence of clear and express prohibition, they have not. In the case of *Youngblood v. Seaton*, 32 Mich. 406, 20 Am. Rep. 654, a tax was objected to as violating the constitutional rule of equality and uniformity. It was said: "If the precise point here is that the tax is unequal and unjust because it is not levied

in proportion to the business done, then the objection is without force. It may possibly be true that an apportionment according to the business done would have been more just, but a question of this nature concerns the legislature, and not us. Courts cannot annul tax laws because of their operating unequally and unjustly. If they could, they might defeat all taxation whatsoever, for there never yet was a tax law that was not more or less unequal and unjust in its practical workings. . . . Apportionment of taxation is purely a legislative function." In *Insurance Co. v. New Orleans*, 1 Woods, 89, Fed. Cas. No. 7,052, it was said: "This is a suit for \$1,000 tax on a foreign insurance company not chartered in this state, but transacting business therein. . . . It is resisted on the ground that the same statute imposes a tax of but five hundred

A domestic corporation is within a general statute declaring all property in the state, and all personal property belonging to the inhabitants thereof, liable to taxation, unless otherwise specially provided, and thereunder is liable for a personal property tax assessed in the city where it has its principal office. *Tripp v. Merchants' Mut. F. Ins. Co.* 12 B. I. 435.

A foreign insurance company having within a city an established agency for the transaction of its business is an inhabitant of such city, so as to be subject to taxation upon its business therein carried on under an ordinance imposing a license tax passed in pursuance of a power in the municipal charter to make such assessments on the inhabitants, or those who hold taxable property in the city, as may seem expedient. *Home Ins. Co. v. Augusta*, 50 Ga. 530.

But a foreign corporation with an office in the state is not within a statute thereof providing that all personal property within or without the commonwealth shall be assessed to the owner thereof in the city or town where he is an inhabitant on a stated date. A corporation is an inhabitant only at its domicile in its own state. *Boston Invest. Co. v. Boston*, 158 Mass. 461, 83 N. E. 580.

"It was decided by this court, in the case of *The Clinton Woolen and Cotton Manufacturing Co. v. Morse & Bennet* (October Term, 1817), that, under the act for the assessment and collection of taxes, corporations are liable to be taxed for property owned by them; yet, the act speaks only of persons liable to be assessed, and the term 'corporation' is not used at all." *People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243.

A banking corporation is within a statute empowering the village in which it is located to assess taxes for municipal public purposes upon the inhabitants and freeholders thereof. *Ontario Bank v. Bunnell*, 10 Wend. 186.

A foreign corporation is within a statute providing that all persons doing business within the state, who are not residents, shall be assessed and taxed upon all sums invested in said business the same as if residents. *Smyth v. International Life Assur. Co.* 35 How. Pr. 126.

A statute enacting that all persons and associations doing business in the state as merchants, bankers, or otherwise, and not residents thereof, shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents; and that said taxes shall be collected from the property of the firms, persons, or associations to which they severally belong,—embraces foreign corporations, which are accordingly liable to local taxation. 60 L. R. A.

People ex rel. Thurber-Whyland Co. v. Barker, 141 N. Y. 118, 23 L. R. A. 95, 35 N. E. 1073.

The New York tax law, in requiring assessors to set down all taxable personal property of each person after deducting his debts, and to make oath that the assessment roll contains a true statement of such personal property of each person named in it above his debts, embraces a corporation; and, therefore, corporate debts should be deducted from the personal property assessed to it for local purposes. *People ex rel. Cornell S. B. Co. v. Dederick*, 161 N. Y. 195, 55 N. E. 927.

A statute enacting that, if any person whose duty it is to list property, or make a return thereof for taxation either to the assessor or county auditor, shall in any year or years make a false return or statement, or shall evade making a return or statement, etc., etc., embraces an insurance corporation. *Ohio Farmers' Ins. Co. v. Hard*, 59 Ohio St. 248, 52 N. E. 635.

A railroad corporation is within a statute enacting that, if any person shall neglect or refuse to pay any tax assessed to him, the township or city treasurer, as the case may be, shall collect the same by seizing the personal property of such person to an amount sufficient to pay such tax, fees, and charges for subsequent sale. *Chicago & N. W. R. Co. v. Ellison*, 118 Mich. 30, 71 N. W. 324.

A statute enacting that, if any person fail or refuse to give a list of his taxable property when legally called upon for that purpose by the assessor, or give a false or fraudulent list, or refuse to give the amount he is worth, he shall be fined and otherwise penalized; that when it shall be known to the sheriff that any person has failed, etc., etc., he shall report such person to be dealt with, fined, and taxed as delinquent, etc.; and that any person who has failed to give in his list of taxable property because he was not called upon to do so by the assessor may, after the assessor has returned his tax book, list the same, etc.,—applies to railroad corporations. *Louisville & N. R. Co. v. Com.* 85 Ky. 198, 3 S. W. 139; *Lincoln County Ct. v. Louisville & N. R. Co.* 3 Ky. L. Rep. 436.

Indeed, Kentucky holds, not only that corporations are persons within the meaning of its tax laws, but that they are "white folks." *Pineville Public Graded Schools v. Bell County Coke & Improv. Co.* 96 Ky. 68, 27 S. W. 862; *Elisabethtown Dist. Public School v. Louisville & N. R. Co.* 17 Ky. L. Rep. 160, 30 S. W. 620; *Com. v. Louisville & N. R. Co.* 17 Ky. L. Rep. 991, 33 S. W. 204.

In some of the states, whose decisions have

dollars upon an insurance company incorporated by the laws of the state and transacting business therein. The defendant contends that the distinction made between these two classes of cases is in violation of article 14 of the state constitution, which declares that 'taxation shall be equal and uniform throughout the state.' The provision of the constitution relied on by the defendant has not deprived the legislature of the power of dividing the objects of legislation into classes. It merely obliges the legislature to impose an equal burden upon all those who find themselves in the same class." This doctrine is supported by *State v. Lathrop*, 10 La. Ann. 398; *Hughes v. Cairo*, 92 Ill. 339; *Lee v. Sturges*, 46 Ohio St. 153, 2 L. R. A. 556, 19 N. E. 560; *Sturges v. Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; *Graham v. St. Joseph Twp.* 67 Mich.

just been cited, general statutes provide that the term "persons" in their enactments shall or may apply to corporations.

VIII. *Booles upon franchises, privileges, and occupations.*

It is generally conceded that corporate franchises are, for the purposes of taxation, property. *Gordon v. Appeal Tax Court*, 8 How. 133, 11 L. ed. 529; *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568; *New Orleans City & L. R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *Stein v. Mobile*, 17 Ala. 234; *San José Gas Co. v. January*, 57 Cal. 614; *Spring Valley Waterworks v. Schottler*, 62 Cal. 69; *Porter v. Rockford*, R. I. & St. L. R. Co. 76 Ill. 561; *Huck v. Chicago & A. R. Co.* 86 Ill. 352; *Belleville Nail Co. v. People*, 98 Ill. 399; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660; *New Orleans v. New Orleans City & L. R. Co.* 40 La. Ann. 587, 4 So. 512; *New Orleans v. Orleans R. Co.* 42 La. Ann. 4, 7 So. 59; *Baltimore v. Baltimore & O. R. Co.* 6 Gill, 283, 48 Am. Dec. 531; *Portland Bank v. Apthorp*, 12 Mass. 252; *Connecticut Mut. L. Ins. Co. v. Com.* 133 Mass. 161; *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809; *State Board v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 367; *People ex rel. Panama R. Co. v. New York Tax Comrs.* 104 N. Y. 240, 10 N. E. 437; *Coney Island, Ft. H. & B. R. Co. v. Kennedy*, 15 App. Div. 588, 44 N. Y. Supp. 825; *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L. R. A. 853, 11 S. W. 348; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115; *Galveston County v. Galveston Wharf Co.* 72 Tex. 557, 10 S. W. 587; *Commercial Electric Light & P. Co. v. Judson*, 21 Wash. 49, 57 L. R. A. 78, 56 Pac. 829; *Edison Electric Illuminating Co. v. Spokane County*, 22 Wash. 168, 60 Pac. 122; *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135, 63 Pac. 1123; *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 322, 16 L. R. A. 561, 52 N. W. 439; *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746.

But, while corporate franchises are a species of taxable property, privilege, franchise, and occupation taxes do not fall under constitutional provisions commanding all property to be taxed equally and uniformly according to its value. *Portland Bank v. Apthorp*, 12 Mass. 252; *Chicopee v. Hampden County*, 16 Gray, 38; *Com. v. People's Five Cents Sav. Bank*, 5 Allen, 428; *Oliver v. Washington Mills*, 11 Allen, 268; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall.

652, 35 N. W. 808. We think the determination of this question is for the legislature, and not subject to review by the courts. It appears from the statute itself that shares in foreign corporations are taxed in this state but once, and the shares in domestic corporations or their representatives are also taxed. The question of the effect of statutes of foreign states cannot be considered, nor can such statutes have any effect in this state upon the question of the uniformity of the rules of taxation. The stock has a situs in this state, and is subject to the control of the legislature for the purpose of taxation.

2. It is further contended by counsel for relator that the law of 1893 (section 3831, 1 Comp. Laws 1897) has an element of doubt and uncertainty in it as to the intent of the legislature to include such property for

632, 18 L. ed. 904, Affirming 12 Allen, 300; *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907; *Com. v. New England Slate & Tile Co.* 13 Allen, 391; *Com. v. Cary Improvement Co.* 98 Mass. 19; *Manufacturers' Ins. Co. v. Loud*, 99 Mass. 146, 96 Am. Dec. 715; *Atty. Gen. v. Bay State Mln. Co.* 99 Mass. 148, 96 Am. Dec. 717; *Connecticut Mut. L. Ins. Co. v. Com.* 133 Mass. 161; *Boston Mfg. Co. v. Com.* 144 Mass. 598, 12 N. E. 302; *Tremont & S. Mills v. Lowell*, 178 Mass. 469, 59 N. E. 1007; *State v. Western U. Tele. Co.* 73 Me. 518; *Somersworth Sav. Bank v. Somersworth*, 68 N. H. 402, 44 Atl. 534; *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Atl. 733; *State, Trenton Sav. Fund Society, Prosecutor, v. Richards*, 52 N. J. L. 156, 18 Atl. 582; *Kittanning Coal Co. v. Com.* 79 Pa. 100; *Com. v. New York, L. E. & W. R. Co.* 145 Pa. 57, 22 Atl. 212, 236; *Com. v. Germania Brewing Co.* 145 Pa. 83, 22 Atl. 240; *Com. v. National Oil Co.* 157 Pa. 516, 27 Atl. 374; *Com. v. Mill Creek Coal Co.* 157 Pa. 524, 27 Atl. 375; *Com. v. Sharon Coal Co.* 164 Pa. 304, 305, 30 Atl. 127, 128; *Com. v. Delaware & H. Canal Co.* 1 Dauphin Co. Rep. 257; *State v. Philadelphia, W. & B. R. Co.* 45 Md. 861, 24 Am. Rep. 511; *Slaughter v. Com.* 13 Gratt. 767; *Norfolk v. Norfolk Landmark Pub. Co.* 95 Va. 564, 28 S. E. 959; *American Harrow Co. v. Shaffer*, 5 Inters. Com. Rep. 336, 68 Fed. 750; *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 35 L. R. A. 497, 25 S. E. 249; *Singer Mfg. Co. v. Wright*, 33 Fed. 121; *Mutual Reserve Fund Life Assn. v. Augusta*, 109 Ga. 73, 35 S. E. 71; *Atlanta Nat. Bldg. & L. Assn. v. Stewart*, 109 Ga. 80, 35 S. E. 73; *Western U. Tele. Co. v. State Bd. of Assessment*, 80 Ala. 273, 60 Am. Rep. 99, Reversed on other points in 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *Capital City Water Co. v. Montgomery County Bd. of Revenue*, 117 Ala. 808, 23 So. 970; *Phoenix Assur. Co. v. Montgomery Fire Department*, 117 Ala. 631, 42 L. R. A. 468, 23 So. 843; *Phoenix Carpet Co. v. State*, 118 Ala. 143, 22 So. 627; *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 So. 219; *Lafayette v. Cummins*, 3 La. Ann. 678; *State v. Lathrop*, 10 La. Ann. 398; *State v. Ogden*, 10 La. Ann. 402; *State v. Fosdick*, 21 La. Ann. 434; *Western U. Tele. Co. v. Mayer*, 28 Ohio St. 521; *Southern Gun Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564; *Com. v. Milton*, 12 B. Mon. 212, 54 Am. Dec. 522; *Southern Bldg. & L. Assn. v. Norman*, 98 Ky. 294, 31 L. R. A. 41, 82 S. W. 952; *People v. Thurber*, 13 Ill. 554; *East St. Louis v. Wehrung*, 46 Ill. 392; *Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *Williams v. Rees*,

taxation in this state, as it is provided by subdivision 5 that personal property actually and permanently invested in any other state shall not be included, while subdivision 9 includes for taxation all shares in foreign corporations owned by citizens of this state, except national bank stocks. It is also contended that it was the intent of the legislature to provide taxation upon such property against citizens of the state; that it is evident the legislature used the word "citizen" in its restricted sense, and that the act was intended to provide taxation against a citizen of the state residing in New York or Ohio, or any other place outside the state,—one who returns for the purpose of voting at elections, but resides for the most part in foreign jurisdictions; that the word "citizen," as used in this statute, was intended to reach a large class of per-

sons who are citizens of this state and reside elsewhere; that, under the construction contended for by the respondent, all citizens who are nonresidents of the state would escape taxation. It is claimed that the construction contended for by relator is made apparent from the change made in 1893 from the former provisions of the statute; that the statute of 1889 (Act No. 195) provided, as did the law of 1885, for taxation upon all ships, boats, and vessels belonging to inhabitants of this state, whether at home or abroad, and all goods, chattels, and effects belonging to inhabitants of this state, situate without this state, and all shares in foreign corporations except national banks owned by inhabitants of this state; that the law of 1889 used the word "inhabitant" in providing for taxation upon personal property; while in the enactment of

9 Biss. 405, 2 Fed. 882; *Walker v. Springfield*, 94 Ill. 384; *Banta v. Chicago*, 172 Ill. 204, 40 L. R. A. 611, 50 N. E. 233; *Walcott v. People*, 17 Mich. 68; *Milwaukee Fire Department v. Helfenstein*, 16 Wis. 137; *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 665; *American Union Exp. Co. v. Ft. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *Washington v. State*, 13 Ark. 752; *Baker v. State*, 44 Ark. 134; *Little Rock v. Frather*, 46 Ark. 479; *Ft. Smith v. Scruggs*, 70 Ark. 549, 58 L. R. A. 921, 69 S. W. 679; *Leavenworth v. Booth*, 15 Kan. 627; *Denver City R. Co. v. Denver*, 21 Colo. 350, 29 L. R. A. 608, 41 Pac. 828; *Ex parte Cohn*, 13 Nev. 424; *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581.

The leading cases in point bring this out very clearly.

A statute exacting a yearly percentage of the capital of all banks is not a tax, but an excise or duty upon a commodity, and, therefore, need not be proportionate, as the Constitution requires assessments, rates, and taxes to be when laid upon the inhabitants and estates within the commonwealth. *Portland Bank v. Apthorp*, 12 Mass. 252.

By the Massachusetts Constitution, the legislature may not only impose and levy, on condition that they be proportionate and reasonable, assessments, rates, and taxes upon all inhabitants of, and persons resident and estates lying within, the commonwealth, but it may also raise a revenue under the power conferred to impose and levy reasonable duties and excises upon commodities and other things,—from other sources of emolument and profit not strictly called property, but which are rather to be considered as the means of acquiring property. An annual percentage charge upon the capital of all banks is an exercise of this latter power. *Ibid.*

The statute requiring every domestic savings bank and institution to pay the state a tax on account of its depositors, of a stated percentage on the amount of its deposits, to be assessed semiannually on the average of deposits during the preceding half year, imposes a duty or excise upon a commodity, *viz.*, the privilege or franchise of the institution; and, hence, is not repugnant to the constitutional provision requiring the imposition and levy of proportional and reasonable assessments, rates, and taxes. This is plain, because the charge is against the corporation, whose franchise may be taken away if it does not pay; it is not laid upon individual deposits, but upon the average aggregate ascertained periodically, and, hence, is measured by the extent the corporation has

used its franchise; and because, too, by another section of the act depositors are exempt. *Com. v. People's Five Cents Sav. Bank*, 5 Allen, 428.

Under that Constitution, it has uniformly been held, since the formation of the government of Massachusetts, that the legislature has power to impose an excise upon any business or calling exercised in the commonwealth, and upon any franchise or privilege conferred by, or exercised within, it. An act requiring every life insurance corporation and association, domestic and foreign alike, to pay annually an excise tax of an amount determinable by assessment upon a valuation equal to the aggregate net value of all policies in force at the end of the year, held by residents, is an exercise of such power. Such an act is constitutional, although it cannot be justified as a tax upon property under the power to impose and levy proportionate and reasonable assessments, rates, and taxes. *Connecticut Mut. L. Ins. Co. v. Com.* 133 Mass. 161.

Every excise necessarily must finally fall upon and be paid by property, and so may be indirectly a tax upon property. But the legislature clearly intended such charge as an excise, and not a tax upon property. It is not in terms laid upon the property, or upon the policy holders; it is the corporation which is to pay it, and which is exposed to the penalties for non-payment. We hold it to be what the legislature has declared it to be,—an excise upon a franchise or privilege of the corporation. It is true that the aggregate net value of outstanding policies represents debts or liabilities of the companies; so does the capital stock of a corporation; and, what is more nearly analogous to these cases, so do the deposits of a savings bank; but this is immaterial if they also furnish a fair basis by which to estimate the value of the franchise or privilege which the legislature, in its discretion, desires to subject to an excise. *Ibid.*

A statute requiring every telegraph corporation, company, or person doing business in the state to pay annually a state tax of a stated percentage on the value of the line owned within the state, including all poles, wires, insulators, office furniture, batteries, and instruments, imposes a tax upon the franchise or business of telegraphing, and not upon the property of those conducting it; and, hence, is not within a constitutional requirement that all taxes upon real and personal estate assessed by authority of the state must be apportioned and assessed equally according to the just value thereof. *State v. Western U. Teleg. Co.* 73 Me. 518.

A tax upon savings banks is admitted to be

1893 this word was eliminated and the word "citizen" substituted, when referring to stock in foreign corporations; that section 3831, 1 Comp. Laws 1897, by subdivision 5, provides for taxation upon all goods, chattels, and effects belonging to inhabitants of this state situate without this state, except that property actually and permanently invested in business in any other state shall not be included; that the word "inhabitants," as used in these statutes, reaches all persons who are residents of the state, while the word "citizen" as used is intended to reach a class of persons who are citizens of the state and reside elsewhere; that by this construction all citizens of the state who are nonresidents of the state could be taxed under this law, while, if it only provided that inhabitants of the state should be taxed, then nonresident citizens would escape tax-

ation. And it is thus insisted that the change made in 1893, by striking out the word "inhabitant" and inserting in lieu thereof the word "citizen," was made to meet this situation. It is claimed that under this construction a rule of taxation is provided which is not uniform, as it does not operate upon all this kind of property alike, and whether it is taxable or not depends upon who is the owner of it. It is claimed that the statute does not provide that all foreign stock shall be taxed; that it provides only for the taxation of stocks owned by citizens of the state. We think this contention has no force, and that it does not accord with the plain provisions of subdivision 9. We think the legislature intended to use the word "citizen" as synonymous with "inhabitant" or "resident." As was said in *McKenzie v. Murphy*, 24

an anomaly. It rests upon peculiar grounds of public policy, and is universally excepted from the rule of equality and uniformity. *Boston, C. & M. R. Co. v. State*, 62 N. H. 648; *Somersworth Sav. Bank v. Somersworth*, 68 N. H. 402, 44 Atl. 534.

An act requiring domestic corporations, with certain exceptions, to pay a yearly license fee or tax of a fraction of 1 per cent on the amount of their capital stock, does not fall within a constitutional provision directing property to be assessed for taxes under general laws and by uniform rules according to its true value. Such a tax is manifestly not one upon property, but a tax on certain corporations by way of a license for exercising corporate franchises, and, although laid upon capital stock, possesses the legal quality of a license or franchise tax. There is in New Jersey no constitutional restriction upon the power of the legislature to impose such a tax. *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Atl. 733.

A tax imposed upon a savings bank under a statute requiring all such institutions, in lieu of all other taxes, to pay an annual tax on the amount of their deposits of a specified percentage after deducting therefrom available funds on hand or on deposit to meet current payments or expenses, and the amount invested in any securities issued by any county, town, township, or city in the state, or which by state or Federal laws are exempt, and, also, the cost of real estate purchased upon foreclosure and subject to taxes the same as other like property,—is not a property tax, nor one upon anything having a certain relation to property; it is a tax upon the bank gauged by the amount of its deposits,—its debts, not its possessions,—subject to stated deductions; and, therefore, it is not affected by a constitutional mandate that property shall be assessed for taxes under general laws and by uniform rules according to its true value. *State, Trenton Sav. Fund Soc., Prosecutor, v. Richards*, 52 N. J. L. 156, 18 Atl. 582.

A state tax laid annually upon the gross receipts of all domestic steam railroads doing business in the state is not a tax upon their property, but upon their franchises, measured by the extent of their business, and, hence, not in conflict with the declaration of the Maryland Bill of Rights that every person in the state, or holding property therein, ought to contribute his proportion of the public taxes for the support of the government according to his actual worth in real and personal property. *State v. Philadelphia, W. & B. R. Co.* 45 Md. 361, 24 Am. Rep. 511.
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A statute levying a percentage tax upon the gross receipts of every telegraph, telephone, electric light, and express company derived from business done by it in the state is not in conflict with provisions in the state Constitution requiring all taxes levied on property in the state to be assessed in exact proportion to the value of such property, and forbidding the legislature to levy in any one year a greater than a stated rate of taxation on the value of taxable property within the state, because such a tax is not one upon property, but upon occupations. *Western U. Teleg. Co. v. State Bd. of Assessment*, 80 Ala. 273, 60 Am. Rep. 99.

This case was reversed in 182 U. S. 472, 83 L. ed. 409, 2 Intern. Com. Rep. 726, 10 Sup. Ct. Rep. 181, but the reversal went upon the ground that, in its application to the Western Union Telegraph Company, the tax was in conflict with the commerce clause of the United States Constitution.

Constitutional provisions requiring all taxes levied on property to be assessed in exact proportion to the value thereof, and that the property of private corporations, associations, and individuals shall be forever taxed at the same rate, do not inhibit the legislature from levying an occupation or a privilege tax upon corporations or business, and measuring the amount thereof by the gross receipts. *Capital City Water Co. v. Montgomery County Bd. of Revenue*, 117 Ala. 303, 23 So. 970.

The fact that such a tax is a percentage of the gross receipts above current expenses does not make it a tax upon income, and therefore upon property, and thus bring it within such constitutional limitations. *Ibid.*

The court reached its conclusion by reasoning that state Constitutions were restraining acts, not enabling ones, and, hence, legislatures had plenary power, in the absence of specific restrictions, to tax anything and everything they chose; that license exactions are not taxes, nor are privilege or occupation taxes taxes upon property. That the power to tax property was the only one limited in respect of taxation. All other taxes might be laid *ad libitum*. *Ibid.*

A municipal ordinance imposing a license tax sanctioned by penalties under a power given a city in its charter to levy and collect a license tax on fire or life insurance companies or agencies, and to impose fines, penalties, and forfeitures for the breach of any ordinance, is not repugnant to a constitutional command to the legislature to provide an equal and uniform rate of assessment and taxation. *Leavenworth v. Booth*, 15 Kan. 627.

Even cases wherein a tax was annulled be-

Ark. 159: "The word 'citizen' is often used in common conversation and writing as meaning only inhabitant, a resident of a town, state, or county, without any implication of political or civil privileges." In *State ex rel. Owens v. Trustees of Section 29*, 11 Ohio, 24, it was said: "Here a question is raised as to the meaning of the word 'citizen' as used in this connection. That this word does not always mean one and the same thing is clear. Thus we speak of a person as a citizen of a particular place, when we mean nothing more by it than that he is a resident of that place. When we speak of a citizen of the United States, we mean one who was born within the limits of, or has been naturalized by the laws of, the United States. It can hardly be believed that the legislature, in using the word 'citizen' in this statute, intended to make a

distinction between native or naturalized citizens and resident aliens." We think it was not intended by the legislature to limit the word to persons who are actually citizens in a political sense. A liberal construction must be given to the tax laws for public purposes. Mr. Justice Grant said in *Auditor General v. Hutchinson*, 113 Mich. 245, 71 N. W. 514: "Tax laws should be liberally construed." See also *United States v. Hodson*, 10 Wall. 395, 19 L. ed. 937; *United States v. Taylor*, 104 U. S. 216, 26 L. ed. 721.

3. One other question is raised. It is claimed that the taxation of relator's stock is in contravention of section 1, art. 4, of the Constitution of the United States, which provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other

cause of its repugnancy to uniformity and equality provisions frequently illustrate the same principle, wholly irrespective of whether, individually, they were well decided, since in the main they go upon the ground that the challenged exaction rested, despite its form, upon property rather than privilege.

In the two cases of *State v. South Carolina R. Co.* and *State v. Northeastern R. Co.* 4 S. C. N. S. 376, a statute imposing a state tax upon railroads, graduated in amount according to the length of the main tracks and branches, was held unconstitutional for violation of the provisions respecting the uniformity and equality of property ad valorem taxation. The overturned statute was entitled, An Act to Provide for a General License Law. The court said: "The section . . . on which the indictments are founded adjusts and fixes the amount to be paid into the treasury by the length of the road. It is a tax imposed on the road as property. It is not laid on its income, or any franchise or privilege, but measured solely by the 'length of the main track and branches.' . . . So far as the provisions of the act seek to make railroad companies amenable to it in the way and manner it proposes, it is unconstitutional and void. The conclusion is so clear and undeniable that we shall content ourselves with a mere reference to the clauses of the Constitution which forbid the levy of any tax on property except in proportion to its value."

One must regret that the court did not spend a little time in demonstrating that the statute *sub judice* did impose a property, and not a franchise, tax. The real nature of the tax was the crux of the case. If it really was a franchise tax, it could as well be measured by mileage as by any other standard.

A state law levying a tax upon the gross receipts of foreign insurers against fire losses and water perils, as a property tax pure and simple, and not as a license tax or condition upon which such foreigners are permitted to do business within the state, no matter by what name it may be called by the legislature, when no tax is laid upon the gross receipts of domestic insurers or of any other kind of business,—is void for want of conformity to constitutional requirements of equality and uniformity of taxation. *Parker v. North British & M. Ins. Co.* 42 La. Ann. 428, 7 So. 599.

In the case of *Crow v. State*, 14 Mo. 237, Birch, J., was of the opinion that a statute requiring merchants to pay a license tax graduated according to their sales when they sell merchandise not grown, produced, or made within the state conflicted with the provision in the state 60 L. R. A.

Constitution requiring all property to be taxed ad valorem. He held that the statute laid a property tax no matter what it was called, and that the constitutional prohibition could not be escaped by calling it a license. While Napton, J., who dissented, did so on the ground that the tax in question was a license, and not a tax upon property, and, therefore, was not affected by the constitutional provision cited.

A statute taxing railroad cars not owned by operating railroads, but running within the state, when the burden of the tax rests upon the cars themselves, and not upon their owners, however complicated and ingenious the method devised for assessing and levying the charge, imposes a property tax, and not a license or privilege tax; and, when the tax is a specific percentage upon the aggregate assessment and valuation of such cars greatly in excess of the rate of tax on property as limited by the Constitution, it is void. *State ex rel. Armour Packing Co. v. Stephens*, 146 Mo. 662, 48 S. W. 929.

In the note in this series on the *Taxation of corporate franchises in the United States* (div. VI.), *Louisville Tobacco Warehouse Co. v. Com.* (Ky.) 57 L. R. A. 33, are collated the cases dealing with the question whether or not a given tax was one upon property or an excise upon a privilege or franchise; and in the note on the *Taxation of capital stock of corporations in the United States*, to State Bd. of Equalization v. People (Ill.) 58 L. R. A. 513, are discussed the cases wherein a disputed tax was, on the one hand, laid directly upon capital stock as the sum of the corporate possessions, and was, therefore, a tax on property, or, on the other hand, was laid primarily upon the corporation on account of its franchises, privileges, business, etc., and was, therefore, an excise, license, or privilege tax in which capital stock was merely resorted to as a standard of measurement. From what has been said and hereafter appears in this note, and from the statements in the two notes just mentioned, it will be manifest that in all cases the rule of uniformity and equality of taxation has or has not application once the nature of the tax is determined. If the tax be one upon property, even upon intangible property,—upon a franchise as property,—it will apply. If the tax be a privilege tax pure and simple, it will not apply. The controversy in any particular case ever turns upon the nature of the tax. The principle is generally conceded.

In *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. 632, 18 L. ed. 904, and *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18

state." This contention cannot be sustained. In *Bonaparte v. Baltimore City Appeal Tax Ct.* 104 U. S. 592, 26 L. ed. 845, the question the court was asked to decide was whether the registered public debt of one state, exempt from taxation by the debt- or state, or actually taxed there, is taxable by another state, when owned by a resident of the latter state. The court said: "We know of no provision of the Constitution of the United States which prohibits such taxation. . . . It is insisted, however, that the immunity asked for arises from article 4, § 1, of the Constitution, which provides that full faith and credit shall be given in each state to the public acts of every other state. We are unable to give such an effect to this provision. . . . While the Constitution of the United States might have been so framed as to afford relief against

such a disability, it has not been; and the states are left free to extend the comity which is sought, or not, as they please." It was further remarked in the case that: "No state can legislate except with reference to its own jurisdiction. One state cannot exempt property from taxation in another." In *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547, it was said: "The constitutional power to tax shares of stock owned by our citizens in corporations located without the state does not depend on whether the capital of the corporation is or is not taxed in the state where the corporation is created. The power is the same whether the capital of the corporation is there taxed or not; otherwise, the power of taxation conferred by the constitution would be made to depend upon the operation of laws of a foreign jurisdiction,—a proposition so obvi-

L. ed. 907, the question was in each case whether the disputed tax was properly to be regarded as a tax upon property, or an excise upon privileges or franchises. The tax in neither was proportional, and hence, if a property tax, was plainly unconstitutional. Each tax was sustained, and only could be sustained as a privilege tax. The dissenting justices took the ground that these taxes were true property taxes, not excises, and were void because disproportionate.

Notwithstanding an opinion about to be referred to, the Supreme Court of the United States consistently adheres to this doctrine. An inheritance tax not being one on property, but on the succession, and the right to take property by descent or devise being the creature of law,—not a natural right, but a privilege, and, therefore, a privilege upon which the authority conferring it may impose conditions,—it follows that states may tax such privilege, may discriminate between relatives and between these and strangers, and may grant exemptions, and are not precluded from so doing by constitutional provisions requiring uniformity and equality. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1087, 18 Sup. Ct. Rep. 594.

If the force of what has been stated in this division can be increased, the opinions of the several members of the New Jersey court of errors and appeals in the great contest over railroad taxation that was waged in that state several years ago will have that effect. The New Jersey railroad tax act of 1884 imposed a tax upon property, including the corporate franchises, and provided a complete system of assessment and valuation. Such a tax was plainly subject to the constitutional rule of uniformity and equality. All the judges agreed as to this. As to the taxability of franchises. They are undoubtedly property, and as such taxable. The act provides that the state board of assessors shall ascertain the value of the franchises separately. They are to ascertain their true value. They have a value which can be estimated. *Runyon*, Chancellor. There can be no question that this law imposes a tax on property, and it is not a franchise tax. The value of the franchise is to be estimated and included in ascertaining the true value of all property used for railroad and canal purposes, and the tax is imposed on this total valuation. All is designated in the act as property, and is within the scope of this paragraph of the Constitution. That the franchise of a railroad or canal company may be thus valued and assessed for general taxes is abundantly settled by authority 60 L. R. A.

and precedent in legislative acts, and in the decisions of the courts. It has an appreciable market value, not in all cases easy to measure, and not always determinable by the same rule or estimate. *Scudder, J.* Nor is the act invalid because, in the ascertainment of the value of the property of the companies, the franchise is to be taken into account as one element of value. The supreme court rightly holds "that this subject is not debatable at the present day, and the doctrine has become already accredited by many decisions as well of the Federal as of the state courts." *Parker, J.* It is clear that the case in hand is subject to the provision of the state Constitution that property shall be assessed for taxes under general laws and by uniform rules according to its true value,—that is, it is one wherein property is assessed for taxes. *Dixon, J.* The tax laid by the act of 1884 is a tax upon property. The tax to be assessed and levied has none of the qualities of a tax *in personam*,—none of the characteristics of indirect taxation for franchisees. The franchises of the corporations are made taxable on the true value thereof as property, and as part of the property of such corporations. The counsel on both sides discussed the case on the assumption that the taxation by the act was taxation upon property, and in that view I concur. *Depue, J.* (dissenting). *State Board v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578, Reversing 48 N. J. L. 1, 57 Am. Rep. 516, 2 Atl. 789.

The dissenting opinion follows further the subject of the present inquiry, and, so far as it is confined to this branch, correctly states the law. The constitutional provision invoked, continues Judge *Depue*, relates only to taxation upon property. It leaves unimpaired that branch of the taxing power which consists in the imposition of indirect taxes for the exercise of franchises or the pursuit of business, trades, or occupations. Over this subject the discretion of the legislature is unrestrained save, only, by the need of conforming to that essential quality of taxation that, when a class of persons or things is selected for taxation, the tax must be imposed upon individuals of the class under a rule of uniformity. *Ibid.*

And, he adds, continuing his argument: Another class of cases cited from Federal and state courts is also inapplicable to this subject. I refer to decisions on the legislative power of indirect taxation by taxes on privileges, franchises, trades, and occupations, and excise duties, of which *Society for Savings v. Colte*, 3 Wall. 594, 18 L. ed. 897; *Head Money Cases*, 112 U. S. 580, 594, *sub nom.* *Edye v. Robertson*, 28 L. ed. 798, 802, 5 Sup. Ct. Rep. 247; *Com.*

ously ill founded that the moment it is stated its falsity becomes apparent." See also *Dwight v. Boston*, 12 Allen, 316, where the same doctrine is laid down. Cooley, in his work on Taxation, lays down the same rule. He says: "The shares owned by residents in foreign corporations may be taxed to the owners, even though the corporations themselves are taxed in the jurisdictions where their operations are carried on." Cooley, Taxn. 2d ed. 57.

The writ must be denied.

Montgomery, Ch. J., and Hooker and Moore, JJ., concur with Long, J.

Grant, J., dissenting:

The conceded facts in this case are: The New York Central & Hudson River Railroad Company is a corporation organized under

the laws of New York. Its property, personal and real, is situated in that state. It has no property subject to taxation in Michigan. All its property, including its capital stock, is taxed in the state of New York. Its tax in that state for the year 1900 was \$2,345,526.08, which it paid. This includes the tax on its capital stock, which tax amounted to \$237,816.71. The total tax amounted to 2 per cent on its entire capital stock, and to 11.4 per cent on its net income. The relator is a citizen of this state, residing in the city of St. Clair. He owns a number of shares of the capital stock of that company, for which he holds its certificate. This stock has been assessed to him in St. Clair, presumably at its cash value. The rate of taxation in that municipality is about 3 per cent on the assessed value of property. The constitution of

v. Cary Improvement Co. 98 Mass. 19; Youngblood v. Sexton, 32 Mich. 406, 20 Am. Rep. 654; New Orleans v. Kaufman, 29 La. Ann. 283, 29 Am. Rep. 328; and Kiltanning Coal Co. v. Com. 79 Pa. 100,—are types. This branch of the legislative power of taxation is universally admitted not to come within the equality clauses in constitutional provisions relative to taxation upon property; and in constitutions which simply provide that all taxation shall be equal a distinction is made between taxes on property and taxes on franchises, occupations, and pursuits, for the reason that in property there is always present the element of market value as the basis on which equality in taxation can be attained by the application of a uniform rate on such values; but in franchises, trades, or occupations there is no such element of value in common; and, hence, the rule of equality is not violated by taxation on these subjects by a rule which is uniform as to each class. *Ibid.*

In the light of all this, it is somewhat discouraging to find Mr. Justice Brown, in the Supreme Court of the United States, as late as November, 1901, in *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26, without a word of dissent from his brethren, confusing two quite distinct things, as he reasons thus: "By § 18 of the company's charter of 1882 it was declared 'that such company, its stock, its railroad, and appurtenances, and all its property in this state necessary or incident to the full exercise of all the powers herein granted, shall be exempt from taxation for a term of twenty years from the passage of this act.' This undoubtedly implies an exemption from privilege, as well as ad valorem taxes; and such has been the construction given to it by the supreme court of Mississippi. *Grand Gulf & P. G. R. Co. v. Buck*, 53 Miss. 246. But, as we have already held, this section must be construed as subservient to § 13, article 12, of the Constitution of 1869, providing that 'the property of all corporations for pecuniary profit shall be subject to taxation.' Now, if privilege taxes are taxes upon the property of corporations, an exemption from such taxes was subject to repeal as much as we have already held an exemption of ad valorem taxes to be. Whatever may have been the fluctuations of opinion upon this subject,—and it is not to be denied that there are many cases in the state courts holding that a privilege tax is not a tax upon property,—the law in this court, so far as concerns railway franchises, must be deemed to have been settled by the case of *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568 in which an exemption in the charter of the

Wilmington & Raleigh Railway Company, of 'the property of said company and the shares therein' from taxation was decided to extend to a tax upon the franchise and rolling stock. In delivering the opinion of this court, Mr. Justice Davis observed: 'It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature, therefore, was not inhibited from taxing it. The position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation,—which in its application to a railroad is the privilege of running it and taking fare and freight,—is property, and of the most valuable kind, as it cannot be taken for public use, even without compensation. It is true it is not the same sort of property as the rolling stock, roadbed, and depot grounds, but it is, equally with them, covered by the general term, "the property of the company," and therefore equally within the protection of the charter.' To the same effect are *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 195, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, and *Veazie Bank v. Fenno*, 8 Wall. 533, 547, 19 L. ed. 482, 487. This also appears to be the law in Mississippi, *Coulson v. Harris*, 43 Miss. 728; *Drysdale v. Pradat*, 45 Miss. 445. In *West River Bridge Co. v. Dix*, 6 How. 507, 534, 12 L. ed. 535, 546, the franchise of a bridge company was held to be property subject to condemnation under the law of eminent domain." Then, citing additional authorities to the point that corporate franchises are property, both within the law of eminent domain and for taxing purposes, Justice Brown concludes: "It follows, then, that privilege taxes, being taxes upon property, are subject to the constitutional limitations of 1869, and their exemption was equally repealable as that of ad valorem taxes."

It certainly is true that there is an almost unbroken line of authority to the effect that corporate franchises are property for the purposes of taxation; but there is an equally long and equally unbroken line of authority to the effect that privilege taxes are not taxes upon property. There has been practically no fluctuation of opinion upon either proposition.

"The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the state, whereas the franchise with which we have to do is the right to exist in corporate form without reference to the powers that, under such form, the company may exercise. This distinction, although formulated by Mr. Justice Field in *Home Ins. Co. v. New York*, 134 U. S.

Michigan provides that: "The legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law." Art. 14, § 11. The statute of Michigan provides that: "For the purposes of taxation, personal property shall include: . . . (5) All goods, chattels and effects belonging to inhabitants of this state, . . . except that property actually and permanently invested in business in another state shall not be included. . . . (7) All shares in corporations organized under the laws of this state, when the property of such corporations is not exempt, or is not taxable to itself; or when the personal property is not taxed. . . . (9) All shares in foreign corporations, except national banks, owned

by citizens of this state." Comp. Laws 1897, § 3831.

Can this taxation be sustained under the above provision of the constitution of Michigan? Double taxation is unequal taxation, under our constitution. Were this railroad company a Michigan corporation, with all its property in Michigan, and assessed at its cash value, and taxes paid thereon, and were its stockholders in Michigan again taxed upon the capital stock owned by them at its cash value, this would be double taxation, and therefore unequal, and clearly prohibited by the constitution. To illustrate: The real estate of the Calumet & Hecla Mining Company, situated in Houghton county, is assessed at \$55,274,920; its personal property, at \$6,550,000; making a total of \$61,824,920. Assuming that the rate of taxation in Houghton county, including

594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593, was not strictly adhered to in his subsequent expressions, probably because there was nothing in that case to call for a nice use of terms. In this state we tax each of these so-called franchises. The former, as in the case of the right to own and operate a railroad, is taxed as property having a true value, which it is the duty of the state board to ascertain for the purposes of constitutional assessment. On the other hand, the naked right of existing in corporate form is taxed, as in the case before us, not at its true value, as it would have to be if it were property, but at a sum arbitrarily imposed by the legislature as an annual fee, the amount of which is to be computed by reference to the capital of the company as a criterion. It is, in short, a poll tax levied upon domestic corporations for the right to be. Such a tax is not upon property or assets, and does not in any way concern the nature of the business the company may be authorized to carry on." *Lumberville Delaware Bridge Co. v. State Board*, 55 N. J. L. 529, *sub nom.* *State, Lumberville Delaware Bridge Co., Prosecutors, v. State Board*, 25 L. R. A. 184, 26 Atl. 711.

Ad valorem taxation and privilege taxation are different things, having no necessary connection. They are distinct burdens laid by the government upon those receiving its protection, and, when legally imposed, must be borne as a recompense for that protection. The same person may be subject to both, or to one and not the other. Subjection to one does not mean subjection to the other; nor does exemption from one include exemption from the other. *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115.

IX. Classification.

a. In general.

1. The power to classify.

The most important qualification of constitutional rules of uniformity and equality of taxation resides in the universally conceded power of legislatures to classify taxpayers and the subjects of taxation, imposing different rates upon the classes formed, and assessing these by different methods. It is admitted that such a power should exist to a greater or less extent, but it is manifest that, if it is wholly unrestrained, it may be so exercised as completely to nullify a constitutional mandate enjoining equality and uniformity. Such a mandate is nugatory if a legislature may classify, divide, and subdivide without limit, and levy varying

taxes upon the artificial and arbitrary divisions made.

The right and power generally of legislatures to select and classify the subjects, and prescribe the methods of taxation and of the assessment and collection of taxes at will, is undenied. *Pine Grove Twp. v. Talcott*, 19 Wall. 668, 22 L. ed. 227; *Barber v. Connolly*, 113 U. S. 82, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Kentucky Railroad Tax Cases*, 115 U. S. 821, *sub nom.* *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 20 L. ed. 414, 6 Sup. Ct. Rep. 57; *Hayes v. Missouri*, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Chester v. Pennsylvania*, 134 U. S. 240, 33 L. ed. 896, 10 Sup. Ct. Rep. 536; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *Pacific Exp. Co. v. Selbert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Giozza v. Tiernan*, 148 U. S. 637, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *New York v. Roberts*, 171 U. S. 658, *sub nom.* *New York ex rel. Parke, D. & Co. v. Roberts*, 43 L. ed. 823, 19 Sup. Ct. Rep. 58, Affirming 149 N. Y. 608, 44 N. E. 1127; *Nicol v. Ames*, 178 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, Affirming 58 Kan. 447, 49 Pac. 602; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43, Affirming 51 La. Ann. 565, 25 So. 447; *Florida C. & P. R. Co. v. Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; *Kidd v. Alabama*, 188 U. S. 730, 47 L. ed. —, 23 Sup. Ct. Rep. 401; *Insurance Co. v. New Orleans*, 1 Woods, 85, Fed. Cas. No. 7,052; *Williams v. Rees*, 9 Biss. 405, 2 Fed. 882; *Singer Mfg. Co. v. Wright*, 33 Fed. 121, Appeal Dismitted in 141 U. S. 696, 35 L. ed. 906, 12 Sup. Ct. Rep. 103; *Wallace v. Myers*, 4 L. R. A. 171, 38 Fed. 184; *Chamberlain v. Walter*, 60 Fed. 788; *Western U. Teleg. Co. v. Norman*.

state, county, and municipal, amounted to 3 per cent, the corporation would pay the present year taxes amounting to \$1,854,747.-60. If the stockholders in Michigan were again assessed upon the cash value of their stock, their property, clearly, would be taxed twice; for the value of their stock is represented by the value of the property of the corporation. That this would be in violation of the constitution is clear. The stock has no value not based upon the value of its property. Furthermore, the stockholder in either event pays the taxes. It matters not what you choose to call the stock; it is but the evidence of his property. The stockholders are the owners in fact of all the property of the corporation. All profits made belong to them. The surplus, upon the winding up of its affairs, belongs to them. Although the taxes levied may be

paid out of the earnings of the company, and out of its treasury, they are just as much paid by the stockholder as though he had been assessed his *pro rata* share for the payment of the taxes. This was distinctly held in *People ex rel. Burke v. Badlam*, 57 Cal. 594. The constitution of that state provided that "all property . . . not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." Is there any difference in meaning between that provision and our own, which declares that taxation shall be equal? Taxation in proportion to value means equality, and equality means taxation in proportion to value. So it has been held that the taxation of the property of a bank and of its capital stock at the same time is double taxation, forbidden by the organic law found in the dec-

77 Fed. 13; Railroad & Teleph. Cos. v. Tennessee Bd. of Equalizers, 85 Fed. 302; Nashville, C. & St. L. R. Co. v. Taylor, 86 Fed. 168; State v. Western U. Tele. Co. 73 Me. 518; State v. Hamlin, 86 Me. 495, 25 L. R. A. 632, 30 Atl. 76; Portland Bank v. Apthorp, 12 Mass. 252; Durach's Appeal, 62 Pa. 491; Kiltanning Coal Co. v. Com. 79 Pa. 100; Kitty Roup's Case, 81* Pa. 211; Williamsport v. Brown, 84 Pa. 439; Germania Ins. Co. v. Com. 85 Pa. 513; Com. v. Delaware Division Canal Co. 123 Pa. 594, 2 L. R. A. 798, 16 Atl. 584; Coal Ridge Improv. & Coal Co. v. Jennings, 127 Pa. 397, 17 Atl. 986; Com. v. Lehigh Valley R. Co. 129 Pa. 429, 18 Atl. 406, 410; Pittsburgh's Petition, 138 Pa. 401, 21 Atl. 757, 759, 761; Com. v. Germania Brewing Co. 145 Pa. 83, 22 Atl. 240; Com. v. National Oil Co. 157 Pa. 516, 27 Atl. 374; Com. v. Mill Creek Coal Co. 157 Pa. 524, 27 Atl. 375; Com. v. Sharon Coal Co. 164 Pa. 304, 30 Atl. 127, 128; Seabolt v. Northumberland County, 187 Pa. 318, 41 Atl. 22; Com. v. Delaware & H. Canal Co. 1 Dauphin Co. Rep. 257; Com. v. Shamokin, S. & L. R. Co. 3 Dauphin Co. Rep. 168; Com. v. Lake Shore & M. S. R. Co. 3 Dauphin Co. Rep. 172; Com. v. Jamestown & F. R. Co. 3 Dauphin Co. Rep. 214; Com. v. Mammoth Vein Coal & I. Co. 3 Dauphin Co. Rep. 220; Hawes Mfg. Co.'s Appeal, 1 Monaghan, 353, 17 Atl. 219; State, Trenton Iron Co., Prosecutor, v. Yard, 42 N. J. L. 357; State Board v. Central R. Co. 48 N. J. L. 146, 4 Atl. 578, Reversing 48 N. J. L. 1, 57 Am. Rep. 516, 2 Atl. 789; Fidelity Trust Co. v. Vogt, 66 N. J. L. 86, 49 Atl. 580; State v. Northern C. R. Co. 44 Md. 131; Daly v. Morgan, 69 Md. 467, 1 L. R. A. 757, 16 Atl. 287; Simpson v. Hopkins, 82 Md. 478, 33 Atl. 714; Luman v. Hitchens Bros. Co. 90 Md. 14, 46 L. R. A. 393, 44 Atl. 1051; Atlantic & D. R. Co. v. Lyons (Va.) 42 S. E. 932; Charleston & S. Bridge Co. v. Kanawha County Ct. 41 W. Va. 658, 24 S. E. 1002; Piedmont R. Co. v. Reidsville, 101 N. C. 404, *sub nom.* Richmond & D. R. Co. v. Reidsville, 2 L. R. A. 284, 2 Inters. Com. Rep. 416, 8 S. E. 124; Wiley v. Salisbury, 111 N. C. 397, 16 S. E. 542; Cobb v. Durham County, 122 N. C. 307, 30 S. E. 338; State v. Carter, 129 N. C. 560, 40 S. E. 11; Atlanta & F. R. Co. v. Wright, 87 Ga. 487, 13 S. E. 578; Columbus Southern R. Co. v. Wright, 89 Ga. 574, 15 S. E. 293; Slinger Mfg. Co. v. Wright, 97 Ga. 114, 35 L. R. A. 497, 25 S. E. 249; Sparks v. Macon, 98 Ga. 301, 25 S. E. 459; Mutual Reserve Fund Life Asso. v. Augusta, 109 Ga. 73, 35 S. E. 71; State v. Mobile County, 73 Ala. 65; Quartlebaum v. State, 79 Ala. 1; Phoenix Carpet Co. v. State, 118 Ala. 143, 22 So. 627; Vicks-

burg Bank v. Worrell, 67 Miss. 47, 7 So. 219; State v. Lathrop, 10 La. Ann. 398; State v. Fosdick, 21 La. Ann. 434; New Orleans v. Home Mut. Ins. Co. 23 La. Ann. 449; Merchants' Mut. Ins. Co. v. Blandin, 24 La. Ann. 112; New Orleans v. Louisiana Sav. Bank & S. D. Co. 31 La. Ann. 637; New Orleans v. People's Bank, 32 La. Ann. 82; State v. Liverpool, L. & G. Ins. Co. 40 La. Ann. 463, 4 So. 504; New Orleans v. Pontchartrain R. Co. 41 La. Ann. 519, 7 So. 83; Parker v. North British & M. Ins. Co. 42 La. Ann. 428, 7 So. 599; Texas Bkg. & Ins. Co. v. State, 42 Tex. 636; Blessing v. Galveston, 42 Tex. 641; Galveston County v. Gorham, 49 Tex. 279; St. Louis, I. M. & S. R. Co. v. Worthen, 52 Ark. 529, 7 L. R. A. 374, 13 S. W. 254; Missouri River, Ft. S. & G. R. Co. v. Morris, 7 Kan. 210; Francis v. Atchison, T. & S. F. R. Co. 19 Kan. 303; Phoenix Ins. Co. v. Welch, 29 Kan. 672; Midland Elevator Co. v. Stewart, 50 Kan. 378, 32 Pac. 33; Atchison, T. & S. F. R. Co. v. Clark, 60 Kan. 831, 58 Pac. 561; *Re* Page, 60 Kan. 842, 47 L. R. A. 68, 58 Pac. 473; Missouri, K. & T. R. Co. v. Labette County, 9 Kan. App. 545, 59 Pac. 383; Hamilton v. Wilson, 61 Kan. 511, 48 L. R. A. 238, 59 Pac. 1069; Missouri, K. & T. R. Co. v. Geary County, 9 Kan. App. 350, 59 Pac. 121; Pryor v. Bryan (Okla.) 66 Pac. 348; State *ex rel.* Kansas City, St. J. & C. B. R. Co. v. Severance, 55 Mo. 378; American Union Exp. Co. v. St. Joseph, 66 Mo. 675, 27 Am. Rep. 382; St. Louis v. Bowler, 94 Mo. 630, 7 S. W. 434; Hughes v. Cairo, 92 Ill. 339; Walker v. Springfield, 94 Ill. 364; Thatcher v. Chicago & N. W. R. Co. 120 Ill. 560, 11 N. E. 853; Coal Run Coal Co. v. Finlen, 124 Ill. 666, 17 N. E. 11; Ottawa Gas Light & Coke Co. v. Downey, 127 Ill. 201, 20 N. E. 20; Sterling Gas Co. v. Higby, 134 Ill. 567, 25 N. E. 660; People's Loan & Homestead Asso. v. Keith, 153 Ill. 609, 28 L. R. A. 65, 39 N. E. 1072; Union Cent. L. Ins. Co. v. Duffee, 164 Ill. 186, 45 N. E. 441; Kochersperger v. Drake, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321; Banta v. Chicago, 172 Ill. 204, 40 L. R. A. 611, 50 N. E. 233; Burton Stock Car Co. v. Traeger, 187 Ill. 9, 58 N. E. 418; Rankin v. Henderson, 9 Ky. L. Rep. 861, 7 S. W. 174; Louisville & N. R. Co. v. Louisville, 16 Ky. L. Rep. 796, 29 S. W. 865; Southern Bldg. & L. Asso. v. Norman, 98 Ky. 294, 31 L. R. A. 41, 32 S. W. 952; Exchange Bank v. Hines, 3 Ohio St. 1; Gallipolis v. Gallipolis Waterworks, 2 Ohio N. P. 161; Collett v. Springfield Sav. Soc. 13 Ohio C. C. 131; Louisville & N. A. R. Co. v. State, 25 Ind. 180, 87 Am. Dec. 358; State *ex rel.* Baldwin v. Insurance Co. of N. A. 115 Ind. 257, 17 N. E. 574; Blackmer v.

laration of rights, and which reads: "Every person in the state, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property." [Maryland Declaration of Rights, art. 15.] *Frederick County v. Farmers' & M. Nat. Bank*, 48 Md. 117. See also *San Francisco v. Mackey*, 21 Fed. 539. Where the law authorizing the formation of corporations provided for the payment of a tax to the state, and exempted them from any further tax or burden upon them, it was held that the exemption from taxation included exemption from taxation of the stock in the hands of shareholders. *Gordon v. Appeal Tax Court*, 3 How. 133, 11 L. ed. 529; *State, Fish, Prosecutor, v. Branin*, 23 N. J. L. 484. The constitution of New Hampshire provides,

"No statute provision shall be so construed as to subject any stock to double taxation." The law of that state provided for assessing stock in corporations located out of the state, to individuals owning the same. Under that act the municipal authorities assessed stock in the Michigan Central Railroad Company to a citizen of New Hampshire. By the charter of the Michigan Central Railroad Company, its capital stock was taxable in Michigan; and the tax so provided was to be in lieu of all taxes, charges, or exactions by virtue of any law of the state. The court held that this stock was not taxable in New Hampshire. *Kimball v. Milford*, 54 N. H. 406. In New York the provision of their statute, "that the shareholder shall not be taxed in respect to his shares in any corporation whose capital stock is taxed," was held to apply to cor-

Royal Ins. Co. 115 Ind. 291, 17 N. E. 580; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 18 L. R. A. 729, 83 N. E. 421; *Pingree v. Auditor General*, 120 Mich. 95, 44 L. R. A. 679, 78 N. W. 1025; *Michigan Mut. L. Ins. Co. v. Hartz* (Mich.) 8 Det. L. N. 882, 88 N. W. 405; *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746; *Allen v. Pioneer Press Co.* 40 Minn. 117, 3 L. R. A. 532, 41 N. W. 936; *State v. Canda Cattle Car Co.* 85 Minn. 457, 89 N. W. 66; *Northern P. R. Co. v. Barnes*, 2 N. D. 310, 51 N. W. 386; *Minneapolis & N. Elevator Co. v. Trall County*, 9 N. D. 213, 50 L. R. A. 266, 82 N. W. 727; *Dubuque v. Chicago, D. & M. R. Co.* 47 Iowa, 186; *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa, 806, 80 N. W. 665; *Mortensen v. West Point Mfg. Co.* 12 Neb. 197, 10 N. W. 714; *Magneau v. Fremont*, 30 Neb. 843, 9 L. R. A. 786, 47 N. W. 280; *State ex rel. Dawson County v. Farmers' & M. Irrig. Co.* 59 Neb. 4, 80 N. W. 53; *Rosenbloom v. State* (Neb.) 57 L. R. A. 922, 89 N. W. 1053; *Gerrard v. State* (Neb.) 89 N. W. 1062; *Stanley v. Little Pittsburg Min. Co.* 6 Colo. 415; *Carlisle v. Pullman Palace Car Co.* 8 Colo. 320, 7 Pac. 164; *People ex rel. Iron Silver Min. Co. v. Henderson*, 12 Colo. 369, 21 Pac. 144; *Ames v. People ex rel. Temple*, 26 Colo. 83, 56 Pac. 656; *American Refrigerator Transit Co. v. Adams*, 28 Colo. 119, 63 Pac. 410; *Gelsthorpe v. Furnell*, 20 Mont. 299, 39 L. R. A. 170, 51 Pac. 267; *Pullman State Bank v. Manning*, 18 Wash. 250, 51 Pac. 464; *State ex rel. Thompson v. Nichols* (Wash.) 69 Pac. 771; *Re Oberg*, 21 Or. 406, 14 L. R. A. 577, 28 Pac. 130; *San Francisco & N. P. R. Co. v. State Bd. of Equalization*, 60 Cal. 12; *Howe Mach. Co. v. Cage*, 9 Baxt. 518; *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115.

From the multitude of cases, a few selected citations are especially apt as illustrations of the stated principle.

The 14th Amendment does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory in which it is to operate. *Hayes v. Missouri*, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350.

A state may, without conflicting with the prohibition in the 14th Amendment against denying to any person within its jurisdiction the equal protection of the laws, distinguish, select, and classify objects of legislation; and, necessarily, its power in this respect must have a wide range of discretion; yet it is not wholly without limitation. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

60 L. R. A.

We need not repeat the commonplaces as to the large latitude allowed to the states for classification upon any reasonable basis. *Kidd v. Alabama*, 188 U. S. 730, 47 L. ed. —, 23 Sup. Ct. Rep. 491.

The legislature has a discretion, with which the courts cannot interfere, to classify for the purposes of taxation. *Fidelity Trust Co. v. Vogt*, 66 N. J. L. 86, 48 Atl. 580.

In the legitimate exercise of the power of taxation, persons and things have always been, and may constitutionally be, classified. No one has ever deuced this proposition. *Durach's Appeal*, 62 Pa. 491.

The Pennsylvania Constitution does not withdraw the power of classification from the legislature. The power to impose taxes for the support of the government, subject to the limitations of the Constitution, belongs to the legislature. The selection of the subjects, their classification, and the methods of collection are purely legislative matters. *Com. v. Delaware Division Canal Co.* 123 Pa. 594, 2 L. R. A. 798, 16 Atl. 584.

It has been settled, said the supreme court of that state in 1894, that the legislature can, without making a revenue statute obnoxious to the Constitution, classify corporations for the purposes of taxation; may sever a small class from a larger one; may subject one class to taxation and leave others untaxed. *Com. v. Sharon Coal Co.* 164 Pa. 304, 30 Atl. 127, 128.

The Tennessee Constitution recognizes only two general kinds of taxation,—ad valorem and privilege. These cover the whole domain of taxation, and beyond these the legislature may not go in the imposition of taxes. In respect of the subjects of the latter kind, the legislative discretion has a very comprehensive range. At least any occupation, business, employment, or the like affecting the public may be classed and taxed as a privilege. *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115.

There is no longer any ground for questioning, in the state of Georgia, the constitutional power of the general assembly, in the imposition of specific taxes upon occupations, to classify the subjects of taxation,—taxing some and omitting to tax others; or for asserting that the uniformity clause in the article of the Constitution of the state relating to taxation is violated, so long as a given tax is made uniform on all individuals belonging to the particular class on which it is imposed. *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 35 L. R. A. 497, 25 S. E. 249.

porations organized in other states, where their property and business were located. *People ex rel. Trowbridge v. New York City & County Tax & A. Comrs.* 4 Hun, 595. I quote the following language from that case: "Such corporations are taxable, and we must presume, in the absence of proof, that taxes in their respective home states are duly assessed and collected upon their capital stock or property. The stocks in such corporations, held by individuals here, are simple representatives of capital or property employed in business in other states, the title of which is vested in and controlled by the artificial person created by and residing in such states. They represent an interest which is or may become a membership in the corporation, and evidence of a right to participate in divided profit, and in the ultimate dividend of surplus after the payment

of all debts and obligations of the corporation. The stock certificates are not themselves the property, but are evidences of the rights just mentioned, to be possessed, enjoyed, and enforced, under and in conformity with the laws of the state which created the body corporate. The property of the corporation, whether real or personal, in which these certificates of legal or equitable rights are outstanding, is not 'within this state,' which, by the general statute, is the test of taxability; but, if any portion of it were, that fact would not affect the question now before us, for then, under our statutes, it would be taxable here, because of its situs, to its possessor or owner, but not to the mere holders of stock in the corporation." That case was affirmed by the court of appeals in a memorandum opinion, found in 62 N. Y. 630. Justice Cooley says: "It

2. The Limitations.

What, then, are the limitations upon the legislative power to classify for the purposes of taxation? Certainly a constitutional mandate commanding uniformity and equality of taxation is not a mere counsel of perfection addressed to the legislature to which the judicial branch of the government cannot give force.

"Clear and hostile discriminations," cautiously remarked Mr. Justice Bradley, "against particular persons and classes, especially such as are of an unusual character unknown to the practice of our governments, might be obnoxious to the constitutional prohibition," & c., against denying the equal protection of the laws. *Bell's Gap R. Co. v. Pennsylvania*, 184 U. S. 232, 38 L. ed. 892, 10 Sup. Ct. Rep. 582.

It is apparent, says Mr. Justice Brewer, that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the 14th Amendment; and that in all cases it must appear, not only that a classification has been made, but, also, that it is one based on some reasonable grounds,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection. *Gulf, C. & S. F. R. Co. v. Ellis*, 185 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, Reversing 87 Tex. 19, 26 S. W. 985.

The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. If the classification be proper and legal, there is the requisite uniformity in that respect. *Nicol v. Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.

Classification cannot be resorted to for the purpose of justifying an evasion of the constitutional mandate that all property shall be assessed for taxes under general laws and by uniform rules according to its true value. The legislative discretion to classify subjects for the purposes of taxation is limited to a classification resting upon substantial differences. So long as the public burden is imposed proximately according to the true value of the property bearing it, the courts cannot interfere with the legislative discretion to classify, upon substantial differences, subjects of taxation, not to provide varying methods of assessment in each class that have a reasonable basis in convenience of levying and collecting the taxes. *Fidelity Trust Co. v. Vogt*, 66 N. J. L. 86, 48 Atl. 580.

Classification, to be valid, must rest on some reason of public policy, some substantial difference of situation or circumstances that would

naturally suggest the justice or expediency of diverse legislation with respect to the objects classified. *State ex rel. Dawson County v. Farmers' & M. Irrig. Co.* 59 Neb. 4, 80 N. W. 53.

Whilst the legislature may, under conditions, create classes, and subject all persons coming within the classification to burdens or duties not imposed upon individuals outside of the classes, these classifications must not be arbitrary or unreasonable, but must rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed. *Luman v. Hitchens Bros. Co.* 90 Md. 14, 46 L. R. A. 393, 44 Atl. 1051.

Classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine, the courts cannot declare the classification void, though they may not consider it to be on a sound basis. The test is not wisdom, but good faith in the classification. *Seabolt v. Northumberland County*, 187 Pa. 318, 41 Atl. 22.

The real test of the validity of an objection to a tax law as violating the rule of uniformity is not whether the classification is wise or just, but whether the legislature acted arbitrarily,—whether, without an adequate determining principle, it divided the subject of the tax into two classes, and then sought to deprive one of these classes of the equal protection of the laws. If there is a genuine and substantial distinction between the two classes, the classification is lawful. *Rosenbloom v. State (Neb.)* 57 L. R. A. 922, 89 N. W. 1053.

To justify judicial interference, the classification adopted must be based upon an invidious and unreasonable distinction or difference with reference to similar kinds of property. *People ex rel. Iron Silver Min. Co. v. Henderson*, 12 Colo. 369, 21 Pac. 144.

The provision of the Michigan Constitution requiring uniformity in the levying of taxes has for its object the prevention of unjust discrimination. It prevents property from being classified and taxed as classed by different rules. All kinds of property must be taxed uniformly, or be entirely exempt. The uniformity must be co-extensive with the territory to which the tax applies. If a state tax, it must be uniform all over the state. If a county or city tax, it must be uniform throughout such county or city. *Pine Grove Twp. v. Talcott*, 19 Wall. 668, 22 L. ed. 227.

Equality and uniformity of taxes on occupations to the approximate extent which is rea-

is a fundamental maxim in taxation that the same property shall not be subject to a double tax, payable by the same party either directly or indirectly." Cooley, Taxn. 2d ed. 227. Justice Champlin, in *Taggart v. Sanilac County*, 71 Mich. 26, 38 N. W. 642, said: "The rule of uniformity forbids that taxation should be double. No person can be twice assessed upon the cash value of the same property, to defray a public burden." This opinion was concurred in by Justices Morse and Long. Justice Campbell, in the same case, said: "No tax law can be valid which does not provide for securing such uniformity. Of course, it is not necessary to attempt impossibilities. Uniformity, as well as value, may involve some exercise of opinion or discretion, and cannot be absolute. But a law which does not provide directly for satisfying these con-

ditions as far as practicable cannot be a valid exercise of the taxing power, and cannot be upheld as conforming to the constitution. . . . It cannot be possible to have double taxation valid under our constitution. It not only destroys uniformity of burdens, but in so doing involves the other considerations referred to."

It is not contended that under the constitution of this state the property of a domestic corporation and the stock of the shareholders, whose value depends upon the value of its property, can be taxed. But it is contended that, if the corporation and its property are located in another state, then the evidence of property known as "stock" can be assessed and taxed to the individual shareholders residing in Michigan. That is the important question in this case. Let us suppose that the Calumet & Hecla Mining

reasonably attainable is required by a constitution containing the usual pertinent provision, and is an essential element in the power of taxation; but discrimination in occupations and classifications of them, so far as seem to be proper and reasonable to the legislature for the purpose of apportioning such taxes equally and uniformly, do not admit of interference from the courts so long as the legislature does not plainly transcend its authority and disregard the constitutional restrictions. And, inasmuch as the legislature may at will create municipal corporations, and clothe them with powers adequate to the purposes of their creation, among which is the power to tax, a municipal ordinance imposing discriminating occupation taxes is valid when a like legislative act would be so. *Blessing v. Galveston*, 42 Tex. 641.

What is the test of the reasonableness of a classification,—of one based upon "some difference which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection?" Legislation special in character is not forbidden by the 14th Amendment. There is no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

In a late case in the Supreme Court of the United States involving the constitutionality of a state law, challenged on the ground that it denied the equal protection of the law, Mr. Justice Brewer, for the majority, after remarking that, upon the one hand, legislation which, in carrying out a public purpose, is limited in its application if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the 14th Amendment; and, on the other hand, that it was equally true that the equal protection guaranteed by the Constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities not cast upon others similarly situated; that it cannot make a classification of individuals or corporations which is purely arbitrary and impose upon such class special burdens and liabilities,—proceeds to say: While cases on either side, and far away from the dividing line, are easy of disposition, the difficulty arises as the statute comes near the line of separation. Is the classification prescribed thereby purely arbitrary, or has it some basis in that which has a reasonable relation to

the object sought to be accomplished? It is not at all to be wondered at that, as these doubtful cases come before this court, the justices have been divided in opinion. To some the statute presented seemed a mere arbitrary selection; to others it appeared that there was some reasonable basis of classification. But the division in all of them was not upon the principle or rule of separation, but upon the location of the particular case one side or the other of the dividing line. *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609, Affirming 58 Kan. 447, 49 Pac. 602.

There is a further limitation. When a reasonable and proper classification has been made, all the members of the class set apart must be taxed alike.

While the 14th Amendment, in forbidding states to deny to any person within their jurisdictions the equal protection of the laws, only requires the same means and methods to be applied impartially to all the constituents in each class so that the law shall operate equally and uniformly upon all persons in similar circumstances; while, too, it does not prohibit legislation limited either in the objects to which it is directed or by the territory in which it is to operate, but merely requires that all subjected to such legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and liabilities imposed,—it is still a question: What is the test of likeness and unlikeness of circumstances and conditions? "These expressions," says Mr. Justice McKenna, "have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition when connected with the facts of the cases in which they are employed." *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

Legislation, which, in carrying out a public purpose, is limited in its application, is not within the 14th Amendment if, within the sphere of its operation, it affects alike all persons similarly situated. *Barbler v. Connolly*, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357.

The 14th Amendment merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions. *Hayes v. Missouri*, 120 U. S. 71, 30 L. ed. 580, 7 Sup. Ct. Rep. 350.

When legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws if all who are brought under its influence are treated alike under the same conditions.

Company were located across the boundary line in Wisconsin, and its property assessed the same as it now is in Michigan; would the assessment of Michigan stockholders at the cash value of their stock be any less double taxation, or any less unequal, than if located within the state? It must be borne in mind that all the property of the corporation would be taxable in Wisconsin, and nowhere else. Or suppose that the Upper Peninsula were organized into a separate state; it would then follow, if respondent's contention be correct, that all the stock of the shareholders in the old state would at once be taxable. Is it possible that the framers of the constitution, and the people who adopted it, supposed that they were adopting a constitution capable of such oppression and injustice? I cannot so hold, even if there are decisions of other courts

to the contrary. There are occasions when precedents from other tribunals, however learned they may be, should not be followed. The value of railroad, mining, and manufacturing corporations is based upon their property, which is taxed where they are located. There is no more justice in taxing the stockholder upon his stock in such a corporation located in another state than there would be in taxing the stock in the hands of a stockholder of a domestic corporation. It is as unjust and unequal in the one case as it is in the other. I cannot sanction that fiction of the law which separates the stock, calls it personal property, and assesses it, regardless of the fact that all the property which the stock represents has been assessed by the authorities where its property is located. It is common knowledge that all such corporate property is, and always has been,

Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161.

The 14th Amendment, forbidding any state to deny to any person within its jurisdiction the equal protection of the laws, does not prevent the classification of property for taxation,—the subjecting of one kind of property to one rate of taxation, and of another kind to a different rate; the distinguishing between franchises, licenses, and privileges, and visible, tangible property, and between real and personal property,—provided all property in the same class is treated alike. Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1026, 10 Sup. Ct. Rep. 593.

The 14th Amendment was not intended to compel the states to adopt an iron rule of equality in respect of taxation,—to prevent the classification of property for taxation at different rates, or to prohibit legislation in that regard special either in the extent to which it operates or the objects sought by it to be attained. It is enough if there is no discrimination in favor of one as against another of the same class. Glozza v. Tiernan, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721.

A tax law which operates alike on all property and persons similarly situated, and under which the assessment is made by a judicial officer after notice and opportunity to be heard by the persons interested, does not conflict with the provisions of the 14th Amendment to the Constitution of the United States. Wallace v. Myers, 4 L. R. A. 171, 38 Fed. 184.

The general requirement of uniformity of public burden is satisfied in a tax upon business, when such tax bears upon all business of a like kind, whether followed by foreign or domestic corporations, or by resident or nonresident individuals. State v. Western U. Teleg. Co. 73 Me. 518.

Excises and duties undoubtedly must be equal; that is, they must operate upon all persons who exercise the employment which is so taxed. A tax upon one particular moneyed capital would unquestionably be contrary to the principles of justice, and could not be supported; but a tax upon all banks is justifiable. Portland Bank v. Apthorp, 12 Mass. 252.

A constitutional provision that all property shall be assessed for taxes under general laws and by uniform rules according to its true value does not take away from the legislature the power of selecting the subjects of taxation, but it does require that all the members of the class selected shall be included in the taxing law, and that the rule applied thereto shall be uniform as to the whole class, and that the assessment shall be made at the true value of the property 60 L. R. A.

constituting the class. A law, therefore, which taxes a class of property separately is not unconstitutional if it embraces all property of that class, applies to it uniform rules, and taxes it according to its true value. The constitutionality of such a law is to be determined in the same way in which it would be determined if the property taxed were the only property taxed in the state. State Board v. Central R. Co. 48 N. J. L. 146, 4 Atl. 578, Reversing 48 N. J. L. 1, 57 Am. Rep. 516, 2 Atl. 789.

A law which operates alike upon all persons under like circumstances is not obnoxious to the 14th Amendment to the Constitution of the United States forbidding the states to deny the equal protection of the laws to persons within their jurisdictions. Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421, Affirmed in 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122.

The Illinois supreme court declares it well settled, by its repeated decisions, in that state, that the state, in its sovereign capacity, and the cities and villages thereof by grants of the legislature, have ample power to exact license fees from trades and occupations mentioned in the Illinois Constitution of 1870, art. 9, § 1, for either regulation or revenue. But, whether the license fee is for one purpose or the other, it is essential that the law which exacts it be so framed as to apply uniformly to the whole class upon which it operates. Banta v. Chicago, 172 Ill. 204, 40 L. R. A. 611, 50 N. E. 233.

Laws public in their object may be confined to a particular class of persons if they be general in their application to the class to which they apply; provided, the distinction is not arbitrary, and rests upon some reason of public policy growing out of the conditions or business of such class. Allen v. Pioneer Press Co. 40 Minn. 117, 3 L. R. A. 532, 41 N. W. 936.

Where the method adopted for subjecting property to taxation is a tax based upon valuation, the rate imposed must be uniform, and apply alike to all who are thus taxed. The property of one citizen may not be taxed at a greater rate than that of another. And, however difficult it may be to obtain equality in other respects, a uniform rate may and must be imposed in this class of taxation. State v. Canada Cattle Car Co. 85 Minn. 457, 89 N. W. 66.

If the same method of taxation is applied without discrimination throughout the state to the valuation of all property in a particular class, there is a sufficient compliance with the requirements of the Constitution. People ex rel.

assessed in the state in which it is located. It was common knowledge when our constitution was framed and adopted. Counsel for respondent cite Cook on Stock and Stockholders: "Aside from constitutional restrictions, it unquestionably is within the power of the state to levy not only a double tax, but even a treble or quadruple tax, if it so chooses." As authority for the text the author cites *Toll-Bridge Co. v. Osborn*, 35 Conn. 7. His comment upon this case is: "Evidently corporations were not popular in Connecticut in 1868, except for taxation purposes." Cook, Stock & Stockholders, § 567, note. Such a result is not possible under the constitution of Michigan. One more illustration may not be out of place: Ten men, five living in Indiana and five in Michigan, are engaged as co-partners in a manufacturing business located in Indiana.

The real estate and all the personal property are in Indiana, and are there taxed. The property cannot be taxed in Michigan. They conclude to form a corporation. Each receives his proportionate share of the stock. The property is taxed in Indiana to the corporation, the same as it was taxed to the co-partnership. The result of the respondent's contention would be that the five stockholders in Michigan, who could not be taxed as co-partners, would pay the same tax in Indiana on their corporate property as they did upon it when partnership property, and would then be taxed again in Michigan, on the theory that their property has been converted into personalty, and is therefore taxable in Michigan. Is not this a species of bald legerdemain? Is it consistent with a constitution prohibiting unequal taxation? Is it the act of an honest and just govern-

Iron Silver Min. Co. v. Henderson, 12 Colo. 369, 21 Pac. 144.

Equality and uniformity in taxation require that individuals in classes be treated alike; and, while it may be stated generally that, under a constitutional provision therefore, a wide discretion is given to the legislature in laying taxes on classes of property and persons, yet there must be uniformity in the application of the rule adopted for the class among individuals and property of the same character in the class. *Pullman State Bank v. Manring*, 18 Wash. 250, 31 Pac. 464.

Legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by the Constitution of the United States or that of Oregon. *Re Oberg*, 21 Or. 406, 14 L. R. A. 577, 28 Pac. 130.

The legislature has a right to classify and impose license taxes upon trades and occupations, and may delegate to municipalities the power to do so; and, provided all pursuing the same occupations are taxed alike and equally, it is no objection to the tax that it does not apply to all business pursuits and every kind of occupation. *Rankin v. Henderson*, 9 Ky. L. Rep. 361, 7 S. W. 174.

When a state Constitution provides that all property shall be taxed according to its value as determined in a manner directed by the legislature, so that taxes shall be equal and uniform throughout the state, and no species of property be taxed higher than any other of the same value, every citizen is brought, for the purpose of taxation, into one constitutional class, and it is not competent for the legislature, under the form of classification, to divide this class and violate the Constitution by providing that taxes be assessed upon some on a different basis than value, and at an unequal and multimetric rate in proportion to value. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168.

When a tax is imposed on vocations or privileges, or on the franchises of corporations, it must be equal and uniform; but the equality and uniformity consist in the imposition of the like tax upon all who follow the same vocation, or who enjoy the same privilege subjected to the tax, and, if it be a franchise tax, upon all corporations belonging to the class upon which it is imposed. *Phoenix Carpet Co. v. State*, 118 Ala. 143, 22 So. 627.

If all in the same class are taxed alike, the requirement of the Mississippi Constitution, of uniformity and equality of taxation, is met. 60 L. R. A.

Vicksburg Bank v. Worrell, 67 Miss. 47, 7 So. 219.

Licenses and occupation taxes must be equal and uniform upon every member of the same class subjected thereto, when there is a constitutional requirement of equality and uniformity of taxation. *State v. Emdon*, 23 La. Ann. 663.

Under a constitution requiring uniformity and equality in taxation, but permitting the legislature to levy an income tax upon all persons pursuing any occupation, trade, or calling, and that all such persons procure licenses as provided by law, the legislature has power to select for taxation any trade, occupation, or calling, but is not competent, when taxing a calling, to exempt from the tax any one party who follows that calling. The tax must burden equally all in the selected calling. *New Orleans v. Louisiana Sav. Bank & S. D. Co.* 31 La. Ann. 637.

b. In the concrete.

1. Reasonable classifications.

The wide discretion conceded to legislatures in classifying the subjects of taxation necessarily impels courts in the majority of cases to uphold a given classification adopted. Classifications that have been sustained vary all the way from natural and obviously proper divisions to those which are barely justifiable, or even dubious.

Corporations generally may be put in a single class. *People v. Home Ins. Co.* 92 N. Y. 328; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593; *People v. Equitable Trust Co.* 96 N. Y. 387; *People v. Gold & Stock Teleg. Co.* 98 N. Y. 67; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666, 17 N. E. 11; *State, Trenton Iron Co., Prosecutor, v. Yard*, 42 N. J. L. 357; *Com. v. Mammoth Vein Coal & I. Co.* 3 Dauphin Co. Rep. 220.

They may be subdivided according to the rate of their dividends. *Com. v. Delaware & H. Canal Co.* 1 Dauphin Co. Rep. 257.

Their capital stock may be treated as a distinct class of investments. *Com. v. National Oil Co.* 157 Pa. 516, 27 Atl. 374; *Com. v. Mill Creek Coal Co.* 157 Pa. 524, 27 Atl. 375; *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564.

Their stockholders may be constituted a separate class of taxpayers. *Wiley v. Salisbury*, 111 N. C. 397, 16 S. E. 542.

And their funded debts a distinct species of taxable property. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Com. v. Delaware Division Canal Co.* 123 Pa. 594, 2 L. R. A. 798, 16 Atl. 584; *Coal*

ment? Chancellor Kent thus states the doctrine: "Every person is entitled to be protected in the enjoyment of his property, not only from invasions of it by individuals, but from all unequal and undue assessments on the part of government. It is not sufficient that no tax or imposition can be imposed upon the citizens but by their representatives in the legislature. The citizens are entitled to require that the legislature itself shall cause all public taxation to be fair and equal in proportion to the value of property, so that no one class of individuals and no one species of property may be unequally or unduly assessed." 2 Kent, Com. 331. This is not a question of allowing the laws of another state to interfere with the right of taxation in this. The case presents no such question. The question is, rather, whether, under our consti-

tution, evidences or representatives of property can be taxed in this state, while the property they represent is not, never has been, and cannot be, taxable here, but is, and always has been, taxable in the state where located. Is a certificate of stock any more property than a deed of land or contracts of co-partnership? All are evidences of property, and nothing more.

I will now discuss the authorities cited in my Brother Long's opinion, and others cited in the brief of the attorney general:

In *Youngblood v. Seaton*, 32 Mich. 407, 20 Am. Rep. 654, the right to impose a tax upon the liquor traffic, as a condition to the right to carry on the business, was involved. It was a personal tax, and not one upon property. It was in effect a license tax, which every dealer was required to pay before entering into the traffic. The court expressly

Ridge Improv. & Coal Co. v. Jennings, 127 Pa. 397, 17 Atl. 986, Affirmed in 147 U. S. 147, 37 L. ed. 116, 18 Sup. Ct. Rep. 282; *Com. v. Lehigh Valley R. Co.* 129 Pa. 429, 18 Atl. 406, 410; *Simpson v. Hopkins*, 82 Md. 478, 33 Atl. 714.

Foreign and domestic corporations may be separately classified. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 126 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Com. v. Germania L. Ins. Co.* 11 Phila. 553; *Germania L. Ins. Co. v. Com.* 85 Pa. 513; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 521; *Hughes v. Cairo*, 92 Ill. 339; *Walker v. Springfield*, 94 Ill. 364; *Michigan Mut. L. Ins. Co. v. Hartz (Mich.)* 8 Det. L. N. 882, 88 N. W. 405; *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 665; *State v. Lathrop*, 10 La. Ann. 398; *State v. Foe-dick*, 21 La. Ann. 434; *Insurance Co. v. New Orleans*, 1 Woods, 85 Fed. Cas. No. 7,052; *New Orleans v. Pontchartrain R. Co.* 41 La. Ann. 519, 7 So. 83.

Railroads constitute a natural class. *State Railroad Tax Cases*, 92 U. S. 575, *sub nom.* *Taylor v. Secor*, 23 L. ed. 663; *Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom.* *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 85 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Florida C. & P. R. Co. v. Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176; *Boston, C. & M. R. Co. v. State*, 60 N. H. 87; *State Board v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578; *State v. Northern C. R. Co.* 44 Md. 181; *Atlantic & D. R. Co. v. Lyons (Va.)* 42 S. W. 982; *Wilmington, C. & A. R. Co. v. Brunswick County*, 72 N. C. 10; *Richmond & D. R. Co. v. Div. v. Brogden*, 74 N. C. 707; *Piedmont R. Co. v. Reidsville*, 101 N. C. 404, *sub nom.* *Richmond & D. R. Co. v. Reidsville*, 2 L. R. A. 284, 2 Inters. Com. Rep. 416, 8 S. E. 124; *Chamberlain v. Walter*, 60 Fed. 788; *Columbus Southern R. Co. v. Wright*, 89 Ga. 574, 15 S. E. 293, Affirmed in 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 183 Ind. 513, 18 L. R. A. 729, 38 N. E. 421, Affirmed in 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; *Porter v. Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Huck v. Chicago & A. R. Co.* 86 Ill. 352; *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 320; *Dubuque v. Chicago, D. & M. R. Co.* 47 Iowa, 196; *State ex rel. Kansas City, St. J. & C. B. R. Co. v. Severance*, 55 Mo. 378; *State ex rel. Brown v. Missouri P. R. Co.* 92 Mo. 137, 8 S. W. 862; *Francis v. Atchison, T. & S. F. R. Co.* 19 Kan. 60 L. R. A.

303; *Missouri, K. & T. R. Co. v. Geary County*, 9 Kan. App. 350, 58 Pac. 121; *Northern P. R. Co. v. Barnes*, 2 N. D. 310, 51 N. W. 386; *Ames v. People*, 26 Colo. 88, 56 Pac. 656.

As it was substantially said in the New Jersey court of errors and appeals, railroad and canal property necessarily used for corporate purposes in an interlocking entirety is a natural class by itself, and of universal recognition as different from other classes. *State Board v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578.

Express companies may be put in a separate class. *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382.

And may be differentiated from other transportation companies doing an express business. *Pacific Exp. Co. v. Seibert*, 44 Fed. 310, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

Banks and bankers may be made another separate class (*Portland Bank v. Apthorp*, 12 Mass. 252), and be further divided according as they may or may not be organized under a free banking act (*New Orleans v. People's Bank*, 32 La. Ann. 82), and, doubtless, according to the nature of the business they do.

As savings banks in one class. *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907; *Suffolk Sav. Bank, Petitioner*, 151 Mass. 103, 23 N. E. 728; *Union Five Cents Sav. Bank's Petition*, 68 N. H. 384, 36 Atl. 17; *Providence Inst. for Savings v. Gardiner*, 4 R. I. 484; *State v. Central Sav. Bank*, 67 Md. 290, 10 Atl. 290, 11 Atl. 357; *Collett v. Springfield Sav. Soc.* 13 Ohio C. C. 131.

And trust companies in another. *Montpelier Sav. Bank & T. Co. v. Montpelier*, 73 Vt. 364, 50 Atl. 1117; *Fidelity Trust Co. v. Vogt*, 66 N. J. L. 86, 48 Atl. 580.

Gas companies may be made another distinct class. *Ottawa Gaslight & Coke Co. v. Downey*, 127 Ill. 201, 20 N. E. 20; *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660; *Williams v. Rees*, 9 Blm. 405, 2 Fed. 882.

All corporations may, for some purposes, be put in one class. So may all manufacturing corporations. But this is not the limit of divisibility. Manufacturing corporations are of diverse kinds; and there is no reason why the legislature may not, if it pleases, put into one class, and tax, companies which make liquor or gas, while leaving all other manufacturing companies untaxed. *Com. v. Germania Brewing Co.* 145 Pa. 83, 22 Atl. 240.

A uniformity and equality clause does not preclude the legislature from exempting manufacturing corporations from a state tax to which

held that it was a uniform tax, and that "uniformity is the very basis of this tax. It is levied entirely without discrimination; and the real objection made to it is, not that it lacks uniformity, but that the legislature were unjust in making it uniform, instead of levying it by some standard of discrimination." The law was attacked as unjust and unequal, in that it was not levied in proportion to the business done. The language quoted in my brother's opinion does not apply to a case where taxation is conceded to be double, but to uniform tax laws, which cannot be made to operate justly in all cases, because of the infirmities of human judgment. In *State v. Lathrop*, 10 La. Ann. 398, a tax was imposed upon a foreign corporation as a condition to its doing business in the state of Louisiana. A like tax was imposed upon home companies, but

in a less amount. The decision is based expressly upon the right of the state to impose any condition it pleases upon foreign corporations desiring to do business within the state. That there be no mistake about this, I quote from the decision: "If this state has thought fit to recognize foreign charters of incorporation to the extent of permitting foreign corporations to transact business in their corporate name, through agents, within our limits, the legislature had an undoubted right to attach what conditions it thought fit to the privilege." In *Insurance Co. v. New Orleans*, 1 Woods, 85, 89, Fed. Cas. No. 7,052, the same question was involved, and the Federal court followed and quoted from *State v. Lathrop*. The same question was involved in *Hughes v. Cairo*, 92 Ill. 339, and the decision was expressly planted upon two grounds: (1)

corporations in general are liable. *Hawes Mfg. Co.'s Appeal*, 1 Monaghan, 353, 17 Atl. 219.

The legislature may go further. It may exempt those manufacturing corporations that carry on their manufacturing within the state, and may tax manufacturing corporations that do their manufacturing outside of the state, and yet not thereby come in conflict with the 14th Amendment to the Constitution of the United States. *New York v. Roberts*, 171 U. S. 658, *sub nom.* *New York ex rel. Parke, D. & Co. v. Roberts*, 43 L. ed. 323, 19 Sup. Ct. Rep. 58, affirming 149 N. Y. 608, 44 N. E. 1127.

Mining and mines may be separately classified. *Kittanning Coal Co. v. Com.* 79 Pa. 100; *People ex rel. Iron Silver Min. Co. v. Henderson*, 12 Colo. 369, 21 Pac. 144.

The sewing-machine business may be singled out for separate taxation in one form or another. *St. Louis v. Bowler*, 94 Mo. 630, 7 S. W. 434; *Quartlebaum v. State*, 79 Ala. 1; *Slinger Mfg. Co. v. Wright*, 97 Ga. 114, 35 L. R. A. 497, 25 S. E. 249; *Slinger Mfg. Co. v. Wright*, 33 Fed. 121.

A corporation engaged in the general business of refining raw sugars purchased by itself, or intrusted to it by others for that purpose, is in a different class from a sugar planter who grows and grinds the cane upon his own plantation and refines the product into sugar; since the former is a manufacturer, and the latter is a farmer or planter. A state, therefore, which discriminates between the two by taxing the corporate manufacturer and exempting the individual planter upon the sugar either refines, does not thereby deny to the corporation the equal protection of the laws in contravention of the 14th Amendment. *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43, affirming 51 La. Ann. 565, 25 So. 447.

2. Unreasonable classifications.

The cases are not numerous wherein a tax law has been adjudged void because it made a classification repugnant to the constitutional rule of equality and uniformity. But occasionally a piece of legislation is so incurably vicious that it cannot stand. Such was the Missouri statute, purporting to regulate business and trade, of May 16, 1899, known popularly as the anti-department store act, imposing license taxes,—a law which the supreme court of the state annulled without a dissenting vote. *Robinson, J.*, who expressed, in the main, the views of the court, attacked with vigor the classification made by the act as "wholly without reason

or necessity." He characterized it as "so arbitrary and unreasonable as to defy suggestion to the contrary;" as "classification run wild." The simple statement of its creation, said he, is a most fatal blow to its continued existence. *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L. R. A. 265, 55 S. W. 627.

There was a similar adjudication by the supreme court of Pennsylvania concerning the Pennsylvania act of June 15, 1897, regulating the employment of unnaturalized male foreigners, and imposing a *per diem* tax for each of such employees, to be deducted from his wages. The law was held to be repugnant to the 14th Amendment as a denial of the equal protection of the laws, and also violative of art. 1, § 9, of the state Constitution, commanding all taxes to be uniform upon the same class of subjects. *Juniata Limestone Co. v. Fagley*, 187 Pa. 193, 42 L. R. A. 443, 40 Atl. 977.

The United States circuit court in the western district of that state had previously reached the same conclusion. *Fraser v. McConway & T. Co.* 6 Pa. Dist. R. 555.

Sometimes a classification is so indefinite and so broad as to work, necessarily, an unequal burden, and the law is held void for that reason. That was the vice with an ordinance of a Virginia municipality laying a specific tax on every 1,000 lbs. of tobacco bought each month. The price of tobacco in that market ranged from 1 cent to \$1 per pound, and some dealers dealt only in the cheaper grades, and others entirely in the more expensive ones. *Danville v. Shelton*, 76 Va. 325.

A municipal ordinance in Pennsylvania suffered from a like infirmity, and was annulled for similar reasons. By its terms the assessors were directed to assess all offices and posts of profit, professions, trades, and occupations according to the income derived from them. It did not divide the several subjects of taxation, but grouped them all as occupations, and left the assessors to guess at the amount of the tax without guiding rules. The supreme court of the state deemed it hopelessly and incurably vicious. *Banger's Appeal*, 109 Pa. 79.

In Pennsylvania the legislature is held incompetent to fix an arbitrary valuation of property in one city, or in certain cities of the state, differing from the valuations in other cities therein. *Pittsburgh's Petition*, 138 Pa. 401, 21 Atl. 757, 759, 761.

Under a constitution forbidding any species of taxable property to be taxed any higher than another of equal value, and giving the legislature power to tax merchants, peddlers, and privileges, and authorize municipalities to

That the constitution of Illinois expressly provides that the general assembly may tax insurance interests or business, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct, by general law, uniform as to the class upon which it operates; and (2) that the legislature could impose any conditions it saw fit upon foreign corporations, as a condition to their right to do business in the state. In the above cases taxation of property subject to general taxation was no more in issue than it was in the case of *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487, 84 N. W. 1101, involving the validity of the inheritance tax law. All such cases do not involve the question of the assessment of property. They are license taxes, pure and simple, upon the right to do business and the statutory right

to inherit. The question now before us was not raised in *Graham v. St. Joseph Twp.* 67 Mich. 652, 35 N. W. 808. The plaintiff there was the owner of stock in a foreign corporation whose sole property was two steamboats, which were assessed at Benton Harbor, a city adjoining St. Joseph, where plaintiff lived. The court held that, if the boats were taxable at Benton Harbor, plaintiff's stock could not be taxed at St. Joseph, and held that the boats were not taxable in Benton Harbor, and the stock was therefore taxable in St. Joseph. The case of *Sturges v. Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014, arose in Ohio. Sturges was the owner of some stock of the Western Union Telegraph Company. He claimed exemption because some of the property of the telegraph company was situated in Ohio, and was there taxed. The court followed the

impose taxes for governmental purposes in such manner as may be prescribed by law, all property to be taxed ad valorem upon the same principles that govern state taxation; and under a charter authorizing a city to license, tax, and regulate merchants and certain other occupations, and to levy and collect taxes upon all privileges taxed for state purposes,—a municipal ordinance, declaring the business of selling goods by sample a separate vocation, and requiring from those who follow it a license charged for at \$300 and a bond in a penalty of \$5,000, to pay 1 per cent of sales, with an additional section making it apply only to merchants out of the city, and not dealing in agricultural products of their own growth, with provisions for a fine if it is not obeyed,—is void, because a municipality has no power to create a privilege in order to tax it, and because it cannot constitutionally discriminate between persons exercising the same privilege,—between resident and nonresident merchants. *Nashville v. Althorp*, 5 Coldw. 554.

c. Constituents of the same class.

It has already been noted that all members of the same class must be treated alike in tax laws; but that the legislature may carry the process of subdivision into classes to a very great length. The courts divide, therefore, upon the question as to whether a discriminating tax law merely discriminates between classes, or between members of the same class. If the former it is constitutional, if the latter, it is not.

1. Justifiable discrimination.

While a tax act which divides, for the purposes of taxation, the railroads operating in the state into two classes, to wit, those not paying an ad valorem tax to the state, and those which do, is undoubtedly class legislation, it is not of the vicious or forbidden kind, because it applies equally to all corporations that are, or may be, in like situation or circumstances; and it makes a natural and reasonable, not an arbitrary, classification, notwithstanding that out of a total of seventy-five railroads in the state only two are in the first class. *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 58 L. E. A. 921 43 S. W. 115.

A similar discrimination was sustained in *Columbus Southern R. Co. v. Wright*, 89 Ga. 574, 15 S. E. 293, Affirmed in 151 U. S. 470. 38 L. ed. 238, 14 Sup. Ct. Rep. 396.

The legislature is competent to put the debts of corporations in a different class from the 60 L. R. A.

debts of individuals for the purposes of taxation. *Com. v. Delaware Division Canal Co.* 123 Pa. 594, 2 L. R. A. 798, 16 Atl. 584; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Chester v. Pennsylvania*, 134 U. S. 240, 33 L. ed. 896, 10 Sup. Ct. Rep. 538; *Jennings v. Coal Ridge Improv. & Coal Co.* 147 U. S. 147, 37 L. ed. 116, 13 Sup. Ct. Rep. 282.

The equal protection of the laws is not denied by a state statute for the taxation of stock in foreign railroad corporations and the exemption of all stock in domestic ones and in others which list the great bulk of their property for taxation. *Kidd v. Alabama*, 188 U. S. 730, 47 L. ed. —, 23 Sup. Ct. Rep. 401.

Contracts of insurance, generally considered, possess such distinctive attributes as justify their classification separately from other contracts; and not alone that, but insurance contracts, as between themselves, may be classified separately, depending upon the nature of the insurance, the character of the property covered, and the extent of the loss that may supervene. *Farmers' & M. Ins. Co. v. Dobney*, 189 U. S. 301, 47 L. ed. —, 23 Sup. Ct. Rep. 565, Affirmed 62 Neb. 218, 86 N. W. 1070.

A statute enacting that there shall be paid to the treasurer of a city fire department for its use and benefit, annually on a stated day, by every person who acts in such city as agent for or in behalf of any individual or association of individuals not a domestic corporation to effect insurances against fire in such city, although his principal may be a foreign corporation existing for that purpose, \$2 on the \$100, and at that rate upon the amount of all premiums received,—is not repugnant to the 14th Amendment to the Federal Constitution as an arbitrary discrimination against a class of citizens pursuing a lawful vocation, *vis.*, those acting for unincorporated or foreign associations, who are burdened with a tax from which others in the same calling, representing domestic corporations, are free, when both have equal rights before the law; because unincorporated and foreign associations of this character receive the same benefits as, without being subject to the burdens of, domestic incorporated ones, and the legislature has a right to classify them apart. *New York Fire Department v. Stanton*, 159 N. Y. 225, 54 N. E. 28.

Under constitutional provisions requiring taxation to be equal and uniform, but permitting the legislature to levy a license tax, and, when it does so, to graduate the amount thereof to be collected from those pursuing the taxed trades, callings, and professions, it is competent for

decision of the Ohio court in *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547, where it was held that the stock of a foreign corporation, owned by a resident of Ohio, was not included in the act exempting from taxation shares of capital stock which was taxed in the name of the corporation. The constitution provided: "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, and joint-stock companies or otherwise." [Ohio Const. art. 12, § 2.] In *Bradley v. Bauder* it is said: "Both the constitution and the statute expressly designate 'investments in stocks' as one of the subjects of taxation, without any restriction or limitation as to the place or state where such 'stocks' may be authorized or issued." Taxation of both domestic and foreign stocks, therefore, was expressly authorized by the constitution of

Ohio. The right to tax was not in question. The sole question was whether the fact that some of its tangible property had its situs in Ohio, and was there taxed, brought the case within the exemption of the statute. The same question again arose in *Lee v. Sturges*, 46 Ohio St. 153, 2 L. R. A. 556, 19 N. E. 560, and was held to be governed by *Bradley v. Bauder*. That case was decided in 1889. On page 161, 46 Ohio St., is this language: "Whether shares of the stockholders and the capital of the company constitute the same or different species of property has been the subject of much discussion in a great number of cases. But the weight of authority we believe to be in favor of the proposition that shares of stock constitute property distinct from the capital or property of the company." Two of the five justices dissented.

the legislature to divide into classes those who follow the insurance business, and tax them according to the amount of premiums collected,—the greater the premiums the greater the tax. *State v. Liverpool, L. & G. Ins. Co.* 40 La. Ann. 463, 4 So. 504.

It is competent for the legislature, in imposing privilege or occupation taxes, to make the amount graduated according to the business done, and to exempt all following a taxed business whose incomes from it are less than a stated sum. That is, the tax may be laid upon those, only, whose incomes exceed a specified amount, without violating the constitutional rule of equality and uniformity of taxation, provided, the tax bears equally upon all having the same income. *Cobb v. Durham County*, 122 N. C. 307, 30 S. E. 338.

A statute imposing an occupation tax upon the business of dealing in stocks and bills of exchange, and fixing the amount thereof five times as high when followed in any city or town of a stated population, or greater, as the sum charged in a city or town having a less number of inhabitants, does not violate a constitutional requirement that taxation shall be equal and uniform throughout the state. Although such a constitutional provision is dominant and must be respected in the levy of all taxes for general revenue purposes, either ad valorem property taxes, or income and occupation taxes, yet, as the Constitution lays down no rule by which the required uniformity is to be secured, and the same specific tax upon all persons following a given occupation no matter how variant the conditions attending its pursuit would produce the grossest inequality, it is for the legislature to say how best to secure uniformity of burden. *Texas Bkg. & Ins. Co. v. State*, 42 Tex. 636.

(The fallacy in this reasoning is obvious. Because a certain method which was not adopted would have resulted in great inequality, therefore, the method actually adopted, which also resulted in great inequality, was valid. This kind of ratiocination has been aptly styled "grotesque reasoning.")

A statute imposing a license tax upon the business of buying and selling fresh meats from stores, offices, and vehicles, graduated according to the population of the cities in which it is conducted; having no application outside of city limits; and exempting therefrom farmers who kill and sell their own stock,—is not void for want of constitutional uniformity. It bears equally upon all in the same class. *State v. Carter*, 129 N. C. 560, 40 S. E. 11. (See, *contra*, *Georgia Packing Co. v. Macon*, 22 L. R. A. 775, 4 Intern. Com. Rep. 508, 60 Fed. 774, and *St. 60 L. R. A.*

Louis v. Spiegel, 75 Mo. 145, *infra*, div. IX., c. 2.)

2. Improper discrimination.

Under a constitution commanding all taxable property to be taxed ad valorem, and the legislature to enact laws for a uniform and equal rate of assessment and taxation, and to prescribe by general laws regulations to secure a just valuation so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property, with a proviso that a deduction of debts from credits may be authorized,—a statute allowing the deduction of all bona fide debts from the gross amount of all the taxpayers' credits except bank stock is unconstitutional so far as it refuses such deduction to bank stocks, for these are credits within the meaning of the Constitution, and entitled to be taxed uniformly and equally with other credits. *Pullman State Bank v. Manning*, 18 Wash. 250, 51 Pac. 464.

Conceding that trust companies may be classified for taxation separately, there is nothing in the character of their property or the uses to which it is devoted which differentiates it from like property of other owners not in the same class. Therefore, the stocks, bonds, notes, mortgages, and other securities belonging to a trust company must be taxed at their true value the same as if an individual was their owner. *Fidelity Trust Co. v. Vogt*, 66 N. J. L. 36, 48 Atl. 580.

When the Constitution requires all taxation to be equal and uniform upon the same class of subjects, and all taxable property to be taxed ad valorem within the territorial limits of the authority levying the tax, and taxes to be levied and collected under general laws, a municipal ordinance which, in terms, imposes a higher rate of tax upon bank stock than upon personal property generally is void. *Savannah v. Weed*, 84 Ga. 683, 8 L. R. A. 270, 11 S. E. 235.

State bank stockholders are entitled to the same deductions that national bank stockholders are accorded in the Alabama tax laws. *State Bank v. Montgomery County Bd. of Revenue*, 91 Ala. 217, 8 So. 852.

A municipal ordinance providing for the payment by insurance companies doing business in the city, of a license tax graded from \$750 to \$6,000 annually according as the amount of premiums received varies between \$150,000 or under and \$1,000,000 or over, is unconstitutional and void for want of equality and uniformity. Licenses, as well as taxes, must be equal when imposed upon the same class or call-

In the construction of state constitutions and state statutes, the Supreme Court of the United States follows the decisions of the state courts, where they are not in conflict with the Constitution of the United States. Several cases are cited by the attorney general from the Supreme Court of the United States, and from other courts, holding that the shares held by stockholders are distinct from the capital stock of the corporation, and that taxation of both is not always necessarily double taxation. Among them is *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198, where it was expressly held that the assessment of a tax upon shares or shareholders in a corporation, which the company was required to pay irrespective of any dividends or profits payable to the shareholders out of which it might repay itself, was sub-

stantially a tax upon the corporation itself. Counsel quote from that case as follows: "It is well settled by the decisions of this court that the property of stockholders in their shares and the property of the corporation in its capital stock are distinct property interests, and, where that is the legislative intent, clearly expressed, that both may be taxed." In other words, such legislation by the states does not conflict with the Constitution of the United States. That case quotes with approval the language of the same court in *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645, wherein it was held that a state statute exempting the capital stock of a railroad company from taxation exempted the shares of stock in the hands of holders. The language quoted is as follows: "In corporations, four elements of taxable value are

ing. *New Orleans v. Home Mut. Ins. Co.* 23 La. Ann. 449.

A tax laid pursuant to the authority to the legislature to levy an income tax upon all persons pursuing any trade, occupation, or calling, and to the requirement that all such persons obtain a license as provided by law, in the Louisiana Constitution, must be equal and uniform on all who follow the business taxed; and, therefore, it can be imposed but once upon any single taxpayer no matter how many separate places of business such taxpayer may have. *Merchants' Mut. Ins. Co. v. Blandin*, 24 La. Ann. 112.

A tax levied, assessed, and collected as a property tax upon the gross receipts of a foreign insurance company, when the receipts of other companies are left untaxed, is unconstitutional. *Parker v. North British & M. Ins. Co.* 42 La. Ann. 428, 7 So. 599.

To the same effect, holding void a municipal ordinance discriminating in the same way between resident and nonresident insurance companies, regardless of whether in point of fact there were any resident companies, was the case of *Mutual Reserve Fund Life Assn. v. Augusta*, 109 Ga. 73, 35 S. E. 71.

A municipal ordinance requiring every agent for every insurance company not located in the city to procure a separate license for each company represented by him, but allowing any resident of the city who has procured such a license to employ as many solicitors as he chooses, is void for unjust, partial, and unequal discrimination against nonresidents and agents of ultra-urban companies. *Simrall v. Covington*, 90 Ky. 444, 9 L. R. A. 556, 14 S. W. 369.

The Indiana act of March 9, 1891, to create a fireman's pension fund by exacting a tax from such foreign insurance companies as did business in counties wherein were cities with paid fire departments was held unconstitutional because, applying, as it did, to only some of the foreign insurance companies in parts of the state, and burdening these for the benefit of a particular class, it violated the equality and uniformity clause. But that statute was also considered to violate another provision of the Constitution forbidding the enactment of a law embracing a subject not expressed in the title. *Henderson v. London & L. Ins. Co.* 135 Ind. 23, 20 L. R. A. 827, 34 N. E. 565.

The Nebraska act of 1899, chap. 47, which discriminated between domestic and foreign insurance companies, taxing the former upon the excess of premiums over losses and current expenses in lieu of other taxes, except those upon real estate and those others provided for

in the general revenue law, and taxing the latter certain fees, and, in addition, 2 per cent of their gross premiums in full of all fees and taxes except on real estate,—was held unconstitutional because in conflict with the uniformity and equality clause of the state Constitution. *State ex rel. Cornell v. Foynter*, 59 Neb. 417, 81 N. W. 481.

An act taxing personal judgments, except those in foreclosure, for labor performed, and for materials furnished to build upon or improve lands, is void for violating a constitutional provision requiring a uniform and equal rate of assessment and taxation without inclusive exceptions. *Hamilton v. Wilson*, 61 Kan. 511, 48 L. R. A. 238, 59 Pac. 1069.

An exemption of notes or bills for work or labor done from a tax imposed upon all other notes or bills is unconstitutional for want of equality and uniformity of taxation among members of the same class. *Fox's Appeal*, 112 Pa. 355, 4 Atl. 149.

A revenue act authorizing the levying and collecting of a specific tax upon wagons, drays, carriages, etc., graded according to the number of animals employed in their traction, is void because it does not bear equally and uniformly on all members in the same class. *State v. Endom*, 23 La. Ann. 663.

Municipal ordinances imposing upon wholesale and retail dealers in meats license taxes and burdensome restrictions as to times when, places where, and quantities of, sales, having the effect necessarily to hamper dealers in dressed meats from other states, from all of which burdens, charges, and restrictions all who sell meats from animals of their own raising are free,—are void for denying the equal protection of the laws guaranteed by the 14th Amendment. *Georgia Packing Co. v. Macon*, 22 L. R. A. 775, 4 Inters. Com. Rep. 508, 60 Fed. 774, Appeal Dismissed in 9 C. C. A. 262, 13 U. S. App. 592, 60 Fed. 781.

A constitutional provision that taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax renders invalid a municipal ordinance imposing license taxes upon meat shops, differing in amounts according to their location in various parts of the city. *St. Louis v. Spiegel*, 75 Mo. 145.

(The reader should compare the two cases just cited with that of *State v. Carter*, 129 N. C. 560, 40 S. E. 11, *supra*, div. IX., c. 1, and read all three in connection with *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43, *affirming* 51 La. Ann. 565, 26 So. 447.)

sometimes found: 1, Franchises; 2, capital stock in the hands of the corporation; 3, corporate property; and 4, shares of the capital stock in the hands of the individual stockholders. Each of these is, under some circumstances, an appropriate subject of taxation; and it is, no doubt, within the power of a state, when not restrained by constitutional limitations, to assess taxes upon them in a way to subject the corporation or the stockholders to double taxation. Double taxation is, however, never to be presumed. Justice requires that the burdens of government shall, as far as is practicable, be laid equally on all; and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect, but, if they do, it is because the legis-

lature has unmistakably so enacted. All presumptions are against such an imposition." I do not deem it necessary to enter into an analysis of the other cases cited from the United States Supreme Court. Some of them arose under the national banking act, where the state had taxed the stock of these banks in the hands of their shareholders. Of those cases it is sufficient to say that the banking act expressly provided for such taxation. But when the state law did not comply with the national act the state law was held void. This was the case in *Van Allen v. The Assessors*, 3 Wall. 573, *sub nom. Churchill v. Utica*, 18 L. ed. 229. In other cases it was insisted that the state taxation was in violation of contracts which the state and the corporation entered into, and was therefore in violation of the Constitution of the United States. Where such

X. Exposition and interpretation.

a. Constitutions.

Mr. Justice McKenna, of the Supreme Court of the United States, significantly said, in the course of one of his opinions, that what satisfies equality in the clause of the 14th Amendment which prohibits a state from denying to any person within its jurisdiction the equal protection of the laws has not been, and probably never can be, precisely defined. *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1087, 18 Sup. Ct. Rep. 594.

And, as this remark will apply with equal pertinency to the various clauses respecting uniformity and equality of taxation in state Constitutions, the investigator in this field is obliged to collate and place in juxtaposition a large number of cases in which the courts have construed constitutions and laws in relation to particular facts.

Neither the Federal, nor the Iowa, Constitution requires taxes imposed upon foreign corporations as a condition upon which they may enter and do business within the state to be uniform and equal upon all engaged in the taxed business. *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 865.

Under a constitution providing that all taxes shall be uniform upon the same class of subjects within the territory of the authority levying the tax, and be levied and collected under general laws securing a just valuation for taxation of all property, real and personal; but that mines and mining claims of precious metals shall be exempt for ten years, and may be taxed thereafter,—when the legislature afterwards taxes mines and mining claims it is bound to do so conformably to the rest of such constitution. *People ex rel. Iron Silver Min. Co. v. Henderson*, 12 Colo. 369, 21 Pac. 144.

The power given by the Massachusetts Constitution to the legislature to impose and levy proportionate and reasonable assessments upon all the inhabitants of, and persons resident, and estates lying, within the commonwealth, requires for its exercise an estimate or valuation of all the property within the commonwealth, and then an assessment of each individual according to his proportion of that property. To select any individual or company, or any specific article of property, and assess them by themselves, would be a violation of this provision. *Portland Bank v. Apthorp*, 12 Mass. 252.

And of the like provision in the Constitution of New Hampshire, Chief Justice Doe, of that state, declared, in 1880, that "the unconstitu-

tionality of unequal taxation is too plainly declared by our Constitution, and too well settled by repeated decisions made during the last fifty-three years, to be debatable." *Boston, C. & M. R. Co. v. State*, 60 N. H. 87.

Constitutional provisions that, while the public expenses shall be assessed on polls and estates a general valuation shall be taken, at least decennially; and that all taxes on real estate assessed by authority of the state shall be apportioned and assessed equally according to the just value thereof,—forbid the levying of taxes for private purposes, as to give or loan to individuals; and they require equality and uniformity in taxing the same class of subjects. *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395.

A constitutional provision that property shall be assessed for taxes under general laws and by uniform rules *ad valorem* requires, not only that the assessment be under general laws, but that it shall be by uniform rules also; but it does not require that all property shall be assessed for taxes, but that, when assessed, it shall be so according to the constitutional mandate. *State Board v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 378.

The terms "property" and "all property" are not interchangeable, and courts are not warranted in substituting one for the other. *Ibid.*

A constitutional provision requiring the property of all corporations to be taxed in the same manner as the property of an individual will not permit the deduction of the corporate debt in assessing a corporation upon its entire property, real and personal, tangible and intangible, including its franchise, under the general designation of capital stock, when individual taxpayers are allowed no debt deductions. *Henderson Bridge Co. v. Com.* 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, Affirmed in 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *Paducah Street R. Co. v. McCracken County*, 105 Ky. 172, 49 S. W. 178.

A constitutional provision that all property shall be taxed is not self-executing. The mode of taxing must be prescribed by the legislature, and the statute strictly followed. *De Witt v. Fays*, 2 Cal. 463, 56 Am. Dec. 352.

A constitutional provision requiring the property of private corporations and of individuals to be taxed at the same rate is not self-executing; so that when, by statute, the incomes of natural persons are taxed, it becomes imperative to tax railroad incomes at the same rate without any legislative enactment therefor. *State v. Mobile County*, 73 Ala. 65.

A constitutional provision that taxation, save

contracts were clearly made, the state laws taxing them were held to be in violation of such obligations, under the Constitution of the United States, and therefore void. Where no such contract relations existed, the power of taxation was held to be a matter for the state to determine, and its action and the judgment of its courts thereon were binding. Others are cases where it has happened that one's property had been taxed in two jurisdictions. While this is recognized as a hardship, it seems to be occasionally unavoidable. This is the case in *Coe v. Errol*, 116 U. S. 524, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, where forest products intended for exportation to another state, and partially prepared for that purpose, were taxed because their situs was there, while during the same year they were assessed to their owner, as a part of his general estate,

in the state to which they were to be exported and where he resided. This involves another rule, viz., the undoubted right of the state to tax personal property situated within its borders.

In most of the cases cited by counsel for respondent from the courts of other states the question now presented does not appear to have been raised. Whether at the time those decisions were rendered the constitutions of such states contained a provision similar to that of our own, I have not taken the time to investigate. If they did, the decisions could be of little value as precedents upon a question which was not brought to the attention of the courts. We are not dealing with a case where the value of the property, which represents the value of the stock, has not been taxed, or perhaps could not be taxed, in a foreign jurisdiction, the

as therein provided, whether imposed by state, counties, or municipalities, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law; and that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value,—is not self-executing so as to empower counties to assess county taxes upon railroad property within their limits independently of any express legislative authority. *Virginia & T. R. Co. v. Washington County*, 80 Gratt. 471; *New York, P. & N. R. Co. v. Northampton County*, 92 Va. 661, 24 S. E. 222.

The uniformity and equality provision of the Mississippi Constitution of 1890, § 112, applies to city, as well as to state and county, taxes. *Adams v. Mississippi State Bank*, 75 Miss. 701, 28 So. 395.

And that of the North Carolina Constitution relates only to taxes for ordinary purposes, and does not apply to special taxes authorized to enable a town to meet its subscription for railway stock. *Jones v. Person County*, 107 N. C. 248, 12 S. E. 69.

The last clause of the uniformity and equality provision of the Illinois Constitution (art. 9, § 1), empowering the legislature to tax certain designated occupations and corporations owning or using franchises or privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates, in no wise limits the first clause requiring proportionate taxation, but merely authorizes the prescription of various methods for assessing and collecting such taxes. *People's Loan & Homestead Assn. v. Keith*, 153 Ill. 609, 28 L. B. A. 65, 39 N. E. 1072.

b. Statutes.

1. Consistent laws.

One of the earliest of taxing statutes to be construed with respect of a constitutional provision for uniform and equal taxation was the act of the Massachusetts legislature that was before the court in the old case of *Portland Bank v. Apthorp*, 12 Mass. 252. That case was decided in 1815, and construed a provision in the Massachusetts Constitution of 1780,—a provision that was unchanged when, in 1867, Mr. Justice Clifford, writing for the United States Supreme Court in a later case, made his lucid review of the decision. The act of 1812, said that jurist, in substance, required incorporated banks to pay the state treasurer annually a tax of $\frac{1}{2}$ of 1 per cent on the amount of the 60 L. R. A.

original stock issued to the stockholders, and it was attacked by the Portland Bank upon the grounds: (1) That the tax was illegal because not equal and proportional; (2) that the bank was not liable to it because chartered before the statute; and (3) that the legislature was powerless to select specific property to tax and assess its owner separately from his proportional share of the taxes required of all inhabitants. And that the court unanimously held: (a) That the statute was constitutional; (b) that the regulation upon the bank could not be justified under the first branch of the powers conferred upon the legislature, viz., to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident, and estates lying, within the commonwealth, because it did not meet the condition that assessments, etc., should be proportional upon all; (c) that the legislature could not select any company or individual, or any specific article of property, and assess them or it separately, because this would not be proportional; (d) that, as the charter of the bank contained no waiver of the right to tax it, a duty or an excise might be laid upon it; and (e) that, while the operation and effect of the term "excise" were limited to any produce, goods, wares, merchandise, and commodities, yet the word "commodities" embraced everything taxable, and included "convenience, privilege, profits, and gains;" and that, under such a construction, the legislature had, without complaint, for thirty years, exacted money annually from auctioneers, attorneys, tavern keepers, and liquor sellers, and might tax the privilege of following, and impose conditions upon, the pursuit of any business, employment, or handicraft. *Provident Inst. for Savings v. Massachusetts*, 6 Wall. 611, 18 L. ed. 907.

And thereupon, for the same reasons, a similar act was held constitutional. *Ibid.*

A railroad corporation subjected to a state tax imposed under a separate classification for the purpose, under a law styling its property real estate, yet treating it as distinct from other forms of real estate, such as farms and town lots, and treating it, too, differently from the property of other corporations,—mining, manufacturing, gas, water, bridge, and street railway companies,—is not thereby denied the equal protection of the laws. *Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

A statute exacting from foreign corporations which do not invest or use their capital within the state (except insurance companies) an an-

situs of all its property, or where its value does not consist of tangible property, but largely of its franchisees, like that of the Western Union Telegraph Company, doing business in every state of the Union, in *Sturges v. Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; or like that of an express company, in *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; or like that of a turnpike road, wherein the court, to justify the assessment of the stock of a foreign corporation, said: "The beneficial interest, the valuable property, consists in the franchise and right to receive tolls; and whether the right of the company in the soil of their road be technically a fee, or a perpetual easement, makes no difference." *Great Barrington v. Berkshire County*, 16 Pick. 572. As a reason for the power to tax shares of

stock of corporations, the supreme court of Ohio, in *Lee v. Sturges*, said: "The shares of stock may be worth much more than the property of the corporation; that is, the franchise may be very valuable, while the visible capital may be of but little value; and dividends may be greatly out of proportion to the tangible property, as frequently occurs in regard to street railroads, gas companies, electric light companies, etc." This language was used as applicable to domestic as well as foreign corporations. It could not apply in this state, where we have just held that franchisees may enhance the value of corporate property, which is to be assessed as a unit, and at its cash value. *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809. There may be cases where such stock is properly and justly assessable under the

nual tribute of $\frac{1}{4}$ of a mill upon every dollar of their authorized capital stock before they can have an office in the state for their stockholders, officers, agents, or employees does not deny the equal protection of the laws within the purview of the 14th Amendment. *Pembla Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

A state law subjecting to an annual tax all moneyed securities not issued by corporations and not corporate bonds, at a stated sum on their actual value, and corporate securities at the same sum on their nominal value, is not violative of the 14th Amendment to the Constitution of the United States as a denial of the equal protection of the laws to those subjected to taxation upon corporate obligations, because all corporate securities are treated alike; and, if discriminated against in respect of other securities, the state is competent to make such a discrimination. And where such a tax is collected through the corporation by deduction from interest payments, there is no discrimination, since, when the interest is paid, the bonds are of full value, and when it is not, there is no tax. *Bell's Gap R. Co. v. Pennsylvania*, 184 U. S. 232, 33 L. ed. 862, 10 Sup. Ct. Rep. 533.

Such a law is no more repugnant to a provision in the state Constitution that all taxes shall be equal and uniform upon the same class of subjects than it is to the 14th Amendment. *Com. v. Delaware Division Canal Co.* 123 Pa. 594, 2 L. R. A. 798, 16 Atl. 584; *Coal Ridge Improv. & Coal Co. v. Jennings*, 127 Pa. 397, 17 Atl. 986, affirmed in 147 U. S. 147, 37 L. ed. 116, 13 Sup. Ct. Rep. 282; *Com. v. Lehigh Valley R. Co.* 129 Pa. 429, 18 Atl. 406, 410.

The rule of uniformity and equality of taxation is not violated by taxing a foreign express company upon the business it does within the taxing state by contract wholly over railroads and steamboat lines that it does not own, while the same business, done by the railroad and steamboat companies upon their own account, is not thus taxed, for the reason that railroad and steamboat companies pay equivalent taxes upon roadbed, rolling stock, boats, etc. Nor is such taxation any denial of the equal protection of the laws. *Pacific Exp. Co. v. Selbert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

The equal protection of the laws is not denied to railroads, nor are they unjustly discriminated against, when they, alone, are taxed to meet the salaries and expenses of railroad commissioners whose services are deemed essential to the public in consequence of the existence 60 L. R. A.

of the railroads and of the privileges they exercise and have obtained at their own request, and which services, when properly performed, are beneficial to the public, and entail the faithful discharge of duty by the railroads for the public safety and convenience. *Charlotte, C & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255.

A corporation of one state, which does some business in another, is not denied the equal protection of the laws in the latter, when it is therein subjected to a state tax, from which manufacturing corporations are exempt, under a statute thereof laying a tax upon all foreign and domestic corporations upon their business or franchise, computed by a percentage upon their capital stock, either at par or at actual value according as their dividends have or have not equaled 6 per cent. Such a tax is valid wholly regardless of the volume of business such a foreign corporation may transact in the taxing state, or of the amount of capital stock it employs therein, or of the extent to which it is benefited or protected by its laws. *Horn Silver Min. Co. v. New York*, 148 U. S. 306, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

A statutory system of railroad taxation for county purposes, under which are required from railroads that are not exempt from property taxation reports of the aggregate value of their whole property, the value of their real estate and trackage, of their rolling stock, and of all their other personal property, and the separate value of their property in each county through which their roads run; whereupon they are to be subject to a property tax in each of such counties to the same extent and in the same manner that all other property is taxed, and are to be assessed upon the property located in each county, first, upon the basis of the value thereof as they report it, and, second, on such proportion of their rolling stock and other personal property as the value of their property in the particular county bears to the value of all their property, real and personal; and under which are required from railroads that are exempt from property taxation, and are taxable upon income, reports of their total mileage and of their mileage in each county in which they operate; whereupon this class is to be assessed at the rates prescribed in their charters for each county upon such proportions of their incomes as the lengths of their roads in such county bears to the whole length of their respective lines,—does not in any wise conflict with the prohibition of the 14th Amendment against a denial of the equal protection of the

statute and the constitution. But we are dealing with a case where the value of all property which the stock represents, and of which its certificate is evidence, is all assessed and taxed by and in the state where it is situated, and where all such property has been assessed and taxed, in accordance with the custom of all the states from the foundation of the government to the present time, and where alone it can be taxed. I have endeavored to demonstrate that this is double, and therefore unequal, taxation. The question is new in this state, having never before been presented to its courts.

To interpret the constitution so as to include such taxation must be conceded to result in the accomplishment of a gross injustice, and to violate that rule of just taxation which lies at the foundation of honest government. It is a narrow construction. It violates the spirit of that instrument. To hold that such taxation is excluded by the constitution does justice to all its citizens, in subjecting them to equal taxation, and does injustice to none. In my judgment, the constitution, both in letter and in spirit, prohibits such taxation. I think the writ should issue.

laws. *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396, Affirming 89 Ga. 574, 15 S. E. 293, Followed in *Sparks v. Macon*, 98 Ga. 301, 25 S. E. 459.

A section in a state Constitution providing that all property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by the Constitution; that all corporate property shall pay the same rate of taxation paid by individual property; and that nothing in such Constitution shall be construed to prevent the legislature from providing for taxation based on income, licenses, or franchises,—does not preclude the taxation of corporate intangible property of a character never owned by individuals. *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527.

Statutes requiring every corporation, joint-stock company, and association, domestic and foreign alike, which does business in the state, except manufacturing or mining ones, whether domestic or foreign, wholly engaged in manufacturing or mining ores within such state (the excepted entities being expressly exempted), to pay a state tax upon its franchise or business, are not objectionable upon the ground that they deny the equal protection of the laws to a foreign manufacturing corporation doing its manufacturing in its home state and sending its output for sale to a market in the enacting state, and thereby subjected to the tax thus imposed. *New York v. Roberts*, 171 U. S. 658, *sub nom.* *New York ex rel. Parke, D. & Co. v. Roberts*, 43 L. ed. 323, 19 Sup. Ct. Rep. 58, Affirming 149 N. Y. 608, 44 N. E. 1127. The prevailing opinion in this case lays stress upon the fact that the statutes challenged made no discrimination between foreign and domestic corporations. That they taxed impartially, regardless of the state of their origin, all corporations not in terms exempted. That they exempted only those wholly engaged in manufacturing or mining within the state. A domestic corporation manufacturing outside of the state was just as liable to the tax as was a foreign one. A foreign corporation wholly engaged in manufacturing within the state was just as exempt as was a domestic one. There was no discrimination to the detriment of foreign corporations. Mr. Justice Harlan, who dissented, points out the superficiality of this view. The real question involved was not one of discrimination between domestic and foreign corporations, but between corporate manufacturers or miners within and without the state. The state discriminated in favor of its own products and against those produced in other states, when the producer was a corporation, either of its own or of another's creation. The majority opinion does not touch this question, and the dissentient rightly insists that it is crucial.

That by a special statute the state comptroller, who is charged by the general laws with 60 L. R. A.

the duty of assessing railroad taxes, is directed to assess the railroads of the state for taxes for certain past years in which they escaped taxation, and no similar act is passed with respect of other property generally assessable by local assessors, which had also escaped taxation in the same years, does not amount to a denial of the equal protection of the laws to the railroads, in contravention of the 14th Amendment. *Florida C. & P. R. Co. v. Reynolds*, 183 U. S. 471, 46 L. ed. 283, 22 Sup. Ct. Rep. 176.

An Indian reservation, although attached for judicial purposes to an organized county, is not a part of the same taxing district, so as to fall under the same tax law, and be subjected to the same taxation upon the principle of equality and uniformity. The foundation of the rule which generally obtains, that there shall be uniformity in taxation of the same kind of property in the same taxing district, rests on the assumption that in such district the circumstances regarding the property to be taxed are ordinarily the same in substance, although there may, and necessarily must, be some differences as to the extent to which the different owners of property may be benefited by the taxes collected thereon, and it is to be assumed that an alteration as to rate would work an unjust and illegal discrimination in taxing property situated alike. When the difference is deep and radical between the two domains in which the same kind of property may be situated, the law which makes them one district for taxation, so that all property of the same kind in the same district must be taxed alike, and no reasonable distinction be permitted, must itself be so plain and urgent that no other intention can be suggested. *Foster v. Pryor*, 189 U. S. 325, 47 L. ed. —, 23 Sup. Ct. Rep. 549, Affirming 11 Okla. 357, 66 Pac. 348.

The New York statute for raising state revenue by taxing certain corporations, etc. (Laws 1881, chap. 361, amending Laws 1880, chap. 542), does not deny to those taxed thereunder the equal protection of the laws, nor conflict with any other provision of the Federal Constitution. *People v. Home Ins. Co.* 92 N. Y. 328; *People v. Equitable Trust Co.* 96 N. Y. 387; *People v. Gold & Stock Teleg. Co.* 98 N. Y. 67.

(The statute referred to was the one that inaugurated the present system in vogue in New York, of taxing, for state purposes, corporations generally, both domestic and foreign, upon their franchises or business according to capital stock and dividends.)

A taxing statute enacting that all the real and personal estate of every domestic corporation, whether specially chartered or organized under the general corporation laws, shall be taxed the same as the real and personal estate of an individual is not shorn of its character as a general law for taxation according to a constitutional mandate by a proviso excepting from its operation railway, turnpike, insurance, canal, and banking property, savings banks, come-

teries, churches, and purely charitable and educational associations. *State, Trenton Iron Co., Prosecutor, v. Yard*, 42 N. J. 857.

A general statute for the taxation of railroad and canal property, which, leaving property not used for railroad or canal purposes to be taxed by local assessors in the same way and to the same extent as other property, separates and places in a class by itself all such property necessarily used for the purpose of railroading and operating canals, which, after due appraisal at its true value,—as is the rule with all property,—by a state board of assessors, is subjected to a tax for state purposes and to another for county and municipal purposes,—does not contravene a constitutional mandate requiring property to be assessed for taxes under general laws by uniform rules, according to its value. *State Board v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578.

A statute concerning trust companies, enacting that they shall be taxed upon the amount of their capital stock issued and outstanding, does not mean that they shall be assessed at the par value of the shares, but that the whole number of shares outstanding shall be assessed at their actual value. Otherwise construed, such an act would conflict with the constitutional mandate that all property shall be assessed for taxes under general laws and by uniform rules, according to its true value. *Fidelity Trust Co. v. Vogt*, 66 N. J. L. 86, 48 Atl. 580.

A tax upon the franchise of a corporation, measured by its business, viz., by the number of tons of coal mined or purchased and sold by it,—one not laid upon the coal itself,—does not violate the constitutional rule of uniformity. Such a tax is uniform. It is at the same rate on every gross ton mined, or purchased and sold. *Kittanning Coal Co. v. Com.* 79 Pa. 100.

A tax law imposing taxes upon capital stock of corporations, at one rate upon the actual cash value thereof when no, or less than 6 per cent, annual dividends have been paid thereon, and at another rate upon the par value thereof for each 1 per cent of dividends when 6 per cent or more dividends have been paid thereon, whereby, in practice, stock upon which less than a 6-per-cent dividend has been paid is often valued above par, and the companies whose stock is thus valued pay a higher tax than they would if they had paid higher dividends, and more taxes proportionately than do other companies paying larger dividends; and when, too, owing to varying conditions in corporate affairs, property, and business, the rate of dividends is an uncertain measure of value for corporate stock,—is, still, not unconstitutional for want of uniformity and equality. *Com. v. Delaware & H. Canal Co.* 1 Dauphin Co. Rep. 257.

An act for the taxation of corporations according to the value of their capital stock, embracing their property, assets, and franchises, is not rendered unconstitutional for conflict with the requirement that taxes be uniform upon the same class of subjects, by the existence of another act exempting real estate generally from state taxes, notwithstanding a part of such capital stock has been invested in, and represents, real estate. *Com. v. Mammoth Vein Coal & I. Co.* 3 Dauphin Co. Rep. 220.

There is no repugnancy to the article in the Maryland Bill of Rights declaring that every person in the state, or holding property therein, ought to contribute his proportion of public taxes for the support of the government according to his actual worth in real and personal property, in a statute levying a state tax annually, of a stated per cent, upon the gross receipts of all domestic steam railroads. For aught that appears such a tax is not unequal 60 L. R. A.

or unjust. *State v. Northern C. R. Co.* 44 Md. 131.

Nor is that Bill of Rights infringed by the taxing of corporate bonds and debt certificates, although individual mortgage debts are left exempt. This is not a discrimination against a special kind of property within the terms of that instrument. *Simpson v. Hopkins*, 82 Md. 478, 33 Atl. 714.

Legislation designed to carry into effect a constitutional provision that taxation, whether imposed by the state or by counties or municipalities, shall be equal and uniform; and that all property, real and personal, shall be taxed ad valorem, ascertained as prescribed by law; and that no one species of property from which a tax may be collected shall be taxed higher than any other species of equal value, by making railroad property bear its just share of local as well as state taxation, although the language employed is not so clear and explicit as to put the liability of all classes of railroad property beyond doubt,—will be given effect as authorizing local taxation of railroads, when, under the uniform interpretation of the public authorities from the time of its enactment, continuously, local taxes have been laid upon railroad property, and the official interpretation has inferentially received judicial sanction, and the railroads during the whole time have paid such local taxes. *Atlantic & D. R. Co. v. Lyons (Va.)* 42 S. E. 932.

A municipal ordinance imposing a tax upon every railroad running through the municipal limits, whether such tax is called a privilege tax or by another name, taxes a business within the municipality, and does not violate the principle of uniformity of taxation embedded in the North Carolina Constitution. *Piedmont R. Co. v. Reidsville*, 101 N. C. 404, *sub nom.* *Richmond & D. R. Co. v. Reidsville*, 2 L. R. A. 284, 2 Inters. Com. Rep. 416, 8 S. E. 124.

A statute fixing the situs, for taxation, of domestic corporate stock at the principal office of the corporation, and requiring it to be listed in the corporate name as capital stock, when the stockholders need not list it, and are not taxable upon it at their respective domicils, conforms to the constitutional requirement of equality and uniformity of taxation. *Wiley v. Salisbury*, 111 N. C. 397, 16 S. E. 542.

A statute laying an annual tax of a specific sum upon every sewing-machine company selling or dealing in sewing machines within the state by itself or through agents, and upon all wholesale dealers in sewing machines made by companies that have not paid such tax; and requiring such companies and wholesale dealers to furnish a list of their respective agents in each county, and pay an annual fee for each one,—does not conflict with a constitutional mandate for equal and uniform taxation. In imposing taxes upon privileges and occupations, the legislature may classify the subjects of the tax, and is only required to make a given tax uniform upon all who are in the particular class taxed. *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 35 L. R. A. 497, 25 S. E. 249.

Nor does such a statute come in conflict with the 14th Amendment as a denial of the equal protection of the laws to foreign corporations, when there are no domestic ones in the sewing-machine business in the state. *Singer Mfg. Co. v. Wright*, 33 Fed. 121, Appeal Dismissed in 141 U. S. 696, 35 L. ed. 906, 12 Sup. Ct. Rep. 103.

The case of *Quartiebaum v. State*, 79 Ala. 1, which arose upon a similar statute, is very much to the same effect as the two Georgia cases just cited.

A statute which imposes a license tax upon all refiners of manufactured sugar and molasses who purchase the crude sugar to refine and sell

again, while exempting from such tax farmers and planters who refine their own sugar, is not objectionable upon the score of denying the equal protection of the laws, since such refiners and the farmers or planters are in different classes, and the tax bears equally upon all in the same class. *State v. American Sugar Ref. Co.* 51 La. Ann. 562, 25 So. 447, Affirmed in 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.

A municipal ordinance laying license taxes on occupations in the city, by which foreign insurance companies are required to pay twice as large sums, each, as are domestic ones, was held in one case not to violate a constitutional article declaring that taxation should be equal and uniform throughout the state, since, it was said, the legislature was not thereby prevented from classifying for taxation, and foreign and domestic insurance companies may well constitute separate classes. Nor does such ordinance, the case further held, conflict with the 14th Amendment, forbidding any denial of the equal protection of the laws to any person within the jurisdiction of a state; for the alleged reason that corporations are not persons within that amendment. *Insurance Co. v. New Orleans*, 1 Woods, 86, Fed. Cas. No. 7,062.

Whether the decision in this particular case was right or wrong, the reasoning upon which it rests is clearly unsound.

Under a Constitution requiring all taxation to be equal and uniform throughout the state, and all property therein, except such as may be exempted by a two-thirds vote of both houses of the legislature, to be taxed ad valorem ascertained as directed by law, but conferring upon the legislature power to tax incomes, trades, occupations, and professions,—a statute taxing sellers of goods and merchandise a specific sum on each \$100 of value of such goods and merchandise when purchased for sale, or received for sale, as agent or auctioneer, and requiring sworn reports under penalty, is to that extent constitutional as an occupation tax law. Whether the other part of it, providing that the specific tax it imposes shall not be construed to exempt the goods and merchandise from the ad valorem taxes imposed elsewhere in the act is valid, is an open question, not decided. *State v. Stephens*, 4 Tex. 187; *State v. Bock*, 9 Tex. 369.

When the Constitution requires taxation to be equal and uniform, authorizes occupations other than mechanical and agricultural to be taxed, and limits local occupation taxes to one half those imposed by the state; and the state lays occupation taxes upon fire, life, and marine insurance companies, with a provision that receipts for the payment thereof shall be authority to pursue the occupation in any county of the state for which a receipt is held,—a city empowered, by a statute passed at the same session, to assess certain named occupations, and such others, not specifically named, as may be taxed by the laws of the state, may lawfully ordain an occupation tax, less than half the state tax, upon every fire and marine insurance company within its limits. The payment of the tax under the state law, and possession of a receipt for it for that county, do not authorize the carrying on in the city of an insurance business without payment of the municipal tax. *Ex parte Schmidt*, 2 Tex. App. 196.

When the tax laws of a state require the assessment of both corporations and individuals upon the intangible property they own at its fair cash value, as required by the Constitution unless exempted by that instrument, they are consistent with the constitutional requirement that taxation shall be equal and uniform in spite of the fact that, in virtue thereof, corporations are taxed upon intangible property which does not, and, from its nature, never

can, belong to natural persons. *Western U. Teleg. Co. v. Norman*, 77 Fed. 13.

The fact that a general taxing statute containing separate sections for the taxation of banks and other corporations and of individuals allows the individuals to deduct their debts, and does not allow the corporations to do so when the state Constitution not only commands equality and uniformity of taxation, but, in terms, declares all property to be subject to taxation without deduction, does not render void the provisions for taxing banks, but merely nullifies the sections discriminating in favor of individuals. *Exchange Bank v. Hines*, 3 Ohio St. 1.

The Ohio Constitution, in requiring banks and bankers to be so taxed that all property employed in banking shall bear a burden of taxation equal to that laid upon the property of individuals, is not violated by the statute (Rev. Stat. § 2759) requiring savings societies to make tax returns, deducting deposits from their cash, stocks, and bonds. *Collett v. Springfield Sav. Soc.* 13 Ohio C. C. 131.

Neither is the provision of such Constitution, requiring all property to be taxed by a uniform rule, violated by the statute (Rev. Stat. § 2417) directing no charge to be made by water-works trustees for water supplied to hospitals and charitable institutions for relieving the poor, aged, infirm, or destitute, or orphans. *Gallipolis v. Gallipolis Waterworks*, 2 Ohio N. P. 161.

A constitutional requirement that the general assembly shall provide by law for a uniform and equal rate of taxation is met in a taxing law when the same basis of assessment is fixed for all property, and the same rate of taxation is fixed within the taxing district. There are uniformity and equality of taxation and assessment when the property is to be assessed at its true cash value, and the same rate is fixed on all property subject to assessment for the tax,—when the rate of a state tax is the same all over the state, and the same rule is applied to counties and townships. *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 18 L. R. A. 729, 38 N. E. 421, Affirmed in 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122.

A general statute empowering cities with organized fire departments, to tax or license for the support of such departments, foreign insurance corporations doing business within their limits to the extent of 2 per cent of their gross premium receipts in the city conforms to a constitutional provision empowering the legislature to tax the owners and users of franchises and privileges, but only by general law uniform as to the class upon which it operates. *Walker v. Springfield*, 94 Ill. 364.

A Constitution which, while requiring proportionate ad valorem property taxation, authorizes the taxation of certain named callings and certain privileges and franchises by general law operating uniformly upon the respective classes, and then provides that the designation of the subjects of taxation shall not prevent the legislature from taxing other subjects consistently with such principles, justifies taxing livery-stable keeping, although that business was not among those named as taxable without a valuation. *Howland v. Chicago*, 108 Ill. 496.

A statute which, by one section, provides for the valuation by a state board of equalization, for the purposes of taxation, of the capital stock of all domestic companies or associations (except certain specified ones left to be assessed by local assessors), at its fair cash value, determined according to rules that such board adopts for the purpose, containing an exemption of shares of stock, and a provision for the assessing by local assessors in the same manner that

they assess individual's property of manufacturing, stock raising, and newspaper printing and publishing companies; and which, by another section, provides that banking, gas, and certain other designated companies, with all other domestic companies and associations (except banks organized under the general banking laws and corporations assessable by local assessors as provided in the former section), shall each in addition to other property required to be listed, also make a sworn statement of its name, location, amount of its authorized and the number of shares of its capital stock, the amount paid up, the market value, if any, and the actual value otherwise of the shares, total indebtedness save for current expenses not additions to plant, and assessed valuation of tangible property,—makes gas companies, although they are manufacturing companies, liable to assessment and taxation upon their capital stock on valuation by the state board. *Williams v. Rees*, 9 Biss. 405, 2 Fed. 882.

A statute enacting that, in computing the taxable property of every domestic insurance company, the value of the real property upon which the company pays taxes shall be deducted from its net assets above liabilities as determined and shown by the last report of the insurance commissioner, and that the remainder shall be the amount of the personal property for which the company shall be assessed, is not violative of a constitutional requirement that the legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and that taxes shall be levied on such property as shall be prescribed by law; also that all assessments shall be on property at its cash value. *Michigan Mut. L. Ins. Co. v. Hartz* (Mich.) 8 Det. L. N. 882, 88 N. W. 405.

When, by an express provision in the state Constitution, the people reserve absolutely to themselves the whole power over statutes relating to banks and banking, an act which has been submitted to, and approved by, a popular vote in the manner prescribed by such Constitution, and which provides for a tax upon banks so repugnant to the uniformity and equality provisions of such Constitution as to be void if an ordinary act of the legislature, must be sustained because it is outside and independent of such provisions. *State ex rel. Reedsburg Bank v. Hastings*, 12 Wis. 52.

A statute for assessing and taxing railroads, which provides that a state board shall assess all the property of each railroad in the state, and, as an aid thereto, that the railroad's officials shall make a sworn statement detailing its property of every kind in each county and showing the amount of its rolling stock and gross earnings; and then, that such property shall be valued at its true cash value, and an assessment made on the entire road in the state, including right of way, roadbed, bridges, rolling stock, station grounds, etc., and all other real and personal property exclusively used in the operation of the road, the valuation being made in the same ratio as that of individual property; and then, that such state board shall transmit to county supervisors where the road runs the length of its main track in their respective counties and the assessed value per mile as fixed by a *pro rata* distribution by mileage of the whole property of the road; and then, that such supervisors, in their turn, shall apportion that assessed value to each taxing district, the amount to constitute the taxable value of the railroad's property in each district for all taxable purposes; and finally, that all such railroad property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes as the property of individuals in the several districts,—is in conformi-

ty with a constitutional provision that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals, notwithstanding that, in apportioning according to mileage, localities where machine shops, depots, and other permanent properties are situated get less than their share for local taxation. *Dubuque v. Chicago, D. & M. R. Co.* 47 Iowa, 196.

A statute requiring insurance companies to pay, as taxes, a certain percentage of the premiums they receive, classifying such companies so that domestic corporations pay the smallest rate, corporations of other states in the Union a somewhat higher rate, and corporations of foreign countries a rate highest of all, does not violate constitutional requirements that all laws of a general nature shall have uniform operation; that the legislature shall not grant any citizen, or class of citizens, privileges or immunities which shall not belong equally to all citizens upon the same terms, nor pass local or special laws for the collection of taxes, nor in any case where a general law can be made to apply; since the legislature has a right to make such a classification, and impose any terms and conditions it chooses upon foreign corporations seeking to do business within its borders. *Scottish Union & Nat. Ins. Co. v. Herriott*, 109 Iowa, 606, 80 N. W. 665.

And, for the same reasons, such statute does not conflict with the 14th Amendment to the Constitution of the United States, nor the civil rights act passed to give it effect. *Ibid.*

A statute providing a general system of railroad taxation for state, county, municipal, and all other purposes, by a state board of equalization, embracing all the railroads in the state, and all the property of each, real, personal, and mixed, assessed ad valorem, and apportioning such taxes upon the mileage basis to the several political subdivisions of the state,—is not violative of a constitutional provision requiring taxation on property to be uniform. *State ex rel. Kansas City, St. J. & C. B. E. Co. v. Severance*, 55 Mo. 378.

Such a statute is not open to an objection that it contravenes such a constitutional provision by apportioning according to mileage to several counties railroad rolling stock in constant flux to and fro along the line instead of assessing it all in the city where the company has its head office, upon the theory that personal property has its taxable situs at the domicile of its owner. That theory is but a convenient fiction that the legislature may at any time change. *Ibid.*

A municipal ordinance requiring every express company, or agency thereof, doing an express business within the city, to pay an ad valorem tax equal to that levied within the same limits upon real estate for general and special purposes upon the gross amount of all money received in the city as compensation for the transaction of express business during the preceding calendar year, when ordained under statutory authority to tax, license, and regulate express companies or their agencies and other designated businesses,—is valid, notwithstanding a constitutional requirement for uniformity and proportional property taxation, and the existence at the same time of another municipal ordinance, passed under the same authority in the same city, taxing merchants on their stock of goods on a stated day at actual cash value and the same as real estate. *American Union Exp. Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382.

A municipal ordinance imposing a license tax upon all sewing-machine agents without discrimination neither violates a constitutional provision requiring taxes to be uniform upon the same class of subjects within the territory of

the authority levying the tax, nor does it amount to a denial of the equal protection of the laws merely because no such tax is imposed upon agents for other chattels. *St. Louis v. Bowler*, 24 Mo. 630, 7 S. W. 434.

A state law for the assessment and collection by state officers of taxes upon railroad property in unorganized counties is not unconstitutional under a clause in the organic law which commands the legislature to provide for a uniform and equal rate of assessment and taxation, and exempts governmental, religious, charitable, educational, etc., property; when such Constitution (unlike Constitutions in other states where the contrary has been held) neither expressly commands that all property shall be taxed, nor expressly limits the exemptions that the legislature may grant; merely because no machinery has been provided for assessing and taxing other property in the unorganized counties, and, in consequence, such other property necessarily escapes its just share of the public burdens. *Francis v. Atchison*, T. & S. F. R. Co. 19 Kan. 303.

In reaching this conclusion, the court was not at all sure of its ground. To hold the act constitutional seemed to conflict with the general idea of uniformity which common justice, as well as the general understanding of both legislatures and courts, places as the foundation of all valid taxation. To decide the contrary, if the decision was carried to its logical results, seemed productive of "an effect so startling, and so fatal to all taxation from the commencement of our state history, as to compel the clearest conviction" before such a decision could be rendered. The court said, quite candidly: "The conclusions we have reached are by no means entirely satisfactory to us. We hold the section to be constitutional and valid, not because it is clear to us that it is so, but because it is not clear to us that it is not." *Ibid*.

A statute does not violate the constitutional requirement of uniformity and equality of taxation by authorizing in some counties a larger rate of taxation than is provided for by law generally throughout the state; provided, of course, that the rates in the specified counties are equal and uniform throughout the territory to which they apply. *Midland Elevator Co. v. Stewart*, 50 Kan. 378, 32 Pac. 33.

A law providing for the levy the next year of an additional tax to make up a deficiency in the tax of the preceding year from failure to collect all the taxes assessed in that year for state purposes in such counties as were delinquent in meeting the state tax apportioned to them, and to the extent in each of its particular deficit, does not violate a constitutional rule of uniformity. *Atchison, T. & S. F. R. Co. v. Clark*, 60 Kan. 831, 58 Pac. 561.

A statute adding interest at the rate of 50 per cent per annum to delinquent taxes where an injunction against their collection has been granted and afterwards dissolved does not violate the constitutional provision for uniformity of taxation, as the charge is in the nature of a penalty. *Missouri, K. & T. R. Co. v. Labette County*, 62 Kan. 550, 64 Pac. 56, affirming 9 Kan. App. 545, 59 Pac. 383.

A territorial statute enacting that from and after its passage no taxes shall be assessed, levied, or collected in any unorganized county, district, or reservation which is or may be attached to any county for judicial purposes, except taxes for territorial or court funds, and repealing inconsistent or conflicting laws, is not beyond the legislative power by the provisions of the organic act of Congress extending such power to all rightful subjects not inconsistent with the Constitution and laws of the United States, forbidding any law to be passed interfering with the primary disposal of the soil, any 60 L. R. A.

tax to be imposed upon Federal property, any taxation of the lands or other property of non-residents higher than those of residents, any law to be enacted impairing private property rights, or making unequal discriminations in taxing different kinds of property, and requiring all property subject to taxation to be taxed in proportion to its value. Such organic act neither limits the legislative power to exempt from taxation, nor requires uniformity in taxation. *Pryor v. Bryan*, 11 Okla. 357, 66 Pac. 548.

Such an organic act does not prevent a territorial legislature from separately classifying railroads for taxation, and commuting their taxes for a percentage of their gross earnings. A territorial taxing act therefore, relating alone to railroads, classifying them by themselves, and imposing upon them a percentage tax upon their gross earnings in lieu of all other taxes upon their property of every kind, real, personal, and mixed, thus exempting, not only property essential to railroad operation, but also lands held speculatively for sale and profit,—is valid. Neither does such taxing act amount to a denial of equal protection of the laws, inhibited by the 14th Amendment, because lands of the same character which belong to individuals are otherwise taxed. *Northern P. R. Co. v. Barnes*, 2 N. D. 310, 395, 51 N. W. 386, 786.

A constitutional requirement that all property be assessed and taxed in the manner prescribed by law, and that laws be passed taxing by uniform rule all property according to its true value in money, does not prevent the legislature from providing for the taxation of tangible personal property within the state, such, for example, as grain stored in warehouses and elevators, by assessing the person, firm, corporation, or company having possession of it on the date or which the law speaks, regardless of who may be the owner. *Minneapolis & N. Elevator Co. v. Trall County*, 9 N. D. 213, 50 L. R. A. 266, 82 N. W. 727.

A statute which, after providing a mode of assessment of railroad, telegraph, ferry, and bridge companies, provides that the stock of all other domestic corporations or joint-stock companies not therein otherwise provided for, whether held by resident or alien stockholders, shall be assessed and taxed the same as all other taxable property in the precinct where such company may have its principal office, without deduction for corporate debts, but with due allowance for corporate real estate taxed where located,—in no wise conflicts with a constitutional provision requiring the legislature to provide needful revenue by levying a tax by valuation, so that each property owner shall pay in proportion to the value of his possessions, to be ascertained in a manner provided by law, and authorizing the imposition of occupation taxes by general law, uniform as to the class upon which it operates. *Mortensen v. West Point Mfg. Co.* 12 Neb. 197, 10 N. W. 714.

A division by statute of mines and mining claims for precious metals into two classes for the purpose of taxation, according as they produce more or less than a stated sum annually, does not contravene a constitutional command for uniform and equal ad valorem taxation upon the same class of subjects within the same jurisdictions. *People ex rel. Iron Silver Min. Co. v. Henderson*, 12 Colo. 369, 21 Pac. 144.

A statutory scheme of taxing railroad property in municipalities according to mileage, rather than values, is not violative of such a constitutional command, since other parts of the Constitution authorize classification, and sanction different modes of assessment, while directing a legislative prescription of rules to se-

cure a just valuation for taxation of all property. *Ames v. People*, 26 Colo. 83, 56 Pac. 656.

2. Inconsistent laws.

Probably the most conspicuous successful contest against a discriminating tax is that waged by the railroads in California in the Federal courts. The California Constitution provided that all property in the state not exempt by the laws of the United States, with some exceptions not here material, was to be taxed in proportion to its value to be ascertained as prescribed by law; but, in the ascertaining of property values, a distinction was made between railroads and other owners. By one article (13) a mortgage or other security for debt was, for the purposes of assessment and taxation, treated as an interest in the property affected by it, and, except as to railroads and other quasi-public corporations, such property, less the security, was taxable to the owner, and the security was taxable to his creditor. By the same article (§ 4) the franchise, roadway, roadbed, rails, and rolling stock of railroads operating in more than one county in the state were assessable at actual value without deduction for mortgages. The assessment of the property of such railroads was committed to a state board, to be, when completed, apportioned among the counties according to mileage. Other property was assessable by the local assessors. In assessing railroads, the state board was neither required to give notice of its intended action, nor were the railroads afforded any opportunity to be heard. With respect of other property, county supervisors were constituted boards of equalization in their several counties, and there was a like board for the entire state, each of which boards was able to act only according to set rules and on notice to taxpayers. The section concerning railroad taxation was held by the California courts to be self-executing and operative without legislation. The railroads attacked the provisions relating to them, and resisted taxation in pursuance thereof, because: (1) Being allowed no deduction for their mortgages as were individual taxpayers, they were denied the equal protection of the laws guaranteed by the 14th Amendment to all persons; and (2) that, without notice or chance of hearing upon their assessments, taxation under these circumstances was, within the same amendment, a deprivation of property without due process of law. These contentions of the railroads were sustained, and the taxes assessed against them were declared invalid. *San Mateo County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722, Appeal Dismissed in 116 U. S. 138, 29 L. ed. 539, 6 Sup. Ct. Rep. 317; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 166, 13 Fed. 385, Affirmed in 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132.

A constitutional provision that laws shall be passed taxing, by a uniform rule, all moneys, credits, and investments, and also all real and personal property, according to its value in money, is violated by a statute exacting from every corporation operating a railroad within the state a so-called fee for general state revenue of \$1 per mile for each mile of main, branch, double, or side track operated in the state; and the statute, therefore, is void. Such a statute plainly imposes a tax for revenue; it does not assess for benefits, nor charge for services; neither is it a police regulation. *Pittsburgh, C. & St. L. R. Co. v. State*, 49 Ohio St. 189, 18 L. R. A. 380, 30 N. E. 435.

A statute creating a system of railroad taxation whereby all the property, real, personal, and mixed, of each corporation, including the length of the entire line, roadbed, switches, and side tracks, and such fractions thereof as lie in

different counties, are to be scheduled and returned to a state officer with details of rolling stock, gross receipts, depots, warehouses, machine shops, tools, and machinery, and the location of every species of such property, and all other corporate possessions as a basis for assessment by railroad assessors; and which then provides that, after the deduction of a constitutional tax exemption of \$1,000, and the real cash value of individual stockholdings, the aggregate value left shall be divided by the number of miles in the total length of the road to fix, for taxation purposes, the value of each mile; and thereupon the state tax is fixed by multiplying the quotient by the total number of miles in the state, and the local taxes by multiplying the quotient by the mileage in each locality,—is void for conflicting with the constitutional provisions respecting uniformity and equality of taxation. *Chattanooga v. Nashville, C. & St. L. R. Co.* 7 Lea, 561. The court rested this decision mainly upon two grounds: (1) That some localities had valuable stations, warehouses, machine shops, etc., and others only bare tracks, so the former got less, and the latter more, taxes, than either was entitled to; and, (2) that, deducting the value of individual stock holdings, the constitutional mandate that all property should be taxed, was not obeyed.

The Kansas statute (act 1895, chap. 263), authorizing the laying of a tax to prevent prairie fires, was held unconstitutional because it rested upon railroad property which was not allowed any benefit from it. *Atchison, T. & S. F. R. Co. v. Clark*, 60 Kan. 831, 58 Pac. 561.

To single out and specially penalize railroads only among delinquent taxpayers is to violate the constitutional mandate that taxes shall be levied and collected under general laws. *Atlanta & F. R. Co. v. Wright*, 87 Ga. 487, 13 S. E. 578.

A statute enacting that from every person, firm, or association owning or running any palace, sleeping, or dining car, there shall be collected an annual tax of \$2 per mile for each mile of any and all railroads in the state over which such cars shall run, imposes neither a tax upon property, nor upon persons, but one upon a business, and one that is of the class designated as occupation taxes; but, inasmuch as it relates to those who own, or who operate and control, cars on railways which they do not own, and subjects them to taxation, while it leaves free from taxation those who own such cars and use them upon their own railroads, it violates the constitutional requirement that all occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax, and is therefore void. *Pullman Palace Car Co. v. State*, 64 Tex. 274, 58 Am. Rep. 758.

A statute, by the terms of which every railroad expressman is required to pay annually to the state for a license, either a specified percentage of the gross receipts of his business, or else a specific sum per mile of road over which he operates, is an exercise of the taxing power, and not a police regulation; and, because it constitutes an unequal division of the public expense, and the only authority of the legislature to tax is limited by a constitutional provision to the imposing and levying of proportional and reasonable rates, assessments, and taxes, it is void. *State v. United States & C. Exp. Co.* 60 N. H. 219.

While a section of a statute exacting annually from each freight line and equipment company doing business or owning cars operated in the state a sum in the nature of an excise or license tax, to be computed by taking 2 per cent of the amount fixed by a state board of apprais-

ers as the value of the proportion of the capital stock representing the corporate capital and property owned and used in the state, less the value of its locally assessed and taxed real estate, is, when read in connection with other sections of such statute, to be construed as an act imposing a tax upon property, and not an excise upon the privilege of transacting business, and, therefore, not in conflict with the commerce clause of the Federal Constitution, because the legislature has a right to tax property, even if it is employed in interstate commerce, although no right to tax such commerce itself; nevertheless, inasmuch as such section imposes a specific and arbitrary tax instead of a general tax ad valorem at the general rate, it does conflict with the state constitutional requirement that all taxes to be raised be as nearly equal as may be; and that all property upon which taxes are levied shall have a cash valuation, and that taxation shall be equal and uniform throughout the state, hence, it is void. *State v. Canda Cattle Car Co.* 85 Minn. 457, 89 N. W. 66.

A provision in a statute designed to tax the franchisees of a corporation by taking the total value of the capital stock as indicated by the aggregate market value of the shares less the total value of the tangible property, which directs that the corporate indebtedness, except for current expenses, also, be deducted, is in conflict with such a constitutional provision, for the reason that indebtedness affects the value of the corporate stock as directly as do the assets of the corporation. The debt depreciates, the assets appreciate, the value of the shares, and the practical effect of allowing a deduction of corporate debts is double exemption, and necessarily results in inequality between the corporation and other taxpayers. *State v. Duluth Gas & Water Co.* 76 Minn. 96, 57 L. R. A. 63, 78 N. W. 1032.

When a state Constitution declares that the property of corporations, except educational and charitable ones, existing at the time of its adoption, or afterwards created, shall be forever subject to taxation the same as the property of individuals, legislation limiting the power of municipalities to tax corporations within them to a stated rate, while the municipalities have the right generally to tax, and do tax, individual property higher, is unconstitutional, and will not save corporations otherwise liable from local taxation at the general rate. *Mobile v. Stone-wall Ins. Co.* 53 Ala. 570.

A state law requiring every domestic fire insurance company, and agency of every foreign one, in a named city, to be taxed annually a stated sum, to be collected by the state tax collector of that city, and, as collected, paid into the city treasury to the credit of the local fire department for equal distribution among the several fire-fighting companies, conflicts with a constitutional provision for equal and uniform taxation, and is void. *State v. Merchants' Ins. Co.* 12 La. Ann. 802.

A law laying a percentage tax upon the gross earnings of domestic insurance companies, and exempting them from all other taxation, state and local, except upon real estate and special assessments, is, so far as it confers exemption, unconstitutional for violating a constitutional provision that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals. *Hawkeye Ins. Co. v. French*, 109 Iowa, 585, 80 N. W. 660.

A law refusing to allow banks and insurance companies any deduction from their assessments for real-estate mortgages otherwise taxed violates the Michigan constitutional requirement of uniformity of taxation and ad valorem assessments. *Standard Life & Accl. Ins. Co. v. Detroit*, 95 Mich. 466, 55 N. W. 112.
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A statute providing that no city or town shall impose or collect a greater tax on banks or solvent credits than the state tax for the same year is void for repugnancy to a constitutional provision that taxation shall be equal and uniform throughout the state, and property shall be taxed in proportion to its value, to be ascertained as directed by law. That constitutional provision applies to, and governs, municipal, as well as state, taxation. *Adams v. Mississippi State Bank*, 75 Miss. 701, 23 So. 395.

A law making it unlawful for any domestic coal-mining company or association to transport for sale to any place in the state or elsewhere, by rail or canal, or upon waters, coal mined within the state, until a state tax of 2 cents a long ton is first paid on such coal to the carrier for the state; requiring every carrier to collect such tax in advance on taking on such coal; and containing appropriate provisions for returns and payments, and penalties for defaults and for remissions to mining companies taxed upon their capital stock,—is void for violating the constitutional Bill of Rights of Maryland providing for equal and proportional taxation according to worth in property, because such law imposes a specific tax upon property regardless of its value. *State v. Cumberland & P. R. Co.* 40 Md. 22. Three judges dissented in this case because they deemed the tax one upon the corporation, not upon its coal,—an excise upon business measured by output; a license tax, not a tax on property.

An act providing that persons who procure insurance upon their property within the state from foreign corporations that have not been authorized to do business within the state shall report to the insurance superintendent their policy contracts for the purpose of taxation, and that all such contracts shall be taxed a sum equal to 10 per cent of the premiums thereon, to be paid by the policy holder, and to be a lien upon the insured property, imposes a tax upon property, and not a license charge upon a franchise, privilege, or occupation; and, while the legislature may lawfully tax insurance policies, yet such act is violative of the constitutional restriction upon all taxation not uniform and equal, and it is, therefore, void. *Re Page*, 60 Kan. 842, 47 L. R. A. 68, 58 Pac. 478. The court reasoned that the act in question laid a specific tax, without regard to value, upon insurance policies, and, moreover, that it taxed one, and not another, resident policy holder, because the one had his policy written out of the state by an unlicensed company, and the other did not, although both might insure property side by side of the same kind and value and liable to the same casualties.

When a state Constitution requires all property to be taxed equally and uniformly according to its value, the legislature is powerless to authorize a state officer to levy and collect taxes for past years when, in his opinion, those assessed and collected through the regularly constituted authorities were levied and paid upon too low a valuation. *State Revenue Agent v. Toneyka*, 70 Miss. 701, *sub nom.* *Adams v. Toneyka*, 22 L. R. A. 346, 14 So. 17.

3. Retaliation laws.

The practice has been followed in some states of singling out certain foreign corporations and imposing upon them the same burdens, by way of taxation or otherwise, that their own states impose upon like corporations from other states. The constitutionality of these retaliation statutes has generally been sustained upon the principle that a state may lawfully impose upon foreign corporations any terms and conditions it chooses as conditions upon which it will grant

permission to enter and transact business within its territory. Some of the attacks upon statutes of this character have been based upon constitutional provisions commanding equal and uniform taxation, or because they were alleged to be a denial of that equal protection of the laws guaranteed by the 14th Amendment. These objections to laws of this class are held generally to be unfounded. *People v. Fire Assn. of Philadelphia*, 92 N. Y. 312, 44 Am. Rep. 380; *Phoenix Ins. Co. v. Welch*, 29 Kan. 672; *State ex rel. Baldwin v. Insurance Co. of N. A.* 115 Ind. 257, 17 N. E. 574; *Blackmer v. Royal Ins. Co.* 115 Ind. 291, 17 N. E. 580; *Home Ins. Co. v. Swigert*, 104 Ill. 653; *Union Cent. L. Ins. Co. v. Durfee*, 164 Ill. 186, 45 N. E. 441.

In Alabama, however, such a statute was held unconstitutional for conflicting with the clause in the Constitution of that state making the property of private corporations, associations, and individuals forever taxable at the same rate, and because, also, it was deemed an unwarrantable delegation of the lawmaking power to the legislature of another state. *Clark v. Port of Mobile*, 67 Ala. 217.

The Illinois supreme court, in *Home Ins. Co. v. Swigert*, 104 Ill. 653, pronounced this decision unsound.

XI. The conflict in Wisconsin.

The legislature of Wisconsin, April 1, 1854, passed an act requiring all railroad companies and plank-road companies which were or should be organized within the state to pay the state treasurer annually, for the use of the state, a sum equal to 1 per cent of the gross earnings of their respective roads. In that act it was declared that this amount of tax should take the place, and be in full, of all the taxes of every name and kind upon such roads, and the property belonging to such companies, or the stock held by individuals therein, and that it should be unlawful to levy or assess thereupon any other or further assessment or tax for any purpose whatsoever. Ignoring this act, officials in Waukesha county assessed and levied taxes for the year 1854 upon the Milwaukee & Mississippi Railroad Company as if no such law existed, and the company sued out an injunction to restrain the collection thereof. Upon demurrer to the bill, the question was raised as to the constitutionality of this statute under the Wisconsin Constitution (art. 8, § 1) declaring that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." It was contended that the rule of taxation was not uniform, because the act (1) made a rule for taxing railroad and plank-road property different from the general rule applying to other property,—laid a tax upon income instead of a ratable tax upon value; (2) levied a state tax and gave an exemption from local taxes; and (3) established a new mode of levying taxes. The circuit judge, in overruling the demurrer, said the contentions against the act were founded upon the error of looking to the first part of the pertinent section of the Constitution without regard to the qualifying and controlling effect thereon of the last part authorizing taxes to be levied upon such property as the legislature shall prescribe. "No property," he said, "can be lawfully taxed until the legislature authorizes and requires it to be done; and, of course, no property can be taxed when the legislature prohibits its being done. The legislature is vested with the absolute power of declaring what property through-

out the state shall be, and what shall not be, subject to taxation." This decision was affirmed upon review by the supreme court of the state, in a very brief opinion, without extended reasoning. *Milwaukee & M. R. Co. v. Waukesha County*, 9 Wis. 431, note.

Very soon afterwards, the supreme court was called upon to pronounce upon the validity of another statute discriminating in taxation, and concluded that it was in conflict with the section of the state Constitution just mentioned, and could not stand. That statute was the charter of the city of Janesville of 1854, which, *inter alia*, provided that the rule of taxation in that city should be uniform, but that in no case should the real or personal property within the territorial limits of the city, and not included in the recorded plat of the village of Janesville or of any addition to said village which might be used, occupied, or reserved for agricultural or horticultural purposes, be subject to an annual tax to defray the current expenses of the city, exceeding $\frac{1}{2}$ of 1 per cent, nor for the repair and building of roads and bridges and the support of the poor more than $\frac{1}{2}$ as much ad valorem as should be levied for such purpose on the property within such recorded plats; and it was also provided that farming and gardening lands should not be subject to any other taxes for any city purposes whatever. The general taxing power conferred upon the municipality was to levy annually upon all the taxable property in the city a tax not exceeding 1 per cent for current expenses, and an additional tax so far as necessary for the repair and building of roads and bridges and for the support of the poor. The argument to sustain this law was that, as it fixed a uniform rate without, and another uniform rate within, the recorded plats, thus taxing all the property without alike and all the property within alike, the Constitution was not violated; in other words, that the legislature had the right to classify property in a city according to its use or geographical location or both, and, provided the separate classes were each uniformly taxed, the law was constitutional. *Knowlton v. Rock County*, 9 Wis. 410 (Judge Cooley's dissent from this decision [Cooley on Taxation, 118, note 3] is approved by Justice Peckham in the Supreme Court of the United States in *Foster v. Pryor*, 189 U. S. 325, 47 L. ed. —, 23 Sup. Ct. Rep. 549, affirming 11 Okla. 357, 66 Pac. 348).

Upon the authority, however, of the *Knowlton Case*, when next the railroad and plank-road statute came before the state supreme court, the earlier case was overruled and the statute held unconstitutional. "It is very clear," reasoned the court in reaching this conclusion, "that a rule taxing horses at one rate, cattle at another, and land at a third would not be a uniform rule. The fact that all horses were taxed alike would not make it so, because the mode of taxing horses would be only a part of the rule. That part might be uniform with itself, but the moment a change was made to other property, there the rule changed and the uniformity ceased. By any other construction there might be as many different modes and rates of taxation as there may be classes of property, and yet the rule of taxation be uniform,—a proposition which is a self-evident contradiction." *State ex rel. Atty. Gen. v. Winnebago Lake & F. River Pl. Road Co.* 11 Wis. 85.

About this time the court in *Weeks v. Milwaukee*, 10 Wis. 248, held that the omission from the city tax list of a large amount of real property, intentionally, pursuant to the express terms of an ordinance so providing, vitiated and rendered void the whole general levy. In that

case, and in the case of *State ex rel. Reedsburg Bank v. Hastings*, 12 Wis. 47, distinguished on the facts, the court cited and approved the *Knowlton* Case.

The constitutionality of the act of 1854 respecting railroad and plank-road taxation came before the court again soon afterward in *Kneeland v. Milwaukee*, 15 Wis. 454, wherein, in reliance upon the decision in the *Weeks* Case, the plaintiff contended that the omission to tax the railroad property in the city rendered the whole levy void; that such omission was intentional because the local assessors obeyed the act of 1854, and that act, as decided in the *Winnebago Lake & Fox River Plank-Road* Case, was unconstitutional and void, hence no justification whatever. The court below, appalled at the logical consequences of this doctrine, had sought to find a way of escape by holding the omission to assess the railroads was inadvertent and the result of an error or mistake, not of purpose or deliberate, and, therefore, did not vitiate the entire levy, but the supreme court declined to assent to this theory, and at first reversed the judgment. Mr. Justice Cole, who had dissented in the *Winnebago Lake & Fox River Plank-Road* Case maliciously said that it logically and inevitably followed from that case, the *Knowlton* Case, and the *Weeks* Case, that the taxes then before the court were unconstitutional and void. He added: "It is true, I did not concur in the decisions in the two former cases, and my views upon the question there decided remain unchanged; but still, assuming the construction there given to be correct, I see no possible escape from the conclusion stated." The consequences of such a ruling were so startling, and entailed a practical paralysis of governmental functions from inanition, that the court found its position untenable, and was compelled to retreat. It granted a reargument, and affirmed the judgment upon the doctrine of *stare decisis*. *Kneeland v. Milwaukee*, 15 Wis. 691.

And, although it still insisted that the old case of *Milwaukee & M. R. Co. v. Waukesha County*, 9 Wis. 431, note, was wrongly decided and unsound, upon that doctrine it followed it with respect of the effect of omitting railroad property from the tax rolls when done obediently to the provisions of the act of 1854. *Dean v. Gleason*, 16 Wis. 1; *Bond v. Kenosha*, 17 Wis. 284.

But so recently as 1890 the Wisconsin supreme court still held to the doctrine that the deliberate and intentional omission from the tax roll of a piece of taxable property makes the entire levy invalid for that year. It so decided where an assessor neglected to assess a vacant lot owned by a church because he supposed it was exempt. *Green Bay & M. Canal Co. v. Outagamie County*, 76 Wis. 587, 45 N. W. 536.

The whole subject of the power of the legislature of Wisconsin to classify subjects of taxation, and tax the classes at different rates by diverse methods, and to grant exemptions in view of the Constitution, was opened again in a suit brought by the Wisconsin Central Railroad Company against Taylor county and its officials to restrain the execution of deeds on certificates of sale of its lands for alleged delinquent taxes, upon the ground that such lands were by law exempt. A general demurrer to the complaint was overruled in the first instance, and judgment was ordered for the railroad. The lands involved were originally a part of the public domain, and granted by act of Congress to Wisconsin in trust for the aid of railroads, and by the state in turn to the plaintiff's predecessors, and confirmed to the plaintiff. The statutes in point respecting the exemptions were: (1) An exemption of such

lands from all taxation whatsoever for ten years, unless sooner sold, in the act of incorporation of, and land grant to, the *Winnebago & Lake Superior Railroad Company*, of April 6, 1866; (2) a like exemption in the similar act of the same month relating to the *Portage & Lake Superior Railroad Company*, and (3) an act respecting the plaintiff (*Laws 1877*, chap. 21) extending the exemption three years, and declaring its object to insure the completion of the road and the advantages thereof, and that the privileges and exemptions were in consideration and on the express condition that the work of construction be renewed and the road completed to Lake Superior in 1877. The constitutionality of these statutes was fully sustained. The court construed the provision of the Constitution in point as having the meaning of, "Taxes shall be levied upon such property as the legislature shall prescribe by a uniform rule." Or, "The rule of taxation shall be uniform upon such property as the legislature shall prescribe." And it concluded, among other conclusions, that the legislature not only has power to prescribe the property to be taxed, but the rule by which it must be taxed, and the only limitation upon that power is that the rule so prescribed shall be uniform. And that the power to prescribe what property shall be taxed necessarily implies the power to prescribe what property shall be exempt. The court took pains to reaffirm, and again install, as an authority resting in sound reason and in principle upon all the points involved, *Milwaukee & M. R. Co. v. Waukesha County*, 9 Wis. 431, note, and to distinctly and emphatically overrule *State ex rel. Atty. Gen. v. Winnebago Lake & F. River Pl. Road Co.* 11 Wis. 35; and it declared that *Kneeland v. Milwaukee*, 15 Wis. 454, 691, in going back to the former case reluctantly upon the doctrine of *stare decisis*, should have gone farther and recognised the decision as right. *Wisconsin C. R. Co. v. Taylor County*, 52 Wis. 37, 8 N. W. 833.

The opinion of Cassoday, J., in this case is one of learning, and evinces much research. Starting from the basic principle that constitutions are not in the states of the Union grants of power, but restraints on sovereignty, he takes up the clauses respecting equality and uniformity of taxation in other state Constitutions, and shows that these are generally couched in broader and more restrictive language than the similar clause in the Constitution of Wisconsin; and, as this is particularly the case in respect of Ohio, the authority relied upon by *Faine*, and *Dixon, J.J.*, and the only one (*Exchange Bank v. Hines*, 3 Ohio St. 15), to sustain their decision in the now discredited case does not justify their conclusion. But the learned judge went further. In effect, he held that there was absolutely no limit upon the legislative power to classify subjects of taxation, no matter how arbitrary, artificial, and unreasonable might be the classification adopted. He was, therefore, for overruling *Knowlton v. Rock County*, 9 Wis. 410, the *Janesville* classification case. He insisted that the act involved in that case was a valid exercise of the taxing power. His colleague, *Orton, J.*, dissented from this doctrine, and asserted that the Constitution required taxation to be uniform in a broad sense; that, if a certain class of property is made taxable at all, it must not only be taxed at a uniform rate, but that all of it must be taxed at such rate without partiality or discrimination. "Any other construction," he said, of the constitutional provision, "would emasculate it of all of its force and effect; and, as a restriction upon the legislative power, it was not worthy of adoption, and is not worth preserving." *Ibid.*

It is worth while noting that Judge Casso

day's view that the Janesville city taxing act was valid finds support in a decision rendered several years afterwards by the Maryland court of appeals, which held it competent for the legislature of Maryland, notwithstanding art. 15 of the Bill of Rights of that state provided that every person, or person holding property therein, ought to contribute his proportion of public taxes for the support of the government according to his actual worth in real and personal property, upon enlarging the boundaries of the city of Baltimore to make the added territory a special taxing district distinct from the old city, and to exempt, for a limited time, the property situated therein from the ordinary municipal taxes assessed in the old city, and continue for such time the taxation thereof at its former and lower rate. *Daly v. Morgan*, 69 Md. 467, 1 L. R. A. 757, 16 Atl. 287.

XII. Commutations and exemptions.

Whether or not a legislature of a state whose Constitution contains an equality and uniformity of taxation clause can enact special laws granting the privilege of commuting taxes or exempting certain subjects from taxation, and, if so, what are the limits upon its power in either particular; and again, the power being admitted, whether or not, when it has been exercised, a given tax, or a tax upon a given subject, is valid or invalid,—are all questions dependent upon such a variety of circumstances for answers that no general principle of universal application can be formulated. There are cases in point upon opposite sides of each of these questions, but they are not necessarily conflicting because of essential differences in the factors of the problems whose solutions were essayed in the respective litigations.

Land owned by a railroad outside of its right of way, and not used in the course of its operations as a common carrier, but which were granted it by the government to aid in its construction, and which have actually contributed to the building of it by securing some of the funds raised for that purpose, although they are, and always have been, held for sale, and not for use, are not merely property owned by a railroad like unto real estate owned by individuals, but are railroad property in the same sense as are rights of way, stations, etc.; and, hence, the competency of the legislature to include them in classifying railroads for taxation by exacting a percentage of gross earnings in lieu of all other taxes and assessments is beyond question, notwithstanding a provision in the organic law that no discrimination shall be made in taxing different kinds of property, but that all property subject to taxation shall be taxed in proportion to the value of the property taxed. *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242.

Notwithstanding a general constitutional requirement that the legislature shall provide for the levying of a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property, to be ascertained by some person or persons to be elected or appointed in such manner as the legislature shall direct, and not otherwise, when the fundamental law also authorizes the taxation of occupations, toll bridges, ferries, and persons using and exercising franchises and privileges in such manner as the legislature shall from time to time direct; and also the taxation of other objects and subjects in such manner as may be consistent with the principles of taxation fixed in such Constitution,—the legislature has the power to commute by statute the taxes to be paid by a railroad company by providing in its charter for the annual payment

of a gross sum, ascertained by a fixed rule of computation. *Illinois C. R. Co. v. McLean County*, 17 Ill. 291.

A territorial statute taxing the gross earnings of railroads in lieu of all other taxation does not conflict with a provision in the organic law that all taxes shall be equal and uniform, and no distinction shall be made in the assessments between different kinds of property, but these shall be ad valorem. Such a statute prescribes no rule of taxation, and the right of the legislature to exempt the property of any person or corporation is undoubted. *Columbia & P. S. R. Co. v. Chilberg*, 6 Wash. 612, 84 Pac. 163.

A statute for the taxation of banks, whose purpose is to impose a tax measured by the entire assets in lieu of all other taxes, is constitutional, and all banks which pay in accordance with its requirements secure immunity from other taxes. *Vicksburg Bank v. Worrell*, 67 Miss. 47, 7 So. 219; *Bank of Oxford v. Oxford*, 70 Miss. 504, 12 So. 203.

Notwithstanding a provision in the state Constitution requiring taxation to be equal and uniform, it is competent for the legislature, in chartering a corporation, to exempt it from payment of all licenses and taxes whatever in consideration of the payment annually to the state treasury of a substantial sum for the benefit of the public-school fund. *Louisiana State Lottery Co. v. New Orleans*, 24 La. Ann. 86.

The legislature has power to exempt property from taxation on account of its use, when such exemption is based upon a substantial classification, as, for instance, property used for religious, benevolent, and educational purposes, without violation of a constitutional requirement that all property shall be assessed for taxes under general laws and by uniform rules, according to its true value. *State Board v. Central R. Co.* 48 N. J. L. 146, 4 Atl. 578.

The Maryland Declaration of Rights that every person in the state, or holding property therein, ought to contribute his proportion of public taxes for the support of the government according to his actual worth in real and personal property, and which all agree necessarily implies equality of taxation on all taxable property, and which has been a part of every Constitution adopted in that state,—has always been held to be no restraint upon the legislature in exempting from taxation such property as, in its judgment, a sound policy might require. *Daly v. Morgan*, 69 Md. 467, 1 L. R. A. 757, 16 Atl. 287.

Simpson v. Hopkins, 82 Md. 478, 38 Atl. 714, affirming the constitutionality of a statute exempting from the tax imposed upon corporate debts secured by mortgages shares of homestead and building and loan associations represented by mortgages, is to the same effect.

A city ordinance requiring the agents of every insurance company, whether foreign or domestic, in the city, to take out a license and give a bond to render an account of and pay a percentage on the premiums received as a license tax, but not exceeding \$100, under penalty of recurring fines for each day's neglect to comply; but which contains an express exemption from its provisions of a particular company in consideration of its continuing to pay, as in the past it had paid, an annual sum, exceeding \$100, to the local fire department,—is not rendered invalid by such exemption and exception, when the statute empowering the city to require licenses of insurance companies and their agents generally, not exceeding \$100 in amount annually, does not authorize exemptions of any kind, and the state Constitution enjoins equality and uniformity in taxation; for the reason that the excepted company actually pays more. *Com. v. Milton*, 12 B. Mon. 212, 54 Am. Dec. 522.

A constitutional provision that all lands liable to taxation, held by deed, or entry, town lots, bank stock, etc., and such other property as the legislature may from time to time deem expedient, shall be taxable, does not deprive the legislature of power to stipulate for total or partial exemptions from taxation in corporate charters, although there is, beside, a constitutional restriction upon the legislative power to grant special privileges, immunities, and exemptions, with a proviso that it shall not affect the granting of such corporate charters as may be deemed expedient for the public good. *Knoxville & O. R. Co. v. Hicks*, 9 Baxt. 442.

The Tennessee legislature is declared, in *State v. Butler*, 13 Lea, 400, to have had power, under the Constitution of 1834, to grant corporations it created either partial or total immunity from taxation for any length of time it might deem proper; and that this had been held by the uniform current of decisions in that state, and also of the Supreme Court of the United States. *Freeman, J.*, however, dissented upon the ground that the constitutional command that all property be taxed, and the uniformity and equality clauses, had shorn the legislature of power to grant the exemption claimed in that case.

The exception in the Wyoming statute of a merchant's goods brought within that jurisdiction to fill up his stock in trade, from taxation, along with other personal property brought in after the regular assessment has been made, is not an unlawful discrimination in taxation forbidden by the organic law. *Frontier Land & Cattle Co. v. Baldwin*, 8 Wyo. 784, 31 Pac. 403.

The uniformity and equality provisions of the Minnesota Constitution have not operated to prevent the legislature of that state from modifying the terms of laws for the payment of a percentage of the gross earnings of railroads in lieu of other taxation in cases where that mode of taxing railroads had been established prior to the adoption of such constitutional provisions. *First Div. of St. Paul & P. R. Co. v. Patcher*, 14 Minn. 297, Gil. 224; *State v. Wilnons & St. P. R. Co.* 21 Minn. 315; *St. Paul v. St. Paul & S. C. R. Co.* 23 Minn. 469; *Stevens County v. St. Paul, M. & M. R. Co.* 36 Minn. 467, 31 N. W. 942.

There is quite as long a line of authorities holding commutation or exemption acts unconstitutional.

A statute imposing a tax upon savings banks, gauged by the amount of their deposits, with certain deductions, because of the business they do or the franchisees they enjoy, and not upon the property they own, in so far and to the extent that it is declared to be in lieu of all other taxes, thereby exempting property which, if held by others, would be taxable, conflicts with a constitutional provision commanding property to be assessed for taxes under general laws and by uniform rules ad valorem. This is chiefly because the exemption does not run to an entire class. *State, Trenton Sav. Fund Soc., Prosecutor, v. Richards*, 52 N. J. L. 156, 18 Atl. 582.

When a Constitution requires equality and uniformity of taxation, and specifies only certain kinds of property,—governmental, educational, charitable, religious, etc.,—that may be exempted, a municipality has no power to contract for commutation of taxes upon property not embraced among the kinds that it is permissible to exempt. *New Orleans v. New Orleans Sugar Shed Co.* 35 La. Ann. 548.

The Georgia statute taxing building associations a particular way, and providing that these shall be in lieu of other taxation, are held to be beyond the legislative power because of the constitutional requirements that all prop-

erty be taxed ad valorem and uniformly. *Georgia State Bldg. & L. Asso. v. Savannah*, 109 Ga. 63, 35 S. E. 67; *Atlanta Nat. Bldg. & L. Asso. v. Stewart*, 109 Ga. 80, 35 S. E. 73.

A general statute authorizing such railroads as accept the terms of the act to pay 1½ per cent of their gross earnings in lieu of all taxation upon their property for a period of ten years, no matter how much public needs may require increased taxation of other property, is void for repugnancy to a constitutional provision requiring all property to be taxed ad valorem, and taxation to be equal and uniform throughout the state. *Ellis v. Louisville & N. R. Co.* 8 Baxt. 530.

A statute enacting that every foreign insurance company, other than life, shall, at a stated time, pay to the insurance superintendent as taxes 2 per cent of the gross amount of premiums received by it for business done in the state during the preceding year, such payment to be a condition precedent for the privilege of doing business in the state, and a license certificate to issue therefor, and the taxes thus imposed to be in full of all taxation, state and local, except that of real estate and reciprocal taxes required by law; with a proviso that, where fire insurance companies pay to cities and villages with organized fire departments a tax of 2 per cent or less upon their premium receipts in such cities and villages, the sums so paid shall be deducted,—violates the Illinois Constitution, and confers upon a company complying with it no immunity from municipal taxes duly assessed under prior statutes. *Raymond v. Hartford F. Ins. Co.* 196 Ill. 329, 63 N. E. 745.

The Michigan statute (*Pub. Acts 1881, No. 168*) taxing telephone and telegraph lines upon assessments by a state board according to the average rate, state and local, throughout the state, of the previous year, in lieu of all other taxes, imposes a tax upon property, not an excise upon business, privilege, or occupation,—an ad valorem, not a specific, tax. The Michigan Constitution, in providing for a uniform rule of taxation except on property paying specific taxes, and that all assessments shall be upon property at its cash value, requires uniformity of taxation in a tax of the character imposed by such statute. And, inasmuch as such statute does not comply with this requirement, because, although the property is taxed upon a cash valuation, the rate is determined in a different way and the tax differs in amount from taxes imposed upon other property, it is unconstitutional and void. *Pingree v. Auditor General*, 120 Mich. 95, sub nom. *Pingree v. Dix*, 44 L. R. A. 679, 78 N. W. 1025.

While, under the Minnesota Constitution, requiring equal and uniform taxation on all property at a cash valuation, and the passage of laws taxing all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise, also all real, and personal property ad valorem, the method of securing these results is left to the legislature, which is at liberty to take any special class out of the operation of the general tax laws of the state,—the method adopted must secure substantial equality of taxation of all the property in the class thus selected; and the legislature cannot, directly or indirectly, exempt from taxation of any property which the Constitution does not in terms permit to be exempted. An act, therefore, of special application to building and loan associations, exempting their personal property upon the theory of a substituted tax upon the shares, but which does not subject to taxation shares held by nonresidents, and expressly forbids taxing those upon which loans or advances have been made, is unconstitutional. *State v. Pioneer Sav. & L. Co.* 63 Minn. 80, 65 N. W. 138.

A municipal ordinance wherein a city agrees with a water company to pay all municipal taxes assessed against its property as a return for a certain supply of water for city purposes is void for repugnancy to the constitutional provisions requiring equality of taxation upon property having a cash valuation, and all taxation of real and personal property according to its money value. *Little Falls Electric & Water Co. v. Little Falls*, 74 Minn. 197, 77 N. W. 40.

Under a Constitution providing that all taxes to be raised in the state shall be as nearly equal as may be, and that all taxable property shall have a cash valuation and be equalized and uniform throughout the state, a statute providing that all domestic mining corporations mining in the state may pay into the state treasury annually, in lieu of all taxes and assessments upon their capital stock, real and personal property connected with, set apart or used for, the mining business,—a specific tax per ton of ore mined, shipped, and disposed of is void. *State v. Lakeside Land Co.* 71 Minn. 283, 73 N. W. 970. The court said in this case: "It would be difficult to conceive of a system of taxation more obnoxious to the Constitution."

When a Constitution declares that all property subject to taxation ought to be taxed in proportion to its value, and that no property, real or personal, shall be exempt unless used for public schools or Federal, state, or local governmental purposes, a statute relating to life insurance companies, providing for the payment by them of certain state fees for the support of the state insurance department in lieu of all taxes, fees, and licenses whatsoever collected for the benefit of the state, and all other fees and taxes except upon paid-up capital stock, is, in so far as it attempts to exempt such companies from taxation upon their assets, void for want of competency in the legislature to grant the immunity. The legislature has no power to impose a commutation tax as a substitute for general and ordinary taxation upon property. *Life Asso. of America v. St. Louis County*, 49 Mo. 512.

The circuit court of the United States for North Dakota held, in *Northern P. R. Co. v. Walker*, 47 Fed. 681, that a territorial act providing that, in lieu of all taxes upon any railroad or the equipment, appurtenances, or appendages thereof, or upon other property in the territory belonging to a corporation owning or operating a railroad, there should be paid annually a percentage tax on the gross earnings arising from the operation of the road,—was void for conflicting with the organic act forbidding the legislature to pass any law impairing rights of private property, or to make any discrimination in taxing different kinds of property, and requiring all property subject to taxation to be taxed ad valorem, to the extent that it exempted from taxation railroad lands not essential to the franchise of a common carrier, but held merely for sale. It was further of the opinion that such statute was void under the provisions of the 14th Amendment for denying the equal protection of the laws because it was not in the legislative power to classify the same property according to ownership, and exempt it when it belonged to a railroad, and tax it when it did not. The bill was, however, dismissed for want of equity in that it did not show payment or tender of the gross earnings percentage tax. The bill was against a dozen counties, and was objected to as multifarious; but the court held this objection not well taken, as the bill proceeded upon a common ground for a common relief. Upon certiorari to the Supreme Court of the United States, that tribunal held that, forasmuch as it did not appear by the record in the case that any or all of the twelve coun-

ties sued claimed as much as \$2,000 of taxes, the jurisdiction of the Federal courts was not apparent; but, as this defect was curable by amendment, it reversed and remanded the case instead of dismissing the bill. *Northern P. R. Co. v. Walker*, 148 U. S. 391, 37 L. ed. 494, 18 Sup. Ct. Rep. 650.

The decision of the circuit court is now to be regarded as overruled by *McHenry v. Alford*, 168 U. S. 651, 42 L. ed. 614, 18 Sup. Ct. Rep. 242.

The uniformity and equality of taxation provisions of the Oregon Constitution (art. 1, § 32; art. 9, § 1) absolutely deprive the legislature of power to exempt, directly or indirectly, by contract, commutation, or otherwise, any property whatever, except the specifically enumerated classes, from bearing a just proportion of the burdens of the government. Hence, a section of a railroad charter commuting the corporate taxes for twenty years in consideration of the free carriage of state troops and munitions of war is void. *Hogg v. Mackay*, 23 Or. 339, 19 L. R. A. 77, 31 Pac. 779.

The equality and uniformity provisions of the Arkansas Constitution render void so much of a statute for the assessment and taxation of railroads as directs the omission from the real and personal property to be valued, of embankments, tunnels, cuts, ties, trestles, or bridges, these not being enumerated among the property which such Constitution permits to be exempted. *Little Rock & Ft. S. R. Co. v. Worthen*, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469.

The Ohio Constitution, requiring the general assembly to provide by law for taxing the notes and bills discounted or purchased, money loaned, and all other property, effects, or dues of every description, without deduction, of all banks and bankers, so that all property employed in banking shall always bear a burden of taxation equal to that imposed on the property of individuals, is violated by a statute for taxing unincorporated banks and bankers, under which they are to be assessed by deducting from the total average amounts of their collectible notes accounts and bills receivable discounted or purchased in the course of business, cash and cash items in possession or transit, and all stocks, bonds, and evidences of debt held as an investment, or representing assets, with the assessed value of the real estate, the average amount of all deposits and other accounts payable and of United States and other exempt securities, and then adding to the remainder the true value in money of all furniture and other nonenumerated property. But such statute is not wholly void, but only to the extent and in so far as it allows the deduction from the average amount of cash or cash items of the average deposits and other accounts payable. *Fayette County Treasurer v. People's & Drovers' Bank*, 47 Ohio St. 503, 10 L. R. A. 196, 25 N. E. 697.

An act declaring that, inasmuch as all money paid to building and loan associations is at once loaned out and invested in taxable property, and the shares of stock in such associations and notes given on such loans being simply evidences as to where such money has been placed, therefore, such stock and notes shall not be subject to taxation,—is so in conflict with the uniformity and equality of taxation provisions, and the prohibitions against exemptions and commutations, of the Constitution of Illinois that it cannot stand. *People's Loan & Homestead Asso. v. Keith*, 153 Ill. 609, 28 L. R. A. 65, 39 N. E. 1072.

A statute discharging a railroad corporation, in consideration of the payment of a gross earnings tax, from the payment of municipal taxes theretofore lawfully levied upon its road-bed, track, right of way, necessary buildings

and rolling stock, contravenes a constitutional provision subjecting the property of all corporations for pecuniary profit to taxation the same as that of individuals. *Dubuque v. Illinois* C. R. Co. 39 Iowa, 56.

A statute authorizing the levy in a township of taxes only upon the property of citizens therein, thereby exempting, or leaving untaxed, the property therein belonging to others not citizens,—nonresidents and corporations,—is unconstitutional for violating the equality and uniformity rule of taxation. *Marion & McP. R. Co. v. Champlin*, 37 Kan. 682, 16 Pac. 222; *Manhattan, A. & B. R. Co. v. Burgoyne*, 37 Kan. 685, 16 Pac. 223.

The decisions of the supreme court of Mississippi in *Mississippi Mills v. Cook*, 56 Miss. 40, and *Natchez, J. & C. R. Co. v. Lambert*, 70 Miss. 779, 13 So. 33, holding that the provisions of the Constitution of that state, that the property of all corporations for pecuniary profit should be subject to taxation the same as that of individuals, and that taxation should be equal and uniform throughout the state, and all property be taxed ad valorem, permitted the legislature to grant corporate exemptions, though not to make them irrevocable; that is, that corporate property should ever be subject to taxation, but not necessarily always subjected thereto,—were explicitly overruled afterwards, and the contrary decided in the subsequent litigations with the Yazoo & Mississippi Valley Railroad Company. *Adams v. Yazoo & M. Valley R. Co.* 77 Miss. 194, 24 So. 200, 317, 28 So. 956, Affirmed in 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240.

A constitutional provision requiring taxation to be equal and uniform, and expressly authorizing the legislature to exempt from taxation property actually used for church, school, or charitable purposes, impliedly inhibits the legislature from exempting any other property. *New Orleans v. People's Ins. Co.* 27 La. Ann. 519.

A constitutional provision for equal and uniform taxation applies to municipal as well as state taxes; and a municipal ordinance exempting property is void. *Austin v. Austin Gas-light & Coal Co.* 69 Tex. 180, 7 S. W. 200.

XIII. Double taxation.

If a statute imposes the same tax more than once upon the same subject and taxpayer, it is obviously unequal and multifarious. In states whose Constitutions prescribe equality and uniformity of taxation such a statute must ever be held unconstitutional. But the courts cannot hold a taxing statute invalid merely because it imposes double taxation, when there is no constitutional restraint upon the legislature, although, when a statute is couched in such terms that a judicial construction will avoid such a result, the courts will so construe it. *New Haven Toll-Bridge Co. v. Osborn*, 35 Conn. 7.

Unless the Constitution forbids it, double taxation does not invalidate a tax. *Pacific Nat. Bank v. Pierce County*, 20 Wash. 675, 56 Pac. 936.

Double taxation may be oppressive, unequal, and unjust, but it is not necessarily unconstitutional. *State, Fish, Prosecutor, v. Branin*, 28 N. J. L. 484.

In New York, where the Constitution does not command equal and uniform taxation, it has been well said: The rule against double taxation is a rule of legislation, not of law. It is a question of expediency, not of power. And, while the court will not infer an intention to impose a double tax, but, rather, will construe a statute otherwise where that can be done without forcing, still the power of the legislature is undoubted. *People ex rel. New York C. & H.* 60 L. R. A.

R. R. Co. v. Roberts, 32 App. Div. 113, 52 N. Y. Supp. 859.

Justice requires that the burdens of government shall, so far as practicable, says Chief Justice Waite, be laid equally on all; and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way when the burden of both taxes falls on the same person. Sometimes tax laws have that effect; but, if they do, it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition. *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645.

In *People v. Hibernia Sav. & L. Soc.* 51 Cal. 243, 21 Am. Rep. 704, taxes upon mortgages were held invalid because they imposed a double burden upon the owners of the property mortgaged, and so conflicted with the constitutional rule of equality and uniformity. Although the Constitution, as well, provided that all property be taxed, the court held that debts were not property within the meaning of this provision. By taxing the debtor and the creditor too, the one property pledged for the debt was twice taxed in the view of the court, and this was not proportional taxation. The earlier cases, of *People v. McCreery*, 34 Cal. 432, and *People v. Eddy*, 43 Cal. 336, 13 Am. Rep. 143, holding credits were property for the purposes of taxation, were overruled. One member of the court, Rhodes, J., dissented, but the grounds of his dissent do not appear in the report. The case is against the weight of authority in holding a tax upon a credit in the hands of the creditor secured by pledge of his debtor's property, when the debtor is also taxed upon that property, is duplicate taxation.

Double taxation of bank and corporate properties has been held in Ohio violative of the constitutional provision that corporate property be taxed like that of individuals. *Cleveland Trust Co. v. Lander*, 62 Ohio St. 266, 56 N. E. 1036.

In the cases of alleged duplicate taxation there is always the preliminary question: Is the tax now disputed really double? Of course, if it is not; if it rests upon different subjects although the same taxpayer must pay it; or, if it rests upon different taxpayers although a burden upon the same property; or, if it is laid by different governments,—then, it does not violate the constitutional rule of equality and uniformity of taxation. The courts in general have found reasons for answering this question in the negative.

Taxation is not double unless it bears upon the same property within the same jurisdiction. *Bradley v. Bauder* (Ohio) 19 Am. L. Reg. N. S. 774.

It is not double taxation for a state in which it is doing business to tax a foreign corporation upon the same subjects that it is taxed upon in its home state. *Com. v. Central Petroleum Co.* 1 Pearson (Pa.) 386.

It is not double taxation when the same property is taxed for the same year in two different states or taxing jurisdictions, where each has a right to lay taxes thereon. *Grigsby Constr. Co. v. Freeman*, 106 La. 435, 58 L. R. A. 349, 32 So. 399.

Each taxing jurisdiction may decide for itself how to lay its taxes; and the fact that the same property is subjected to taxation in two jurisdictions does not make either tax illegal. *Prairie Cattle Co. v. Williamson*, 5 Okla. 483, 49 Pac. 937.

Funds belonging to a corporation that owns a bridge between two states, and that has been chartered by both, set aside from its profits to provide for reconstruction and repairs, are taxable in the state where they are deposited and where the corporation's toll office is situated.

although the dividends on its stocks are also taxed for the same purpose, and the corporation is also subjected to taxation in the other state as well. *Boston Bridge v. County*, 9 Pa. 415.

It is the doctrine of the Supreme Court of the United States, and of several of the states, that the capital stock of a corporation, and the shares into which that capital stock is divided and held by its stockholders, are separate subjects of taxation, and that both may be taxed without resulting duplicity. *Van Allen v. The Assessors*, 3 Wall. 573, *sub nom.* *Churchill v. Utica*, 18 L. ed. 229; *New York v. New York City & County Tax & A. Comrs.* 4 Wall. 244, 18 L. ed. 344; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. ed. 558; *New Orleans v. Houston*, 119 U. S. 265, 30 L. ed. 411, 7 Sup. Ct. Rep. 198; *Sheiby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; *United States Electric Power & Light Co. v. State*, 79 Md. 63, 28 Atl. 768; *Glenn v. Dodge (D. C.)* 8 Cent. Rep. 287; *Com. v. Charlottesville Perpetual Bldg. & L. Co.* 90 Va. 790, 20 S. E. 364; *Union Bank v. Richmond*, 94 Va. 316, 28 S. E. 821; *Belo v. Forsyth County*, 82 N. C. 415, 33 Am. Rep. 688; *Durham County v. Blackwell Durham Tobacco Co.* 116 N. C. 441, 21 S. E. 423; *Memphis v. Farrington*, 8 Baxt. 589; *South Nashville Street R. Co. v. Morrow*, 87 Tenn. 406, 2 L. R. A. 853, 11 S. W. 348; *Atlanta Nat. Bldg. & L. Assn. v. Stewart*, 109 Ga. 80, 35 S. E. 73; *Jefferson County Sav. Bank v. Hewitt*, 112 Ala. 546, 20 So. 926; *People v. Bradley*, 39 Ill. 130; *Republic L. Ins. Co. v. Pollak*, 73 Ill. 293; *Porter v. Rockford*, R. I. & St. L. R. Co. 76 Ill. 561; *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 615; *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 320; *Danville Bkg. & T. Co. v. Parks*, 88 Ill. 170; *Bradley v. Bauder*, 86 Ohio St. 28, 88 Am. Rep. 547.

In those jurisdictions, therefore, the subject of capital stock of corporations, and of shares of stock of their stockholders, to the same tax are held not repugnant, either to the uniformity and equality of taxation clauses in the state Constitutions, or to so much of the 14th Amendment as forbids a state to deny the equal protection of the laws to any person within its jurisdiction.

In other states taxation of this character is held to be double, and not allowable. *Stroh v. Detroit (Mich.)* 9 Det. L. N. 228, 90 N. W. 1029; *State v. Hannibal & St. J. R. Co.* 37 Mo. 268; *State v. Simmons*, 70 Miss. 485, 12 So. 477; *Louisville & E. Mail Co. v. Barbour*, 85 Ky. 73, 9 S. W. 516; *Whitaker v. Brooks*, 90 Ky. 68, 13 S. W. 355; *Gillespie v. Gaston*, 67 Tex. 599, 4 S. W. 248; *State v. St. Paul Union Depot Co.* 42 Minn. 142, 6 L. R. A. 234, 43 N. W. 840; *Foster v. Stevens*, 63 Vt. 175, 13 L. R. A. 166, 22 Atl. 78; *Bugbee v. Stevens*, 63 Vt. 185, 22 Atl. 80; *American Bank v. Mumford*, 4 R. I. 478; *Dunnell Mfg. Co. v. Newell*, 15 R. I. 233, 2 Atl. 766; *Newport Reading-Room, Petitioner*, 21 R. I. 440, 44 Atl. 511; *People ex rel. Burke v. Badlam*, 57 Cal. 594.

But these cases have not all involved a constitutional question. The doctrine of the earlier cases in Pennsylvania, and as late as 1882, when *Com. v. Standard Oil Co.* 101 Pa. 119, was decided, was that the capital stock of a corporation, and the shares of stock belonging to its stockholders, were separate subjects of taxation; but the decisions since have been that, when a corporation is taxed upon its capital stock, its stockholders are not to be taxed upon their shares, and *vice versa*. *Com. v. Pennsylvania Co. for Ins. on Lives & G. A.* 137 Pa. 411, 15 Atl. 456; *Com. v. Fall Brook Coal Co.* 60 L. R. A.

156 Pa. 488, 26 Atl. 1071; *Com. v. United Gas Improv. Co.* 162 Pa. 602, 29 Atl. 667; *Com. v. Lehigh Coal & Nav. Co.* 162 Pa. 608, 29 Atl. 664; *Com. v. American Waterworks & Guarantee Co.* 8 Pa. Dist. R. 268; *Com. v. Provident Life & T. Co.* 9 Pa. Dist. R. 479.

There is also a diversity of opinion as to whether the capital stock of a corporation, and the aggregate of its property and assets in which its capital has been invested, constitute separate subjects of taxation that may both be taxed without duplicate taxation resulting.

In some jurisdictions the prevailing view has been that they do not. *Bank of Commerce v. McGowan*, 6 Lea, 705; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; *Hyland v. Brasil Block Coal Co.* 128 Ind. 335, 26 N. E. 672; *Hannibal & St. J. R. Co. v. Shacklett*, 80 Mo. 550; *State v. St. Louis, K. C. & N. R. Co.* 77 Mo. 203; *Lewiston Water & P. Co. v. Asotin County*, 24 Wash. 371, 64 Pac. 544; *State v. Simmons*, 70 Miss. 485, 12 So. 477.

But elsewhere it is thought that they do. *Jefferson County Sav. Bank v. Hewitt*, 112 Ala. 546, 20 So. 926; *Com. v. New England Slate & Tile Co.* 13 Allen, 391; *Distilling & Cattle Feeding Co. v. People*, 161 Ill. 101, 43 N. E. 779.

It is generally admitted that a corporation may be subjected at one and the same time to privilege or license taxes and to taxes upon its property *ad valorem*, without being thereby doubly taxed. *Owensboro Nat. Bank v. Owensboro*, 178 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564; *Cobb v. Durham County*, 122 N. C. 307, 30 S. E. 338; *Carbon Iron Co. v. Carbon County*, 39 Pa. 251; *Troy Fertilizer Co. v. State*, 184 Ala. 333, 82 So. 618.

It is not unconstitutional to tax a manufacturing corporation engaged in vending its products upon both its stock in trade as property and its sales as business. *Keystone Bridge Co. v. Pittsburgh (Pa.)* 6 Cent. Rep. 153.

A foreign insurance corporation subjected to a municipal tax on its net premium receipts in the city at the rate imposed on property therein, and also to an annual license tax of a percentage of its gross premiums, is not doubly taxed. One tax is on the privilege of doing business, and the other on the property invested in such business. *Walker v. Springfield*, 94 Ill. 364; *St. Joseph v. Ernst*, 95 Mo. 360, 8 S. W. 538.

And an insurance company may be taxed certain fees to support a state insurance department, and upon its capital stock for local purposes the same as other property in the same locality, and also upon its loans, securities, and bonds. *St. Louis Mut. L. Ins. Co. v. St. Louis County*, 56 Mo. 503.

And, as an insurance company and its agent are different personalities, and the business of one is to write risks and settle losses, while that of the other is to solicit insurance and collect premiums, it is not double taxation to require licenses from both such a company and its agent. *Farmington v. Rutherford (Mo. App.)* 68 S. W. 83.

To the same effect is *Memphis v. Carrington*, 91 Tenn. 511, 19 S. W. 673.

But it is double taxation to lay a tax upon both the gross premiums of an insurance company and its net earnings. *Com. v. Penn Mut. L. Ins. Co.* 1 Dauphin Co. Rep. 233.

Double taxation of railroads operating interstate lines, asserted to result under a tax law because it provides that the railroad track and rolling stock shall be listed and taxed in the several counties, the one in proportion that the length of the main track in each county bears to the whole length of the road within the state,

and the other in proportion that the main track used in such counties bears to the entire length of the road, for the alleged reason that the assessing board may, and in effect does, import to the rolling stock and railroad track values belonging wholly to the corporate property in other states,—does not take place, because the value of railroad track and rolling stock in an operating railroad depends to a great extent upon their relations as parts of a whole system, and not as separate isolated things. *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 18 L. R. A. 729, 38 N. E. 421, Affirmed in 154 U. S. 439, 38 L. ed. 1041, 4 Intern. Com. Rep. 677, 14 Sup. Ct. Rep. 1122.

But when, by specific acts of the legislature, a foreign railroad corporation is authorized to construct a part of its line within the state, and granted other privileges for which it is to pay a special annual tax of \$10,000, together with such further rate of taxation of its stock to an amount equal to the cost of constructing that piece of road that similar property is subjected to in the state, it is not liable to state and county taxes, imposed under general laws upon property included in the cost of construction, and built and used for railroad purposes, without an express statute subjecting it thereto; because it is not to be presumed that the legislature intended to impose double taxation. *New York & E. R. Co. v. Sabin*, 26 Pa. 242.

It is not double taxation to tax tolls paid to a railroad company as rentals, by another railroad leasing and operating the line, although the latter corporation has been taxed upon its receipts for transportation upon the leased line. *Com. v. New York, P. & O. R. Co.* 145 Pa. 38, 22 Atl. 212.

Nor is it double taxation to tax a railroad upon embankments, tracks, and other works for railroad purposes, constructed on the land of another, and at the same time tax the owner of the fee of said land *ad valorem*. *State, Hoboken R. Warehouse & S. S. Connecting Co., Prosecutor, v. State Board*, 62 N. J. L. 561, 41 Atl. 728.

And without double taxation a municipality may impose upon a railroad operating within its limits a license or occupation tax for each of two main lines of railroad which it so operates. *Anniston v. Southern R. Co.* 112 Ala. 557, 20 So. 915.

A statute subjecting every express company, incorporated or unincorporated, doing business in the state, to the payment of a state tax upon each dollar of its gross receipts from express business done wholly within the state, does not impose double taxation simply by allowing no deduction for such part of the receipts as in current operation is paid out immediately to other corporations, common carriers, for express matter carried, when such carriers are by the same act in turn taxed upon their gross receipts inclusive of such payments. *Com. v. United States Exp. Co.* 157 Pa. 579, 27 Atl. 396, Affirming 13 Pa. Co. Ct. 225.

Under statutes that apply to private corporations, and impose a tax upon dividends earned or declared and undivided, and another tax upon the annual incomes, gains, or profits of every resident of the state, a corporation is liable to taxation upon its income, gains, or profits during the year preceding the assessment, and also upon the undistributed dividend fund on hand at the beginning of such year. This is not double taxation, because one tax is upon income and the other upon property accumulated from income. If corporate profits are divided among the stockholders, the accumulation does not exist to be taxed as such, but has been converted into income of the stockholders; and, in that case, both recipients, first the cor-

poration, and next its shareholders, are taxable upon such income, but not both for the same year. *Montgomery County Bd. of Revenue v. Montgomery Gaslight Co.* 64 Ala. 269.

To tax a bank upon its real estate, and its stockholders upon its capital and surplus, is not double taxation; nor is it unequal and multi-form because banks that own no real estate are not subject to such a tax. *Second Ward Sav. Bank v. Milwaukee*, 94 Wis. 587, 69 N. W. 359.

The payment of an illegal state tax will not extinguish liability for a legal local tax upon the same subject upon the ground that the levy of the latter under the circumstances amounts to a double taxation. *Chicago, B. & Q. R. Co. v. People*, 136 Ill. 660, 27 N. E. 200.

Although New York has erected no constitutional safeguard against double taxation, its jurists condemn the imposition of it. In a recent case *Earl, Ch. J.*, of the court of appeals, in discussing the taxability of banks and their depositors upon deposits, says: "The Revised Statutes neither exempted the bank nor the depositors therein. But there could not be double taxation. If that had been attempted, some way would have been found to defeat it, as that would be against public policy, the purpose of the laws, and natural justice. While the legislature may constitutionally impose double taxation, its purpose to do so can never be inferred, but must plainly appear. The bank is in some sense a trustee of the depositors, and takes their money and invests it, and pays them the net interest which it earns; and it cannot be supposed that there is any system of laws under which taxation can at the same time be imposed upon a trustee and the beneficiary in respect of the same property." *People ex rel. Savings Bank v. Coleman*, 135 N. Y. 231, 31 N. E. 1022.

XIV. Assessments at full value when valuations generally are less.

It is true in a sense that a taxpayer whose property is assessed for taxation at no more than it is fairly worth suffers no wrong. Yet, if his neighbors are habitually and continually assessed upon their property at less than it is worth, it is plain that he pays more than his proportion of taxes, and that the rule of equality and uniformity of taxation is violated. There are cases holding that such a taxpayer cannot be relieved from a tax imposed under such circumstances, and there are other cases wherein, under such circumstances, the tax laid upon him has been held invalid. Notwithstanding the conflict of opinion disclosed in the decisions, it is confidently thought that one general principle can be formulated that will usually prove controlling when a new case of this character arises. That principle is this: That whenever it can be established indisputably by competent and sufficient evidence that a given assessment upon an aggrieved taxpayer's property has been laid upon a distinctly higher valuation than the assessments in the same jurisdiction upon the property of taxpayers in general, and that this discrimination was intentional and pursuant to a well-recognized and persistent practice of the assessors, the courts will intervene to reduce or annul the tax to the extent necessary to place the complaining taxpayer upon a plane of equality with others in his class, even though the subject of his tax has not been valued beyond its actual worth. That is to say, relief will depend upon the proof of discrimination in practically all cases.

Whatever may be the remedy, if there be any, says the Massachusetts supreme court, when it is shown that the assessors have intentionally assessed the property of part or all of the inhabitants at less than its fair cash value, we are of the opinion that, in a petition for the

abatement of taxes on the ground of overvaluation of the property of the petitioner and the disproportionate taxation arising from such overvaluation, the question is whether the property has been valued at more than its fair cash value, and not whether it has been valued relatively more or less than similar property of other persons. *Lowell v. Middlesex County*, 152 Mass. 875, 9 L. R. A. 856, 25 N. E. 469.

Considered by itself, this decision goes no farther than to say that, in the proceeding there undertaken, the scope of the inquiry and measure of relief were limited to cases within the strict letter of the pertinent statute.

In Kentucky, however, the courts go farther. A tax upon a railroad in that state is not rendered invalid under a constitutional provision for uniform and equal taxation by evidence showing that other railroads which have been assessed at the same amount per mile are worth more than is this particular railroad, without proof that the complaining road is worth less than it has been assessed. This, it is said, may afford reason for increasing the assessments of other roads, but none for reducing that of the complaining one. *Evansville, H. & N. R. Co. v. Com.* 9 Bush, 438.

A corporation, assessed a franchise tax by a state board upon its capital stock at the full value thereof, less the assessed value of all its tangible property, cannot escape liability by showing that the local assessors value individual property at only two thirds of its real worth; the Constitution and laws of the state providing that all property be assessed at its fair cash value, and that the property of corporations be rated no higher than that of individuals. *Paducah Street R. Co. v. McCracken County*, 105 Ky. 472, 49 S. W. 178.

By a statute passed in 1891 Missouri required shares of bank stock, bank reserves, undivided profits, etc., to be treated, for the purposes of taxation, as so much money, less the taxable value of the real estate and fixtures, and subject to the right of parties in interest to show the impairment of shares before the board of equalization. In a contest over a tax on bank stock assessed under this statute, it was insisted by the stockholder that, inasmuch as the taxable value of the real estate and fixtures of his bank had been fixed by the board of equalization at only 40 per cent of their real value, while his shares were assessed at their face value, he was in fact taxed on such shares one and one half times greater than he ought to have been, and that a statute which authorized such a result was unconstitutional for violating the mandate that all taxable property be taxed ad valorem. Falling back upon the conceded propositions that perfect equality of taxation cannot be attained, and much, therefore, must be left to the legislative discretion as to methods of ascertaining and equalizing assessable values, and that only gross inequality warrants the nullification of a statute for conflict with the organic law, the supreme court of the state held the act *sub judice* constitutional, because it was said to fix upon bank stock only a *prima facie* value subject to the right of stockholders to show it was too high, and because, as respected other property, the equalization board had power to raise or lower assessments. *Ward v. Gentry County Bd. of Equalization*, 135 Mo. 309, 36 S. W. 648.

While it is quite true in New Hampshire that a taxpayer unduly taxed by the overvaluation of his property in comparison with that of others in his class and district by the intentional acts of the assessors is entitled to relief against the inequality and disproportionate burden, yet it is not sufficient to procure an abatement of his tax to show that some kinds and

classes of his possessions were thus overvalued, if it also appears that others were correspondingly undervalued, so that on the whole his taxes are no more than he should bear upon his whole taxable estate; since in that case he is not aggrieved. *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 200, 46 Atl. 470. The court said: It is, in fact, conceded by the plaintiffs that the constitutional rule of equality requires a proportional and equal valuation of the different kinds of taxable property. It is also true, as claimed in the plaintiffs' brief, that "it is equally elementary that the law requires all property to be appraised at its true value. Yet, if A's estate is appraised at that value, and all other property in the town of X at 50 per cent of that value, A is entitled to a reduction of his valuation from the legal to the illegal rate." The reason is that in no other convenient way can A's tax on the property owned by him be made proportional to that paid by his neighbors, for the remedy of a reassessment of the whole tax upon all taxable property in the town upon a legal appraisal at its true value would be inconvenient and impossible of execution. But it does not follow, where A's property is appraised proportionately upon the whole with that of other taxpayers, that, if the selectmen have appraised one class of property for which A is taxed to other taxpayers at a lower rate, A is entitled to a reduction on that class to the same illegal rate, and thereby to have his assessment of the common burden reduced below his share, and the shares of owners of other property increased. *Ibid*.

The supreme court of Nebraska has declared that it is a cardinal rule of taxation, prescribed by the Constitution of that state, that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises. And this rule of uniformity applies, not only to the rate of taxation, but as well to the valuation of property for the purpose of raising revenue. The Constitution forbids any discrimination whatever among taxpayers. Thus, if the property of one citizen is valued for taxation at one fourth its value, others within the taxing district have the right to demand that their property be assessed on the same basis. *State ex rel. Young v. Osborn*, 60 Neb. 415, 83 N. W. 357.

Such a Constitution commands not merely uniformity of taxation, but uniformity in the rate of taxation as well; and it is not within the province of the legislature to evade this inhibition, either directly or indirectly. *High School Dist. No. 137 v. Lancaster County*, 60 Neb. 147, 49 L. R. A. 343, 82 N. W. 380.

Although a railroad has been assessed at less than the real value of its property in a town, if it is assessed at a higher proportion thereof than is the other property in such town, it is entitled to a reduction. *People ex rel. New York, L. E. & W. R. Co. v. Zoeller*, 15 N. Y. Supp. 684.

And a taxpayer under such circumstances is entitled to a reduction of his assessment, notwithstanding the Constitution requires property to be assessed at its true value, when he can by no other means secure his constitutional right to equal taxation. *Ex parte Ft. Smith & V. B. Bridge Co.* 62 Ark. 461, 86 S. W. 1060.

A constitutional provision requiring the legislature to provide by law for a uniform and equal rate of assessment and taxation, and to prescribe such regulations as shall secure a just valuation, for taxation, of all property, real, personal, and possessory, excepting mines and mining claims, the proceeds of which alone shall be taxed, and excepting municipal, educational, religious, charitable, etc., property exempted by law,—compels the assessment of all ad valorem

taxes upon property to be made at the same rate. A statute fixing a rate of \$1 per \$100 on mine products, and levying it at 75 per cent of their ascertained value, and a rate of \$2.75 per \$100 on other properties at full value, is unconstitutional. *State v. Estabrook*, 3 Nev. 178.

The courts in Pennsylvania will reduce an assessment on property, although it would sell for the amount assessed, when it is overvalued in comparison with other property similarly situated. *Cambridge Spring Co.'s Appeal*, 21 Pa. Co. Ct. 669.

Appropos of the statement of the Pennsylvania supreme court in *Com. v. New York, P. & O. R. Co.* 188 Pa. 169. 41 Atl. 594, that, "the actual value being a pure question of fact, appellant has no standing to complain of discrimination in methods so long as its stock is not assessed in excess of that value. It may be that the Reading and some other corporations are taxed on less than the actual value of their capital stock; if so the commonwealth is not here appealing, and consequently it is not our business to inquire into the matter,"—Simonton, P. J., of the Dauphin county common pleas, says: We submit with all deference that this leaves out of view the mandate of the Constitution that "taxes shall be uniform," and that if adopted as a principle, corporations that are taxed out of proportion to others of the same kind would be without remedy. The commonwealth cannot appeal from a settlement of taxes, and, therefore, if for any reason the methods adopted by the accounting officers lead to a want of uniformity, or tend to discriminate between corporations alike taxable, those discriminated against would be helpless. *Com. v. Lake Shore & M. S. R. Co.* 3 Dauphin Co. Rep. 172.

So, he concludes that the Constitution means by "taxes shall be uniform" more than that the taxing acts shall provide for uniformity; it means that taxation shall be uniform in fact. And he reaches the like conclusion in three other cases, decided about the same time. *Com. v. Shamokin, S. & L. R. Co.* 3 Dauphin Co. Rep. 168; *Com. v. Jamestown & F. R. Co.* 3 Dauphin Co. Rep. 214; *Com. v. Mammoth Vein Coal & I. Co.* 3 Dauphin Co. Rep. 220.

And when, under such a Constitution, a corporation is assessed for taxes upon its capital stock according to the actual aggregate value of its shares with a capitalization of its funded debt added; while taxes upon other like corporations under the same law are settled upon an appraisement of the actual value of their shares only when they, too, have funded debts,—the assessment is invalid for want of the constitutional uniformity. *Com. v. Shamokin, S. & L. R. Co.* 3 Dauphin Co. Rep. 168; *Com. v. Lake Shore & M. S. R. Co.* 3 Dauphin Co. Rep. 172.

And when, too, in settling accounts for taxes against corporations upon their capital stock upon valuations other than of their shares, there is a great lack of uniformity in determining the taxable valuations, which are in some cases computed by adding to the value of the shares all or a part of the funded debt; in others by adopting a sum of which the net earnings equalled 6 per cent; in others by deducting the floating indebtedness; in others by deducting so much of the funded indebtedness as might be owned by and taxed to residents of the state; and in others by valuing property, assets, and franchises without either adding or subtracting indebtedness, so that as a result of such multifariousness of valuations there is a general lack of uniformity of taxation,—the Constitution is violated, and the assessments consequently are illegal and void. *Com. v. Jamestown & F. R. Co.* 3 Dauphin Co. Rep. 214; *Com. 60 L. R. A.*

v. Mammoth Vein Coal & I. Co. 3 Dauphin Co. Rep. 220.

A provision in a state Constitution that all property shall be taxed according to its value, ascertained in a manner directed by the legislature, so that taxes shall be equal and uniform throughout the state, and no one species of property subject to taxation shall be taxed higher than any other species of the same value, does not require that property be taxed at its full actual value, but only that taxes on property be based on values, and not, for instance, on acreage, quantity, location, frontage, or any one of numerous other gauges; and, therefore, when the universal and continued usage of years in such state has been, and is, to assess property for taxation at only a percentage of its real value, no species of property can be singled out and alone assessed at its full value without violence to such Constitution. *Railroad & Teleph. Cos. v. Tennessee Bd. of Equalizers*, 85 Fed. 302.

Under such circumstances, and in such state, the action of a state equalization board in assessing railroad and telephone property at the full actual value thereof, without any effort whatever to equalize such assessments with those made upon other classes of property in the state, amounts to a denial of the equal protection of the laws, and to a deprivation of property without due process of law, contrary to the provisions of the 14th Amendment to the Constitution of the United States. *Ibid.*

It was contended in these cases that a taxpayer whose property has been assessed at no more than its value has no ground of complaint in the fact that other taxpayers have been assessed upon their property at less than its value, when the Constitution prescribes uniform and equal taxation.

Clark, J., thus dealt with this contention: Much stress has been placed in argument upon the language of the Constitution providing that all property shall be taxed according to its value. Defendants say that the proper interpretation of these terms requires that property shall be assessed at its full value, and, unless plaintiffs can show that their own property has been in fact assessed at more than its actual value, it is not open to them to complain that all other property in the state is assessed at only a percentage of its actual value. The contention is that, if the assessors have obeyed the constitutional direction, and assessed plaintiff's property at its full value, it is no just or legal cause of complaint, and no ground of relief, that other assessors have put a taxable value on other property much less than its actual value. Conceding, for the purpose of testing the soundness of this proposition, that the constitutional term "according to its value" means the same thing as "at its full value," the contention of the state then, with reference to its effect, is this: That it may assess the property of A at its full value in obedience to the Constitution, and the property of B at one half its value in violation of the Constitution, and, when A complains that the result has been to violate the Constitution in respect to the equality provision, the answer is that the objection is not open to A because he is taxed no more than the full value of his own property, and that he must pay 50 per cent more on the same actual value than B. Now, it will certainly be admitted that the simple statement of such a proposition suggests its utter unreasonableness. If decisions may be found which apparently uphold such a result as this, they promulgate a doctrine which cannot be accepted as good law. *Ibid.*

The same judge followed this by deciding further that, while it is true that the prohibi-

tions of the 14th Amendment to the Federal Constitution in respect of denying the equal protection of the laws and the deprivation of property without due process of law are directed against state action only, such state action is not to be regarded as limited to the terms of a legislative enactment as it comes from the legislature, but it extends to all instrumentalities and agencies officially employed in the execution of the law down to the point where the personal and property rights of the citizen are touched. *Nashville, C. & St. L. R. Co. v. Taylor*, 86 Fed. 168.

These decisions of Judge Clark came under review in the United States circuit court of appeals, and the question here under discussion was considered. After treating of various other questions in the case, that tribunal turned to this one. The next objection to the assessment, it said, and the most serious, is that the railroad property of the state has been assessed at its real value, whereas all other property in the state is habitually and intentionally assessed by the assessing officers, who are not the defendants, at not exceeding 75 per cent of its real or correct value. The contention is that the undervaluation of real and personal property is intentional and systematic throughout the state, and is in accordance with an immemorial and well-recognized custom; that, combined with the assessment at full value of all railroad property, the undervaluation of all other property makes a system of taxation operating to impose upon complainant and all others holding the same class of property a grossly unjust share of the cost of the state, county, and city governments, and that this is in violation of the Constitution of the state, which enjoins uniformity of taxation, according to value, on all property, and expressly forbids that one species of property shall be taxed higher than any other; and that a court of equity, because it is unable to remedy the glaring injustice done to complainants and others of the same class by compelling the assessment on other property to be raised to its real value, may accomplish the same result by enjoining the defendants from assessing railroad property at any higher percentage than that at which other property in the state is assessed. In considering the soundness of this contention, the court found, first, that, as a fact established by overwhelming and uncontradicted evidence, the assessors and county equalization boards for many years generally in the state intended to, and did, assess real and personal property at a uniform percentage less than its real value, and on the average 25 per cent less, and, second, that this happened during the year when the assessments the railroads complained of were made. But the state Constitution commanded, in the view taken by the court, assessments to be made upon the true value of the taxable property at the same time that it expressly forbade any one species of property to be taxed higher than another species of equal value. Considering, nevertheless, that the intent and purpose of the Constitution were to secure a real equality of taxation, and that this purpose would be frustrated by upholding any single assessment upon a par valuation, it decided that, to enjoin the enforcement of such an assessment if the injunction secured uniformity as to all would be not so great a violation of the Constitution as would result from a continuation of existing conditions, and a denial of relief to the injured taxpayer. "The court," it said, "is placed in a dilemma from which it can only escape by taking that path which, while it involves a nominal departure from the letter of the law, does injury to no one, and secures that uniformity of tax burden which was the sole end of the Constitution. To 60 L. R. A.

hold otherwise is to make the restrictions of the Constitution instruments for defeating the very purpose they were intended to subvert. It is to stick in the bark and to be blind to the substance of things. It is to sacrifice justice to its incident." *Taylor v. Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350.

A foreign corporation whose property is assessed for taxation at its full value does not sustain the allegation of unjust discrimination against it, and, therefore, a violation of the constitutional provision requiring all property subject to taxation to be taxed ad valorem by offering no proof beyond the testimony of one member of the state board of equalization that, in his judgment, the valuation of property generally is only 35 or 40 per cent of its true value. It is bound to go further, and show that such is the general common rule of action or agreement of the assessors. *State ex rel. Gottlieb v. Western U. Teleg. Co.* 165 Mo. 502, 65 S. W. 775.

The corporation is bound, if it would establish a violation of the 14th Amendment in respect of a denial of the equal protection of the laws, to prove, either that the state laws themselves sanctioned such practice of undervaluation, or else that it was the result of a general agreement or common rule of action of the assessors. *Ibid.*

To warrant a Federal court in intervening by injunction against a state tax upon a corporation upon the alleged ground that it has been so discriminated against in being assessed at full value, while other property in the state has been generally intentionally and systematically assessed at but 70 per cent thereof, as to amount to a denial of the equal protection of the laws in violation of the 14th Amendment, the discrimination alleged must be established by a clear preponderance of evidence, or admitted. *Louisville Trust Co. v. Stone*, 46 C. C. A. 299, 107 Fed. 305.

Such a discriminating rule of action among assessors generally may be proved inferentially when direct proof is lacking, from a regular and persistent course of conduct in respect of assessments upon their part; and to that end evidence of particular assessments and of the value of the property assessed is admissible. *Southern R. Co. v. North Carolina Corp. Co.* 104 Fed. 700.

When a rule or system of valuation under an unobjectionable and constitutional tax law is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate the fundamental principle of the Constitution; and when such rule is applied, not solely to one individual, but to a large class of individuals or corporations,—equity may properly interfere to restrain the operation of this unconstitutional exercise of power. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903.

To establish such an inequality of assessment and taxation as will amount to a denial of the equal protection of the laws to one set of taxpayers as compared with others in the same class and circumstances, it must be alleged and proved, when the laws on their face are innocent of discrimination, that the assessors habitually and intentionally, by some rule prescribed by themselves or others whom they are bound to obey, undervalue the one, or overvalue the other, subject of the tax. *Albany County v. Stanley*, 105 U. S. 305, 26 L. ed. 1044.

In *New York v. Barker*, 179 U. S. 279, 287, *sub nom. New York ex rel. New York Clearing House Bldg. Co. v. Barker*, 45 L. ed. 190, 194, 21 Sup. Ct. Rep. 121, Affirming 158 N. Y. 709, 53 N. E. 1130, it was alleged that, although by the New York tax laws all assessors were commanded to assess real estate for taxation at its full and actual value, nevertheless, as corpora-

tions were also assessed upon their capital stock at its actual value under another statute that did not apply to individuals, and from the latter assessment there was to be deducted the assessed value only of the corporate real estate, the effect of this process was always and necessarily to tax corporations up to the full value of their real estate, whereas, individuals were never so taxed upon the single assessment; wherefore, it was contended the corporations were denied the equal protection of the laws. But the record failed to show, either by averment or proof, that there was a regular, habitual, and general undervaluation of individual real estate in assessing it for taxation, and the court declined to assume that such was the case; and if, as the legal presumption necessarily was, the assessors did their sworn legal duty, and assessed all real estate, by whomsoever owned, at its full and actual value, there was no discrimination, and there could be no inequality in including it at its real, and excluding it at its assessed, value, in taxing a corporate landowner upon its capital stock.

XV. Different methods of assessment and procedure.

It is plain that the constitutional provisions referred to *ubi supra* have only the purpose to prevent the saddling upon any single taxpayer, or any specific property, of more than his or its fair and just proportionate share of the burden of public taxation. If a taxpayer is not called upon to bear more than this, he has no grievance in so far as such constitutional provisions are concerned,—no wrong has been done or threatened him in this respect which entitles him to call upon the courts to redress or prevent. Accordingly, one finds the courts interfering upon the ground of a violation of uniformity and equality of taxation rules when actual inequality has resulted, or necessarily must result, and in no other cases.

A taxing statute is not invalid, according to Runyon, Chancellor, of the New Jersey court of errors and appeals, anent the railroad and canal tax legislation of 1884 in that state, under a constitutional rule of uniformity and equality in property taxation *ad valorem*, merely because it directs the valuation and assessment of certain property to be made by a board of assessors specially appointed for the purpose; as the machinery designated to execute a law does not affect the case if the principle of the law be constitutionally unobjectionable. Whence, it follows that a general statute establishing a system for the taxation of railroads and canals, which sets apart for assessment by a state board all the property of the railroads and canals used and appertaining to their specific corporate purposes, including their franchises, and assesses them at their true value,—the rule relating to all *ad valorem* property taxation,—leaving any other property railroads or canals may chance to own, and which is not necessary to the exercise of their franchises, to be assessed and taxed by the local authorities like all property in their respective jurisdictions, and which lays upon the railroad and canal property assessed by the state board, a tax for state purposes, and a further tax for county and municipal purposes,—is not repugnant to the Federal Constitution, either as denying the equal protection of the laws, or as depriving one of property without due process of law. *State Board v. Central R. Co.* 43 N. J. L. 146, 4 Atl. 578.

And his colleague, Parker, J., concurring, says: "I agree with the supreme court in that part of the opinion which holds the act of 1884 not invalid because it directs that the valuation and assessment shall be made by a board of as-

sessors specially appointed for the purpose. It matters not what the machinery set in motion by the legislature to execute a tax law may be, so long as the principle lying at the root of the act is not antagonistic to the Constitution." And, in his view, while the legislature may not be competent, under a provision of the state Constitution commanding the assessment and taxation of property *ad valorem* by general and uniform laws, to select the property of two classes of corporations, and tax it while exempting all other property from taxation, yet, that body may, by a series of laws, subject the property in the state in general to taxation by different methods, and group the subjects of taxation into classes for the purpose, and then no single statute in the series will be unconstitutional because the whole series is *in part materia*. *Ibid.*

It is within the legislative discretion, in a state having such a Constitution, to create classes upon a substantial basis for the convenience of levying and collecting taxes; and, so long as the modes provided substantially result in assessing the classes upon their property according to its true value, different methods of ascertaining such value may be prescribed in such classifications. *Fidelity Trust Co. v. Vogt*, 13 N. J. L. 86, 48 Atl. 580.

Individuals may be taxed in a different manner from corporations without violating a constitutional rule of uniformity. *Fox's Appeal*, 112 Pa. 337, 4 Atl. 149; *Sanderson's Appeal* (Pa.) 3 Cent. Rep. 569.

But, although the legislature, without violating the constitutional rule of equality and uniformity, may classify corporations for the purpose of taxation, and may subdivide them into smaller classes, and assess them in different ways, all property in the same class must be taxed without discrimination of rate, and the rule for ascertaining its value must be applied, alike to all in the class, and each must be taxed on the actual cash valuation, ascertained from any relevant evidence tending to establish it. *Com. v. Sharon Coal Co.* 164 Pa. 304, 80 Atl. 127, 128; *Com. v. Shamokin*, 8 & L. R. Co. 3 Dauphin Co. Rep. 168; *Com. v. Lake Shore & M. S. R. Co.* 3 Dauphin Co. Rep. 172; *Com. v. Jamestown & F. R. Co.* 3 Dauphin Co. Rep. 214; *Com. v. Mammoth Vein Coal & I. Co.* 3 Dauphin Co. Rep. 220.

There is power in the West Virginia legislature to prescribe the method of ascertaining, for the purposes of taxation, the value of any class of property in the state; and, provided such method is applied uniformly throughout the state, the constitutional rule of equality and uniformity of taxation is not infringed. *Charleston & S. Bridge Co. v. Kanawha County Ct.* 41 W. Va. 658, 24 S. E. 1002.

There is nothing in the Constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislature, and there is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality in respect of the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect, which the discretion of the legislature has seen fit to make. *Kentucky Railroad Tax*

Cases, 115 U. S. 821, *sub nom.* Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

If it be granted that a constitutional provision that taxes shall be equal and uniform upon all property subject to taxation within the territorial limits of the authority levying the tax applies to taxation based upon income, license, or franchise, still it is not violated by a statute taxing, by a different mode than that applied to individuals, corporations generally upon all their property and assets, tangible and intangible, franchises and privileges. *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527.

It is not an unconstitutional discrimination for a city to allow individuals a discount for prompt payment of their taxes, when none is allowed to a railroad assessed under a different system not administered by such city, and where the procedure for collecting railroad taxes is altogether unlike that applied to natural persons. *Louisville & N. R. Co. v. Louisville*, 16 Ky. L. Rep. 796, 29 S. W. 865.

A municipality in Kentucky may not, however, without violating the Constitution, levy city taxes upon the ad valorem basis upon real property, and upon a license basis upon personal property, even though the Constitution does authorize taxation based on licenses and franchises. *Levi v. Louisville*, 97 Ky. 394, 28 L. R. A. 480, 30 S. W. 978.

And when a state Constitution provides that all property shall be taxed according to its value, ascertained in such manner as the legislature directs, so that taxes shall be equal and uniform throughout the state, and no species of taxable property be taxed higher than another species of equal value, the provision is mandatory and self-executing: so that, although the legislature may provide for the assessing of railroads and telephone companies by a state board of equalization, yet, if that board, even acting with perfect honesty and good faith pursues methods calculated to bring about a substantial inequality in the taxable values of the properties of such companies as compared with other sorts of property assessed by the ordinary methods, the innocent intent of the procedure will afford no legal justification for the resulting wrong. *Railroad & Teleph. Cos. v. Tennessee Bd. of Equalizers*, 35 Fed. 302.

But when it is shown without contradiction that the valuation put upon the property of a railroad within the state is not excessive, either as regards its intrinsic worth, or by comparison with the assessments of other railroad property in such state, it matters not what were the ways and means by which the assessing officers arrived at that valuation, since whatever method they adopted did not result in any overvaluation of the railroad property, nor in any discrimination against the railroad as compared with other railroads whose property is taxed in the same state. *Kansas City, Ft. S. & M. R. Co. v. King*, 120 Fed. 614.

A separate system of railroad taxation, whereby rolling stock and other personal property in flux along the line is assessed and apportioned to different counties by a state officer who enforces collection, when in ordinary taxation personal property is assessed and taxed by local officials in the counties where it happens to be, is not invalid upon the score of a want of uniformity. *Columbus Southern R. Co. v. Wright*, 89 Ga. 574, 15 S. E. 293, Affirmed in 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396.

The Indiana Constitution does not require a uniform method of valuation of property, but only such regulations as shall secure a just valuation for taxation, of all property, both real and personal. The legislature may use its dis-

cretion as to the best method of securing a just valuation, and, unless the method adopted be clearly inadequate to secure that result, the action of the legislature cannot be questioned. *Louisville & N. A. R. Co. v. State*, 25 Ind. 180, 87 Am. Dec. 358.

That a state board of tax commissioners—the highest body in the state with jurisdiction or authority to make or correct assessments of property for taxation—is given original jurisdiction in assessing and valuing railroad tracks and rolling stock, while it acquires jurisdiction over other classes of property by appeal, does not deny railroads the equal protection of the laws. Equal protection of the law does not require that all persons shall have the right of a hearing or trial before the same tribunal and in all the same tribunals, and have the same right of appeal from one to another. That such is not the theory of, or interpretation to be given to, art. 14, § 1, of the Constitution of the United States is too clear to admit of argument or the citation of authority. *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421, Affirmed in 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122.

Nor is the statute establishing that system of railroad taxation any more objectionable upon the score of infringing the provisions of the state Constitution relating to a just valuation of all property for taxation and to equality and uniformity in taxation. *Ibid.*

The same conclusions were reached upon the same questions by the Supreme Court of the United States. *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114.

The provision of the Illinois Constitution requiring taxation to be by general law, uniform as to the class on which it operates, does not invalidate a statute for the assessment by a state board of some corporations, and of other corporations by local authorities. *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660.

The Illinois act creating a board of assessors in all counties of the state having a certain number of, or more, inhabitants, and making township assessors elected in each township in such counties not lying wholly within the limits of one city *ex officio* deputy assessors to make assessments in their respective townships, is not open to the objection of a want of constitutional uniformity and equality as dividing the city of Chicago into two parts for assessment purposes, one to be assessed by the board so constituted and the other by township assessors. Aside from the consideration that the act does not evince any such legislative intention, it creates, as a matter of fact, but one set of assessors for the whole county embracing that city. There are two classes of deputies, one elected and the other appointed, but both of these act under the direction of the one board, and the work of both is subject to its revision and correction; and becomes, when revised and adopted, the work of the board itself. *Burton Stock Car Co. v. Traeger*, 187 Ill. 9, 58 N. E. 418.

Diverse methods in electing or appointing city assessors and boards to review their action in different cities do not violate the constitutional provision for uniform taxation. *State ex rel. Milwaukee Street R. Co. v. Anderson*, 90 Wis. 550, 63 N. W. 746.

All that is required in a statute for the taxation of the property of railroad corporations to conform to a constitutional requirement that the property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals is equality of burden on the tax-paying corporation; and the legislature has power, when this result is attained, to provide any

proper manner for the valuation of such property, and to fix the situs thereof for the purposes of taxation. *Dubuque v. Chicago, D. & M. R. Co.* 47 Iowa, 196.

A constitutional provision requiring the legislature to provide for a uniform and equal rate of assessment and taxation is not infringed by a statute requiring railroad property to be assessed by joint action of county clerks along the line thereof, as an entirety as personal property (although it includes real estate), and the taxes thereon to be collected in the same manner as are taxes upon personal property; when other property is assessed separately, according to quantity, by township assessors in each township, and other real estate is assessed as such while real and personal taxes are collected generally in different ways; nor when ordinary taxes are equalized by a board in each county which has naught to do with railroad taxes. The Constitution does not require equality and uniformity in the mode or manner of assessing and method of collecting taxes, but only that all property be assessed and taxed at an equal and uniform rate. *Missouri River, Ft. S. & G. R. Co. v. Morris*, 7 Kan. 210.

A statute creating a state board of railroad commissioners to assess railroad property for taxation, authorizing the annual assessment of railway tracks, when other real estate is assessed biennially, without a right of appeal, enjoyed by ordinary taxpayers taxed by other assessors upon a different class of property, is not repugnant to a constitutional provision for equal and uniform taxation; nor does it deny railroads the equal protection of the laws. *St. Louis, I. M. & S. R. Co. v. Worthen*, 52 Ark. 529, 7 L. R. A. 374, 13 S. W. 254.

The legality, as well as the advantage, of different modes of assessing different kinds of property is regarded by the supreme court of Colorado as in accord with the constitutional requirement in that state that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and that taxes shall be levied and collected under general laws and regulations to secure a just valuation for taxation of all property. *Stanley v. Little Pittsburgh Min. Co.* 6 Colo. 415; *Carlisle v. Pullman Palace Car Co.* 8 Colo. 320, 54 Am. Rep. 553, 7 Pac. 164.

The uniformity required in that state is a uniformity of taxes, not of procedure, nor of rules or regulations to govern the imposition of them. To demand absolute uniformity in the latter regard would tend strongly to defeat the prior and supreme requirement. The Constitution leaves the matter with the legislature, simply directing that the regulations be made by general law and secure just valuations. *People ex rel. Iron Silver Min. Co. v. Henderson*, 12 Colo. 369, 21 Pac. 144.

Thus it is that a law for taxing railroad cars, which excepts from its application cars of railroads operating lines within the state, whose taxation is otherwise provided for, is not in conflict with such constitutional provisions. *American Refrigerator Transit Co. v. Adams*, 28 Colo. 119, 63 Pac. 410.

The Constitution of California requires all property to be assessed at its actual value; but the fact that the value of one kind of property is to be ascertained by one officer or board, and the value of another kind by another officer or board,—each clothed with the duty and responsibility of ascertaining the actual value,—does not operate to deny to the owners of either kind the equal protection of the laws. The state board in the one case, the assessors and county boards in the other, are but different instrumentalities through which the same result is

reached, the fair and just valuation by reference to the same standard—and, therefore, the equal and uniform valuation—of property for the purposes of taxation. *San Francisco & N. P. R. Co. v. State Bd. of Equalization*, 60 Cal. 12.

Under the Constitution of Washington commanding, first, that all property in the state, not exempt by Federal laws of such Constitution itself, shall be taxed in proportion to its value, to be ascertained as provided by law; and, second, that the legislature shall provide by law an equal and uniform rate of assessment and taxation on all property in the state according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation of all property so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property,—the legislature has power to select the subjects of taxation, and prescribe the methods of assessment and collection of taxes, and has the right to create a state board of equalization, and designate its duties, and how they shall be performed. *State ex rel. Thompson v. Nichols* (Wash.) 69 Pac. 771.

Michigan is somewhat out of harmony with her sister states.

When a state Constitution requires the legislature to provide a uniform rule of taxation except on property paying specific taxes, and taxes to be levied upon such property as prescribed by law, and that all assessments shall be on property at its true cash value, a statute for the assessment of telegraph and telephone lines within the state, which provides that certain designated state officers shall assess such lines at their true cash value equal to the average rate of taxes (general, municipal, and local), to be ascertained from the files of the auditor general's office, and to be in lieu of all other taxes, does not provide for a specific tax; and therefore, although these lines are to be assessed at their true cash value, inasmuch as they are to be assessed as a whole, and not locally, by a state board, not by local assessors as in ordinary cases,—granting, without deciding, that this is permissible,—the rate, being determined in a different way, and being a different amount than that applied to other property taxed for state purposes,—is void for violating the constitutional rule of uniformity. *Pingree v. Auditor General*, 120 Mich. 85, *sub nom.* *Pingree v. Dix*, 44 L. R. A. 679, 78 N. W. 1025.

And it has been held in Georgia that, when there is a constitutional requirement that taxes shall be levied and collected under general laws, it means that laws for the levying and collecting of taxes shall be substantially the same for all classes of property; that, if a pecuniary penalty is put upon delinquent taxpayers, it shall affect all alike; that the legislature cannot impose one penalty upon a railroad and another upon an individual for failure to pay a property tax,—to penalize one class alone and other classes not at all for like defaults. A statute which does this is invalid. *Atlanta & F. R. Co. v. Wright*, 87 Ga. 487, 13 S. E. 578.

XVI. Miscellaneous.

A few cases remain to be noticed before the topic is closed, which have not readily been assignable to the foregoing groups, and which have nothing in common but a question of equality. They are included to complete the survey of the whole field of inquiry. When a Constitution provides that no political corporation shall impose a greater license tax than the legislature imposes for state purposes, a city may exact a license tax only from those occupations or businesses that the state has so bur-

dened; but, after the state has charged a particular business with a license tax, it is no objection to a municipal license tax upon it not greater in amount than the state tax discriminates between those who follow the business in cities of 50,000 people and those who do so in less populous places, in violation of the constitutional rule of equality and uniformity, because a state tax law will not be held invalid in a collateral proceeding not involving a state tax and where the state is no party. *New Orleans v. Pontchartrain R. Co.* 41 La. Ann. 519, 7 So. 88.

A constitutional declaration that taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax does not invalidate a statute providing that no assessment shall be laid *ex nomine* upon the capital stock of state or national banks, banking firms, companies, or associations, or corporations with capital stock divided into shares, but that, instead, the actual value of shares of stock shall be taxed, because in its practical administration stockholders in corporations which have capital invested in nontaxable securities are not allowed any *pro rata* deduction on account thereof. This does not amount to a taxation of corporations upon securities which are exempt when owned by individuals, and, hence, does not constitute an unequal taxation. *Parker v. Sun Ins. Co.* 42 La. Ann. 1172, 8 So. 618.

After a tax in aid of a railroad has been duly assessed and levied, the release by the railroad of some of the taxpayers from its payment does not invalidate the tax as to the rest. Their burden is not increased by such release, and so the rule of equality and uniformity is not infringed. *Missouri, K. & T. Trust Co. v. Smart*, 51 La. Ann. 416, 25 So. 443.

When a railroad has been properly and legally assessed for taxation by a state railroad commission, and the amount of its taxable property in a given county apportioned to such county, it cannot avoid a highway tax assessed upon such apportionment in such county because it is unequally and inequitably subdivided among the several road districts in the county entitled to parts of it. So long as the corporation pays no more than it is liable for in the aggregate, it is immaterial to it how the payment is subdivided. *State v. Cincinnati, N. O. & T. P. R. Co.* 18 Lea, 500.

When the jurisdiction of a Federal court has been duly invoked to restrain the imposition of a state tax upon a corporation alleging it has been unfairly discriminated against by being assessed upon the value in full of its property, whereas other taxpayers in general throughout the state are universally and intentionally assessed upon but 70 per cent thereof, so that, in effect, the equal protection of the laws has been denied the complainant in violation of the 14th Amendment, that jurisdiction is retained for all purposes; and, although it is decided that the discrimination charged is not established by the proof, the corporation may still have relief by being exempted as a stockholder in another taxed corporation of the state to the amount of its interest therein, when the state law provides that the shareholders of such corporations shall not be taxed upon their shares, and the proper deduction on this account has not been allowed in the assessment. *Louisville Trust Co. v. Stone*, 46 C. C. A. 299, 107 Fed. 305.

An objection that a tax is void for want of constitutional uniformity and equality, for the reason that lands of unequal value have been arbitrarily assessed at the same rate per acre is unavailing when raised for the first time in suit to set aside an assessment and restrain the

collection of a tax, when a statute provides that no person or corporation shall be heard in any action, suit, or proceeding to question the equality of any assessment, unless he or it shall have first made such objection before the board of review, and made offer to sustain the same by competent proof. *Wisconsin C. R. Co. v. Ashland County*, 81 Wis. 1, 50 N. W. 937.

While the Minnesota Constitution allows the deduction of indebtedness from credits in assessments for taxation, yet such deductions can be secured only in some manner provided by law, as the Constitution is not self-executing; and if, by failure to observe the requirements of a statute regulative of the allowance of such deductions, the right thereto is lost, the tax is not invalidated for want of equality and uniformity. *State v. London & N. W. American Mortg. Co.* 80 Minn. 277, 83 N. W. 339.

When a state law imposes upon foreign insurance companies doing business within its borders a percentage tax upon their gross premium receipts higher than is laid upon the like receipts of domestic companies of the same kind, and does not provide for the enforcement and collection thereof in any way except to make the payment thereof a condition precedent to the obtaining of a license to do business in the state, the Federal courts have no jurisdiction to restrain the revocation of or refusal to renew such license notwithstanding the claim that the discriminating tax amounts to a denial of the equal protection of the laws within the terms of the 14th Amendment of the Constitution of the United States. Although such discrimination might be sufficient to prevent the collection of the tax, a state has the undeniable right to impose any condition it chooses upon its permission to foreign corporations, not government agencies or exclusively engaged in interstate or foreign commerce, to do business in its territory, and the right, also, with or without reason, to exclude them *in toto*. *Manchester F. Ins. Co. v. Herriott*, 91 Fed. 711.

Under a Constitution requiring all property to be assessed and taxed at an equal and uniform rate, upon a just valuation, and statutes requiring it to be assessed at actual cash value (defined to mean the sum at which it would be accepted in payment of a just debt from a solvent debtor), and laws directing assessors, in fixing the value for taxation of any railroad, to assess it the same as other property, each to consider, treat, and assess the portion within his jurisdiction as an integral part of a complete, continuous, and operated line, and not merely as so much land covered by a right of way, or as so many miles of track consisting of rails, ties, and couplings,—a railroad, like other property, must be assessed at its true cash value; but the rule for determining that value is to capitalize its earnings at the current rate of interest, taking into account its prospects of increased or diminished utility; but the value of any particular portion of the road is not necessarily a fractional proportion of the whole, for local conditions may make it more or less. *State v. Virginia & T. R. Co.* 23 Nev. 283, 85 L. R. A. 759, 46 Pac. 723.

XVII. Conclusion.

The review has shown that, however consonant with justice equal taxation may be, it cannot be judicially enforced, even approximately in the United States,—such is the plenary power in the premises of state legislatures,—without controlling constitutional provisions. The varying language employed in the Constitutions to secure equality, and the vary-

ing constructions thereof by the courts interpreting that language, have necessarily led to a great variety of decisions. The thoughtful reader observes something of a tendency in the courts to hold that, inasmuch as absolute equality of taxation is supposed to be unattainable, gross inequality must be tolerated. The decisions of the United States Supreme Court indicate this tendency. A remark, typical of the mental attitude of its members, is that of Mr. Justice Field, in speaking of a tax burden laid upon a particular district for a public work of benefit to the whole state: "This court is not the harbor in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive state legislation." *Mobile County v. Kimball*, 102 U. S. 691, 704, 28 L. ed. 238, 242.

Many rights belong to citizens which persons as such do not enjoy. Few, or no, burdens rest upon citizens which persons do not sustain. The rights of citizens may be withheld from, and their obligations imposed upon, persons, and they are. Corporations are included among persons, and excluded among citizens.

About thirty years ago Mr. Justice Beck, of the Iowa supreme court, in *Dubuque v. Illinois* C. R. Co. 39 Iowa, 56, wrote, and afterwards, in *Dubuque v. Chicago*, D. & M. R. Co. 47 Iowa, 196, repeated: The history of corporations for pecuniary profit in this country shows that there long has been a disposition on the part of these artificial persons to seek, and on the part of legislatures to grant, immunities and exemptions from taxation. It has often occurred that their charters provided for total exemption from taxes, or for rules of taxation applicable to them different from those affecting other property holders. Legislation in other forms has been often sought and granted securing the same end. The law before us, as well as others enacted in this state, bear evidence of the correctness of this statement. Against such legislation, the evils of which existed and were felt when the Constitution of 1857 was adopted, the provision above quoted (i. e., the uniformity and equality provision) was aimed. The end sought and attained thereby is the equal and uniform taxation of the property of all the taxpayers of the state.

When these words were written they were doubtless true, and prudently used of a past when legislation had sought to open new regions by every legitimate inducement to railroads, telegraphs, and banks; but the succeeding years have seen a great change in legislation regarding corporations. The history of these later years is the history of a struggle by corporate enterprises to escape being burdened for the benefit of individuals, to maintain an equality with natural persons, and of legislative efforts to saddle corporations with every possible burden, and to tax them over and over again. The constitutional provisions devised to make corporations taxable to as great an extent and as much as other taxpayers are now relied upon by the corporations to prevent their being taxed more than individuals.

In respect of classification of subjects of taxation, the principle has at length been evolved, that an arbitrary, unreasonable, unjust classification will not be allowed to stand when the Constitution commands equality and uniformity of taxation. Yet, it is not to be denied that the courts often sustain classifications apparently

unjustifiable and vicious. And sometimes they waver so much in opinion as to deprive their final conclusions of all weight whatever. An instance in point is the course of Judge Deady in *Dundee Mortg. Trust Investment Co. v. School Dist. No. 1*, 19 Fed. 359, 10 Sawy. 52, 21 Fed. 151, and *Dundee Mortg. Trust Investment Co. v. Parrish*, 11 Sawy. 92, 24 Fed. 197.

The case of *Knowlton v. Rock County*, 9 Wis. 410, discredited by subsequent decisions of the court which decided it, condemned by Judge Cooley and the Supreme Court of the United States as mentioned *supra*, opposed to decisions in other states, faultily reasoned, and sponsor for decisions that could not stand, is doubtless deemed to deserve the general condemnation it has received. But, after all, with diffidence be it said that decision nullified a classification which if it did not pass the boundary between the natural and the arbitrary, the reasonable and the unreasonable, went up to the very line. One who doubts the justice of lifting from the farmer a part of his just share of the burdens of state, and adding it to what the rest of the community must bear, is moved to ask why land devoted to agriculture or horticulture should be taxed but half as much as land devoted to other purposes located by its side in the same city.

Double taxation certainly subjects the victim of it to more than his share of the public burden, yet the courts generally concede the power of the legislature to impose it, and ignore constitutional provisions commanding equal and uniform taxation as any restraint upon that power.

It is plain that, if a taxpayer is not disproportionately burdened, he has no cause to complain. If he pays no more than his just share he has no grievance. It is equal taxation that the Constitutions aim to secure, nothing else. Every other distinction made in the tax laws between him and other taxpayers is a case of *damnum absque injuria*; there is no wrong to be righted, no violation of any constitutional right.

The cases of *State ex rel. Poe v. Jones*, 51 Ohio St. 492, 37 N. E. 945; *Western U. Teleg. Co. v. Poe*, 61 Fed. 449; *Adams Exp. Co. v. Poe*, 61 Fed. 470; *United States Exp. Co. v. Poe*, 61 Fed. 475; *Sanford v. Poe*, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546; *Adams Exp. Co. v. Ohio State Auditor*, 185 U. S. 194, 41 L. ed. 633, 17 Sup. Ct. Rep. 805, Rehearing denied in 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604, Affirming last above cited case, and which sustained at last the Nichols law of Ohio, —involved among other questions the constitutionality of the statute with respect of uniformity and equality in taxation. In these cases, and in the kindred one that arose under the Indiana tax law (*Western U. Teleg. Co. v. Taggart*, 141 Ind. 281, 40 N. E. 1051, Affirmed in 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054), the right to classify separately express and telegraph companies for taxation, and to assess them by different officers, rules, and methods than ordinary taxes, was fully affirmed. These cases are fully treated of in their more important aspects in other notes in this series, and, as they are in harmony with the great body of the case law in point upon the questions discussed in this note, they have not been taken up further.

J. B. G.

CALIFORNIA SUPREME COURT.

Frederick KLEBAUER *et al.*, *Respts.*,
v.

WESTERN FUSE & EXPLOSIVES COMPANY, *Appt.*

(.....Cal.....)

The storage of gunpowder by a fuse manufacturer in quantities necessary for his business, which is located in a proper place and is conducted with the utmost care, is not a nuisance *per se*, so as to render him liable for injuries caused to neighboring property by the malicious explosion of the magazine by an employee.

(*Beatty, Ch. J., dissents.*)

(June 10, 1902.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiffs in an action brought to recover damages for injuries alleged to have been caused by the explosion of defendant's powder magazine. *Reversed.*

The facts are stated in the opinions.

Messrs. John A. Wright and G. R. Lukens, for appellant:

The doctrine of "proximate cause" disposes of this case in favor of the defendant.

In jure non remota causa sed proxima spectatur.

Broom, *Legal Maxims*, 165; Bacon, *Maxims*, Reg. 1; Pollock, *Torts*, *380; *Herr v. Lebanon*, 149 Pa. 222, 16 L. R. A. 106, 24 Atl. 207; *Scheffer v. Washington City*, V. M. & G. S. R. Co. 105 U. S. 249-252, 26 L. ed. 1070, 1071; *Louisiana Mut. Ins. Co. v. Tureed*, 7 Wall. 44, 19 L. ed. 65; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *McDonald v. Snelling*, 14 Allen, 294, 92 Am. Dec. 768; *Barton v. Pepin County Agri. Soc.* 83 Wis. 19, 52 N. W. 1129; *Union Credit Co. v. Mersey Docks & Harbour Board* [1899], 2 Q. B. 213; *Mahogany v. Ward*, 16 R. I. 479, 17 Atl. 860; *Burt v. Advertiser Newspaper Co.* 154 Mass. 238, 13 L. R. A. 97, 28 N. E. 1; *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400.

If gunpowder is properly manufactured and carefully stored, it has no "subtle nature" which renders it liable to explode spontaneously.

Judson v. Giant Powder Co. 107 Cal. 553, 29 L. R. A. 718, 40 Pac. 1020; *McCurrie v. Southern P. Co.* 122 Cal. 561, 55 Pac. 324.

A powder magazine in a residence community is not a nuisance *per se*.

NOTE.—As to nuisance by keeping and storing explosives, see also *note* to *Harrington v. Providence* (R. I.) 38 L. R. A. 308.

For unnecessarily delaying a car loaded with high explosives on switch in vicinity of dwellings as nuisance, see, in this series, *Ft. Worth & D. C. R. Co. v. Beauchamp* (Tex.) 58 L. R. A. 716.

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Kinney v. Koopman, 116 Ala. 310, 37 L. R. A. 497, 22 So. 593; *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296.

No one can be made liable for injuries to the person or property of another, without some fault or negligence on his part.

Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623.

Whether the defendant's magazine was a nuisance or not, still the rule of proximate cause applies.

Wharton, *Neg.* § 134; *Walsh v. Hunt*, 120 Cal. 52, 39 L. R. A. 697, 52 Pac. 115; *Union Credit Bank v. Mersey Docks & Harbour Board* [1899], 2 Q. B. 213; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 17, 10 Am. Rep. 205; *Delaware, L. & W. R. Co. v. Salmon*, 39 N. J. L. 308, 23 Am. Rep. 214; *McAndrews v. Collier*, 42 N. J. L. 192, 36 Am. Rep. 508; *Wiley v. West Jersey R. Co.* 44 N. J. L. 252.

Messrs. Reddy, Campbell, & Metson for respondents.

Cooper, C., filed the following opinion:

This action was brought to recover damages for injuries to plaintiffs' house, caused by reason of the explosion of a large quantity of gunpowder on defendant's premises. The case was tried with a jury, and a verdict returned for plaintiff, upon which judgment was entered. Defendant made a motion for a new trial, which was denied, and this appeal is from the judgment and order. The facts are substantially as follows: For several years prior to the explosion the defendant had been engaged in the business of manufacturing fuse, and had its plant and magazine in the village of Melrose. Within a radius of 250 yards of the magazine there were many dwelling houses, of which plaintiffs' was one, the vicinity being regularly laid out in streets. Defendant had in its magazine, immediately prior to the explosion, about 5,000 pounds of gunpowder, being the amount it usually kept on hand. In the employ of defendant was a Chinaman, whose business it was to carry powder from the magazines to the hoppers, from which the powder was distributed. The Chinaman, during a quarrel with one of his countrymen, killed him, and then fled into the magazine to evade arrest. While the officers of the law were making an attempt to arrest him, he wilfully, and with murderous intent, set fire to the magazine, exploding it, killing some of the officers and himself, and causing the injury to plaintiffs' dwelling. The court below instructed the jury that, if the defendant kept and stored in its magazine a large quantity of gunpowder in a thickly settled neighborhood, and so near thereto that its explosion was liable to injure persons, dwellings, or other property in the neighborhood, the so keeping said powder was a nuisance; and the jury, by its verdict, found by implication that it was a nuisance.

It is settled by the great weight of au-

thority that the keeping of a dangerous explosive, such as gunpowder or nitroglycerin, in large quantities, in a public place, or in close proximity to buildings inhabited by human beings, is a nuisance *per se*. Webb's Pollock, Torts, note on page 503, and cases cited; *Cheatham v. Shearon*, 1 Swan, 213, 55 Am. Dec. 734; *Myers v. Malcolm*, 6 Hill, 293, 41 Am. Dec. 744; *Chicago, W. & P. Coal Co. v. Glass*, 34 Ill. App. 364; *Weir's Appeal*, 74 Pa. 230; *McAndrews v. Collier*, 42 N. J. L. 189, 36 Am. Rep. 508. In the latter case it is said: "The keeping of gunpowder, nitroglycerin, or other explosive substances, in large quantities, in the vicinity of a dwelling house or place of business, is a nuisance *per se*, and may be abated as such by action at law, or injunction in equity." And in this case the question was properly left to the jury under appropriate instructions. *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654; *Rudder v. Koopman*, 116 Ala. 333, 37 L. R. A. 489, 22 So. 601. Therefore the defendant was guilty of maintaining a nuisance in keeping the large quantity of powder in so populous a neighborhood.

Is it liable to plaintiff for damages caused by the explosion, that being caused by the criminal act of the Chinaman? We are of opinion that it is, and the fact that the Chinaman, by his act, was the direct cause can make no difference. The fact that defendant maintained the nuisance was a violation of legal duty. If it had not maintained the nuisance, the damage would not have occurred. Powder is regarded by all the authorities as a destructive agent, liable to explosion by contact with the smallest spark, and often by the elements. The maxim, *Sic utere tuo ut alienum non laedas*, applies. The plaintiffs had the right to the free use and enjoyment of their property. The defendant, in maintaining the nuisance upon its own land, for its own profit, caused the damage. The thing constituting the nuisance was the property of defendant, the Chinaman its servant, and, although he turned aside from his employment in setting fire to the powder, yet the defendant, on principles of public policy, must be held liable. The defendant's violation of legal duty and wilful disregard of the property rights of others indirectly caused the damage. The principle is correctly stated by Mr. Justice Blackburn in *Fletcher v. Rylands*, L. R. 1 Exch. 265: "We think the true rule of law is that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. . . . But for his act of bringing it there, no mischief could have accrued, and it seems but just that he should, at his peril, keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this, we think, is established to be the law 60 L. R. A.

whether the things so brought be beasts, or water, or filth, or stench." This language was repeated and approved by Lord Cranworth on appeal. L. R. 3 H. L. 330. The same reason applies to explosives. The party bringing upon his premises, in the vicinity of other dwelling houses, large quantities of powder or other explosives, does so at his peril. In this case, if the defendant had not brought and kept the powder on its premises, the Chinaman could not have exploded it. In 1 Hale, P. C. 430, Lord Hale states that where one keeps a beast, knowing its nature or habits are such that the natural consequences of his being loose is that he will harm men, the owner "must, at his peril, keep him up safe from doing hurt, for, though he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages." We can see no difference in principle whether the thing be an animal or a dangerous explosive. The defendant knew the nature of the thing kept, its liability to explosion, and it kept it at its peril. The American authorities, with hardly an exception, follow the doctrine laid down in the courts of England. It is said in 1 Wood, Nuisances, 3d ed. p. 183: "So, the keeping of gunpowder, nitroglycerin, damp jute, or other explosive substance, in large quantities, in the vicinity of one's dwelling house or place of business, is a nuisance, and may be abated as such by action at law, or by injunction from a court of equity; and, if actual injury results therefrom, the person keeping them is liable therefor, even though the act occasioning the explosion is due to other persons, and is not chargeable to his personal negligence." In the case of *Heeg v. Licht*, 80 N. Y. 581, 36 Am. Rep. 654, the powder in defendant's magazine exploded from an unknown cause. The action was for damages caused by the explosion. In the opinion the court said: "The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might, in some localities, render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business when free from negligence has no application." In a later case (*Prussak v. Hutton*, 30 App. Div. 66, 51 N. Y. Supp. 761) the powder magazine was so near to dwelling houses that it was held to be a nuisance *per se*, and the owner liable, although the explosion was caused by lightning. The court said: "The defendants, at least, were not free from fault which co-operated to produce the result." In another case by a different plaintiff for damage caused by the same explosion (*Oibulski v. Hutton*, 47 App. Div. 107, 62 N. Y. Supp. 167) the court again affirmed the rule, saying: "The recovery was not placed upon the ground of the defendants' negligence, but upon evidence sufficient to support the finding of the jury that the powder mill, in the place where it was situate, with reference to the dwelling in which the plaintiff in that

case was injured, was a nuisance." In *Ohiago, W. & V. Coal Co. v. Glass*, 34 Ill. App. 364, the damage was caused by an explosion of the powder magazine by lightning, and the defendant was held liable. The court said: "We do not think it necessary that the proof should show any immediate and direct agency on the part of the appellant causing the injury, when the original or primary cause was the establishment of a public nuisance by it." In a later case (*Laftin & R. Powder Co. v. Tearney*, 131 Ill. 325, 7 L. R. A. 262, 23 N. E. 390) in which the explosion was caused by lightning, the court said: "As a general rule, the question of care or want of care is not involved in an action for injuries resulting from a nuisance. If actual injury result from the keeping of gunpowder, the person keeping it will be liable therefor, even though the explosion is not chargeable to his personal negligence." In *Cheatham v. Shearon*, 1 Swan, 213, 55 Am. Dec. 734, the defendant was held liable for damages by the explosion of a powder magazine by lightning. The court said: "The fact that it is liable to explode by means of lightning, against which no human agency could guard, is decisive of this question." In *Wilson v. Phenix Powder Mfg. Co.* 40 W. Va. 413, 21 S. E. 1035, the cause of the explosion was unknown, but the defendant was held liable, and the court said: "Was the defendant maintaining a public nuisance? If it was, it was engaged in the commission of a public wrong, and, injury resulting therefrom to the plaintiff, the defendant must repair such injury." And further, in the same opinion: "If damage happen to a person from explosion, the injured party is entitled to compensation without proving negligence on the part of defendant. He is injured by that which breaks the law [made for his protection], the law against public nuisance. He is in no fault, while the other man is, and he has received damage from that other man's wrongful act. He has a right to immunity from this injury, and the other man owed him the duty of securing him immunity." In a very late case in Ohio (*Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.* 60 Ohio St. 560, 45 L. R. A. 658, 54 N. E. 528) the question is elaborately discussed, and it was held that one who stores nitroglycerin on his own premises is liable for injuries to surrounding property by its exploding, although he neither violates any provision of the law regulating its storage, nor is chargeable with negligence contributory to the explosion. In *Hazard Powder Co. v. Volger*, 7 C. C. A. 130, 12 U. S. App. 665, 58 Fed. 153, defendant was held liable for damages caused by the explosion of its powder magazine from an unknown cause. It was said: "It is liable for the injuries resulting from its explosion from any cause, because its location under the ordinance made it a nuisance." In *Myers v. Maloolm*, 6 Hill, 292, 41 Am. Dec. 744, the defendant was held liable where the explosion was caused by the building in which the powder

was stored taking fire. The court said: "The situation of the building in other respects, moreover, was such as to render the gunpowder dangerous to the lives of the citizens, for an explosion, either by accident or design, at any period of time after the deposit, would in all human probability have proved destructive to more or less of the inhabitants residing in the neighborhood." In *McAndrews v. Collierd*, 42 N. J. L. 189, 36 Am. Rep. 508, the damage was caused by the explosion of blasting materials from an unknown cause; and the chancellor, in delivering the opinion, held that depositing such materials in the vicinity of a dwelling house is a nuisance *per se*, and that, if injury results therefrom, the person so keeping them is liable, "even though the act occasioning the explosion is due to other persons, and is not chargeable to his personal negligence." It is said in Webb's *Poillock, Torts*, Am. ed. p. 615: "The risk incident to dealing with fire, firearms, explosives, or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, and (it is apprehended) poisons, is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term 'consummate care' is used to describe the amount of caution required, but it is doubtful whether even this be strong enough. At least we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him." It is a maxim of our law "that no one should suffer by the act of another." Civil Code, § 3520. In this case, if the plaintiffs, whose property was injured, must suffer, it would, at least to some extent, be by the act of the defendant. The defendant, by its acts in bringing and storing the large quantity of powder near plaintiffs' property, violated the law. Such violation of law, together with the act of the Chinaman, caused the damage. It is claimed that this is a very singular case, and the only one of the kind in the books, and that it should be distinguished from the lightning cases, because it is possible to so insulate a powder magazine that lightning would not strike it. It would have been possible for defendant to have kept matches from the person of the Chinaman while working around the powder magazine. It would have been possible, and it was defendant's duty, to keep its magazine in such locality that, if it exploded, it would not have injured the plaintiffs' property.

It follows that the judgment should be affirmed.

A rehearing having been granted, *Vandyke, J.*, on February 14, 1903, delivered the opinion of the court:

This is an action for damages. It is alleged in the complaint that defendant was at the time, and prior to the 19th day of July, 1898, engaged in manufacturing and storing powder, dynamite, nitroglycerin, and other high explosives and fuses on its

premises near Melrose, in Alameda county, and that by reason of the negligence and carelessness of the defendant a large quantity of fuse and explosives belonging to it, and under its control, on said day exploded with great violence, whereby plaintiffs' house was injured and damaged to the extent of \$400, for which amount damages are claimed. The answer denies that the defendant was engaged in the manufacture or storage of powder, dynamite, nitroglycerin, or other high explosives, but admits that it was the owner of and operating a factory for the manufacture of fuse on its premises; and denies that, by reason of the premises mentioned in the plaintiffs' complaint, or by reason of any negligence or carelessness on the part of the defendant, plaintiffs have been or ever were damaged in any sum whatever. The action was tried in the superior court of San Francisco before a jury, and resulted in a judgment for the plaintiffs, from which, and an order denying defendant's motion for a new trial, an appeal was taken.

There seems to be not much conflict in reference to the facts of the case. In July, 1898, at the time of the explosion, and for over ten years prior thereto, defendant corporation was carrying on the business of manufacturing fuse near San Leandro bay, in the county of Alameda, near a station called Melrose. There were other fuse works there besides that of the defendant, and there were in the vicinity dwelling houses scattered here and there about the manufactory. The place was platted in streets, but there were only two roads or ways through the vicinity. One was called High street, the other Clark street. In the testimony of witness Clark, a civil engineer, he says: "High street is open and macadamized. Clark street is a road that is in pretty fair condition only,—that is, simply open,—and a wagon might go through it by picking out the better places." It is outside of the limits of both Oakland and Alameda, and within the township of Brooklyn. The company's grounds contained about an acre and a half. A tight board fence 6 feet and over in height in the lowest place, and 6 feet 7 inches in the highest, with a run of barbed wire on top, inclosed the buildings in which the company carried on its operations. One of these buildings was a powder magazine. This was a brick structure about 14 by 16 feet, and 8 or 10 feet high, covered with metal, and the floor lined with thick linoleum, and was situated in the corner of the inclosure, and in another corner was the residence of the superintendent. The powder used in the manufacture of fuse is ordinary black powder, kept in round metal cans. The company did not manufacture the powder, but it was brought on the premises and stored in the magazine, to be used as required in the manufacture of fuse. The gunpowder was taken from the magazine to a loft or upper story of another small building, and thence poured into small tin hoppers, funnel-shaped, with an orifice leading through

the floor to the room below. Each orifice has a thread drawn through it, and, as the thread which thus passes through the gunpowder in the hopper leaves the funnel in the room below, it is wound with other threads and twisted so that it becomes the center thread of the twist. Afterwards this twist is covered with tape and becomes a ropelike fuse, used for the purpose of conveying a spark from a distance to the explosive in blasting operations. The superintendent of the company in his testimony says that the works were located near the slough running into San Leandro bay, and that within 100 feet of the works it was all marshy to San Leandro bay. In the vicinity of the fuse works there were fields under cultivation. The plaintiffs went there and built their house over five years after the defendant company had been in operation, and it does not appear from the evidence whether, at the time the defendant located there and commenced its business, there were any residences or other buildings in the vicinity, but at the time of the explosion there was quite a number of buildings in the neighborhood. About 3 o'clock in the afternoon of the 18th of July, 1898, a quarrel arose between a Chinaman named Quong Ng Chong and another Chinaman within the inclosure in which the company's works were situated. Quong Ng Chong had for many years been employed by the company. His business was to go to the magazine and bring the powder over to the spinning room whenever it was necessary. He was a man of good reputation for peace and quiet. The Chinaman with whom he quarreled was a vegetable dealer who sold vegetables to the men employed in the fuse works. Quong Ng Chong suddenly killed him, and after perpetrating the murder, taking advantage of the excitement caused, he fled into the magazine. He then piled in the doorway of the magazine a number of the metal cans in which the gunpowder was kept, and by that means filled up the doorway of the magazine while he remained inside. He then announced that if any sheriff, policeman, or other person attempted to arrest or take him, he would set fire to the gunpowder. The sheriff of Alameda county and several deputies promptly arrived at the fuse works to arrest the murderer. The afternoon was spent in vain endeavors to induce the Chinaman to come out of the magazine, but he had a pistol, and declared he had matches, and he could not be induced to leave. Late in the evening the employees of the company left the place in charge of the sheriff and several armed deputy sheriffs. They remained on guard during the night. About 5 o'clock next morning, in consequence of an attempt then made to arrest him, the Chinaman carried out his threat and set fire to the gunpowder. The magazine exploded, destroying defendant's factory, killing some of the deputy sheriffs, and injuring the dwelling house of the plaintiffs in this action.

In submitting the cause to the jury, the court gave the following instruction, among

others: "A magazine of powder so situated that, in case of explosion from any cause, it is liable to injure the persons and the dwellings of persons living in the vicinity, is a nuisance; and, therefore, if the jury believe from the evidence that the defendant corporation maintained at the time mentioned in the complaint, at the town or village or place called Melrose, a magazine, and kept stored therein large quantities of gunpowder, which, in case of explosion, was liable to injure the persons, dwellings, or other property of the residents of the said town or village or place called Melrose, your verdict should be for the plaintiffs. Although the jury may believe from the evidence that powder in the magazine in question was exploded by an agency beyond the control of the defendant corporation, still this would not exempt the defendant corporation from liability, provided the jury believe from the evidence that said magazine was maintained by such defendant corporation in such a place that, in case of an explosion, it was liable to injure, damage, or destroy the persons or property of persons living in the vicinity. . . . The fact, if it be a fact, that defendant's magazine and factory were located and built at Melrose before plaintiffs' house was built, has no bearing on this case. Such circumstances can in no way excuse the maintenance of a nuisance, and the question of whether the magazine and factory of the defendant was a nuisance must be solved without any reference to the location of defendant's factory and magazine." The court also either refused defendant's instructions or modified them on the line of the foregoing.

Although the complaint alleges that the damage was caused "by reason of the negligence and carelessness of the defendant," there is not a particle of evidence to support such allegation, and that theory of the action seems to have been abandoned by the plaintiffs during the trial. Under the instructions of the court there were no facts for the jury to consider, for the reason that there was no question but that powder was stored in a magazine or place where, in case of explosion, it would be liable to injure or damage persons or property. The doctrine laid down by the court in the instructions, in substance, declared the business of the defendant, under the circumstances, a nuisance *per se*, and made it an insurer against all damage arising from whatever cause.

It will be observed in this case the plant in question was not devoted to the manufacture of explosives. The only risk attendant upon the business was that risk inseparable from any handling or storing of powder,—the same risks that accompany its transportation, sale, use, and application in all the various circumstances in which it is availed of. By the court's instruction there is no distinction between a case of the use and manufacture of this explosive, nor any exception to the rule in a case where a secluded situation is sought in the first in-

stance, and thereafter others are attracted to the locality, perhaps by the very fact of the business of the factory; and by such instruction the defendant is made liable, notwithstanding that the greatest care and prudence may be used in the transaction of the business, and that the explosion or damage is caused by some agent entirely beyond the control of one conducting the business. This is not the law. In *Judson v. Giant Powder Co.* 107 Cal. 549, 29 L. R. A. 718, 40 Pac. 1020, the damage for which the action was brought was occasioned by an explosion of nitroglycerin in process of manufacture into dynamite in the defendant's powder factory. In that case the judgment for plaintiff was sustained by this court on the ground that the damage resulted from negligence, the court holding that, the explosion having been shown, it was for the company to show by evidence that it was not the result of negligence or carelessness on its part, which it failed to do. Quoting from *Shearman and Redfield on Negligence*, § 60: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." The court, continuing, says: "This case seems to clearly come within the provisions of the rule there declared. There is nothing to distinguish it in principle from the army of cases that have been held to come directly within its provisions. Appellant was engaged in the manufacture of dynamite. In the ordinary course of things, an explosion does not occur in such manufacture if proper care is exercised. An explosion did occur; *ergo*, the real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care." Respondent relies upon *Cheatham v. Shearon*, 1 Swan, 213, 55 Am. Dec. 734, in support of his theory that the business in question here was a nuisance *per se*. In *Dumesnil v. Dupont*, 18 B. Mon. 800, 68 Am. Dec. 750, the Supreme Court of Kentucky says that the only adjudged case met with in which the principle that a powder magazine is a nuisance *per se* seems to have been definitely settled, is that of *Cheatham v. Shearon*; and adds that "the principles and reasoning upon which the decision rests are opposed to the unbroken current of modern authority, English and American, upon this subject." In *Kinney v. Koopman*, 116 Ala. 310, 37 L. R. A. 497, 22 So. 593, it is said: "The storing and keeping of gunpowder or dynamite in large quantities near the dwelling houses of citizens in a thickly settled portion of the town, and near a certain public street in said city, is not a nuisance *per se*; and, to constitute such a nuisance, there must be negligence or want of due care in storing and keeping it." And in the same case it is said: "After a

most careful examination of the common-law text-books and decisions, we have no doubt of the correctness of our conclusion in the foregoing cases, and which exactly accords with the law as declared in *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296. Steam power, gas, electricity, dynamite, gunpowder, are in daily use, and have become indispensable to the convenience of the public, and for the public defense. Invention of man and advancement in science have enabled the manufacturer of, or dealer in, these articles to provide the public or the individual with almost, if not altogether, absolute protection against danger or hurt from explosion. And, even had the manufacturing and storage of gunpowder, in its early history, been a nuisance at common law, the common-law definition of a nuisance would not include gunpowder at this day." In *Tuckachinsky v. Lehigh & W. B. Coal Co.* 199 Pa. 515, 49 Atl. 308, a similar case was considered. In that case, at the time of the accident, the defendant had 4½ boxes of dynamite and 4½ kegs of black powder in a wooden building 14 feet square and 12 feet high, in an open space near the shaft of its colliery. The mine was not in operation at the time, but some dead work was being done, in which powder was necessary. The plaintiff was standing in the doorway of her father's house, and was thrown backwards down a flight of stairs by the concussion of the air, receiving injuries for which damages were sought. The explosion was caused by lightning. The trial court in its instructions to the jury stated that there was no evidence in the case of any "negligence on the part of the defendant, unless it consists in having the kind and quality of explosives in the place at the time, for the purpose, and under the circumstances already stated. As to this there is no controversy, no dispute, no question of fact to be determined. The only question to be decided is whether, under the law, this state of facts constitutes negligence in itself for which the plaintiff may recover in this action." And the court instructed the jury to return a verdict in favor of the defendant. On appeal the supreme court says: "A nuisance has been defined as 'that which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him.' The evidence in this case shows that the powder magazine had been in use by the defendant company for more than thirty years, and that the plaintiff has resided within about 700 feet of it for some sixteen years. Yet there is no testimony to show that any apprehension of danger, or any fear of explosion, was felt or expressed by anyone during that time. No objection to the location or maintenance of the magazine has been

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shown. The explosives were stored in small quantities to meet current needs. Such materials are always dangerous, but, as their use is essential to the work of mining, it is impossible to protect, absolutely, persons or property in the immediate vicinity. The risk is similar to that arising from the operation of steam boilers and other machinery and apparatus necessary to the prosperity of great communities. Negligence in the care of the explosives, or in the management of the magazine, was neither charged nor proved. The only question in the case was as to whether or not the magazine was in itself a nuisance. We can see nothing in the evidence to support such a finding. The explosives were kept only for use in the mine, and were kept in small quantities. The explosion was caused by no act of the defendant, but by a stroke of lightning. The trial court could not have sustained a verdict for the plaintiff upon the evidence. Its instructions to the jury, to find in favor of the defendant, were proper, and the judgment is affirmed."

As said in the foregoing opinion, powder, gas, steam, etc., are equally dangerous, but equally necessary in the present condition of society, and the rule laid down in the above opinion seems to be well settled, not only in Pennsylvania, but in New York and elsewhere. 12 Am. & Eng. Enc. Law, 2d ed. p. 514; and *Schmeer v. Gaslight Co.* 147 N. Y. 529, 30 L. R. A. 653, 42 N. E. 202. Another case relied upon by the respondent is *Heeg v. Licht*, 80 N. Y. 579, 36 Am. Rep. 654. In a later case (*Lounsberry v. Foss*, 80 Hun, 296, 30 N. Y. Supp. 89), speaking of *Heeg v. Licht*, the court says: "Keeping of such material does not, however, necessarily constitute a nuisance *per se*; that depends upon the locality, the quantity, and the surrounding circumstances. The consequential result of the authorities is that each case like this must be left to the jury, under proper instructions from the court."

It does not appear that when the defendant commenced its business it was not located in a proper place, and at that time sufficiently removed from a residence neighborhood. It was carried on with the utmost care. The damage in question resulted from a cause entirely beyond its control, and without any carelessness or negligence on its part whatever, and under the more recent and better line of authorities, as shown under such circumstances, it is not responsible.

The judgment and order are reversed.

We concur: **Shaw, J.; Angellotti, J.; McFarland, J.; Lorigan, J.**

I dissent: **Beatty, Ch. J.**

COLORADO SUPREME COURT.

DENVER POWER & IRRIGATION COMPANY, *Pf. in Err.*,

v.

COLORADO & SOUTHERN RAILWAY COMPANY *et al.*

(.....Colo.....)

1. Authority to condemn land for a reservoir for agricultural and milling purposes is sufficient to cover its condemnation for power, manufacturing, and "other beneficial uses and purposes," where no suggestion is made of an intended use which is not directly or indirectly associated or connected with uses expressly authorized.
2. Absence of power to condemn, for a reservoir, land situated within a government forest reserve cannot be urged by a private individual to defeat the condemnation proceedings.
3. A reservoir company cannot take, by right of eminent domain, land devoted to the purposes of a railroad, unless such taking is required by public necessity; and the facts that the site is the only available one on the stream, and that the railroad company might procure an equally available location for its purposes elsewhere, are immaterial.
4. A company seeking to acquire for a reservoir site, by right of eminent domain, land claimed by a railroad company cannot, for the purpose of defeating the latter's right in the property, attack its corporate existence, or assert that it has not sufficiently complied with the law to give it a right to the property.
5. The state cannot intervene in a proceeding to condemn for reservoir purposes land claimed by a railroad company, for the purpose of obtaining a forfeiture of the latter's rights, where it has no claim to the property in controversy, and no interest in the subject-matter of the dispute, and the result of the intervention will be to change the entire character of the action.
6. The mere laying of rails upon a right of way is not sufficient to protect the property from appropriation for other public uses, if the property has been held by various railroad companies for many years without any attempt by them to utilize it, and the rails are laid only a short time before the proceedings are instituted to acquire adverse title to the property, and three years after the one seeking title has commenced to expend money on the property; and the fact that the corporation laying them comes into existence only a short time before it begins to lay the rails is immaterial if its rights are acquired from other corporations which never made any attempt to construct a road.
7. A private corporation may exercise the right, given by the Constitution, to take private property for purposes of a reservoir, upon property of a railroad company which is not held for public use.

8. A denial of the right to take property by right of eminent domain upon the issues made by the pleadings after hearing testimony introduced upon motion for the appointment of commissioners, and motion to dismiss, is a final judgment, which may be reviewed by the appellate court.

(April 7, 1902.)

ERROR to the District Court for Douglas County to review a judgment in favor of defendants in a proceeding instituted to condemn land for a reservoir site. *Reversed.*

Statement by Gabbert, J.:

Plaintiff in error, as petitioner, commenced an action in the district court to condemn a piece of land for a reservoir site. To this proceeding defendants in error were made respondents. On the trial of the issues made by the pleadings, the court rendered judgment denying the right of petitioner to condemn the premises sought to be taken. From this judgment, petitioner brings the case here for review on error. Since the case was brought here, the people, through the attorney general, have filed a petition in intervention, and ask to intervene, which petition certain of the respondents move to strike from the files. These same respondents also move to dismiss the writ of error. The necessary facts and statements in the pleadings for an understanding of the questions discussed and determined appear in the opinion. For convenience, when named, the petitioner will be referred to as the "power company," and the respondents the Denver & Rio Grande Railroad Company as the "Rio Grande company," the Denver, Leadville, & Gunnison Railway Company as the "Leadville company," the Denver, Cripple Creek, & Southwestern Railroad Company as the "Cripple Creek company," and the Colorado & Southern Railway Company as the "Colorado Southern." The only respondents appearing here are the Leadville, Cripple Creek, and Colorado Southern companies.

Messrs. Teller & Dorsey and Norman M. Campbell, for plaintiff in error:

Corporations organized to construct reservoirs and ditches to supply water for the irrigation of arid lands are organized for the performance of a public duty.

4 Thomp. Corp. § 5375, p. 4085; *State ex rel. Bradford v. Western Irrig. Canal Co.* 40 Kan. 96, 19 Pac. 349; *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365.

The word "milling," as used in the Constitution, should be given its modern ac-

NOTE.—As to right to appropriate, by eminent domain, property already taken for public use, see also, in this series, *notes to Barre R. Co. v. Montpelier & W. River R. Co.* (Vt.) 4 L. R. A. 785; *Cary Library v. Bliss* (Mass.) 7 L. R. A. 765; and *Miffin Bridge Co. v. Junlata* (Pa.) 13 L. R. A. 481; also *Butte, A. & P. R.* 60 L. R. A.

Co. v. Montana Union R. Co. (Mont.) 81 L. R. A. 298; *Chicago, M. & St. P. R. Co. v. Starkweather* (Iowa) 31 L. R. A. 183; *Re Stewart* (Minn.) 33 L. R. A. 427; *Mobile & O. R. Co. v. Postal Teleg. Cable Co.* (Tenn.) 41 L. R. A. 408; and *Diamond Jo Line Steamers v. Davenport* (Iowa) 54 L. R. A. 859.

ception, and held as synonymous with the word "manufacturing."

Lamborn v. Bell, 18 Colo. 346, 20 L. R. A. 241, 32 Pac. 989.

Where the first filing was defective, the subsequent filing, though made after the time required by law, is valid for the reason that it relates back to the time of the original filing.

Re Prescott & A. O. R. Co. 13 Land Dec. 47; *St. Paul, M. & M. R. Co.* 26 Land Dec. 181; *Re Pope*, 28 Land Dec. 402; *Re Kootenai Valley R. Co.* 28 Land Dec. 439; *Re Gibson*, 19 Land Dec. 304.

Even if plaintiff's rights had not vested, and even if plaintiff was a mere trespasser, yet this objection could be raised only by the government.

Nippel v. Forker, 26 Colo. 74, 56 Pac. 579.

Condemnation is the proper proceeding.

Denver, W. & P. R. Co. v. Church, 7 Colo. 146, 2 Pac. 218; *Lewis, Em. Dom.* § 331; *Mills, Em. Dom.* § 77; *Hutchinson v. McLaughlin*, 15 Colo. 492, 11 L. R. A. 287, 25 Pac. 317.

By making the Denver, Leadville, & Gunnison Railway Company and the Denver, Cripple Creek, & Southwestern Railroad Company parties defendant, plaintiff does not admit they are either *de facto* or *de jure* corporations.

People v. Montecito Water Co. 97 Cal. 276, 32 Pac. 236; *Kincaid v. Duinelle*, 59 N. Y. 548; *People ex rel. Union P. R. Co. v. Colorado Eastern R. Co.* 8 Colo. App. 301, 46 Pac. 219; *Jones v. Aspen Hardware Co.* 21 Colo. 263, 29 L. R. A. 143, 40 Pac. 459; *Morawetz, Priv. Corp.* § 758.

Although the corporation may exist as *de jure*, and even *de facto*, yet it may have lost its right to, and all power to acquire, the property which is in controversy.

4 Thomp. Corp. § 5340; *Zanesville v. Zanesville Gaslight Co.* 47 Ohio St. 1, 23 N. E. 55; *Germantown Pass. R. Co. v. Citizens' Pass. R. Co.* 151 Pa. 138, 24 Atl. 1103; *Elliott, Priv. Corp.* § 68; *Brown v. Calumet River R. Co.* 125 Ill. 600, 18 N. E. 283; *Arkansas River Land, Town, & Canal Co. v. Farmers' Loan & T. Co.* 13 Colo. 587, 22 Pac. 954; *Willis v. St. Paul Sanitation Co.* 16 L. R. A. 281, note, sub nom. *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110; *Cooley, Const. Lim.* 6th ed. p. 99.

The defendants have forfeited and lost their corporate entity, their corporate powers, franchises, and all rights. The plaintiff has the right to assert and take advantage of these forfeitures.

Bybee v. Oregon & C. R. Co. 139 U. S. 677, 35 L. ed. 305, 11 Sup. Ct. Rep. 687.

The filing of a profile map is a condition precedent; it is jurisdictional; the failure to file it may be attacked in a collateral proceeding.

Madison v. Daley, 58 Fed. 751; *Indianapolis, B. & W. R. Co. v. Reed*, 52 Ind. 357; *Walkhill Valley R. Co. v. Norton*, 12 Abb. Pr. N. S. 317; *Re Rochester Electric R. Co.* 123 N. Y. 351, 25 N. E. 381; *Convers's Appeal*, 18 Mich. 459, 60 L. R. A.

The mere filing of a preliminary survey gives a railroad neither title nor possession, and is not notice to purchasers of land within the survey.

Central R. Co. v. Hatfield, 18 N. J. Eq. 323; *Chicago, K. & W. R. Co. v. Grovier*, 41 Kan. 685, 21 Pac. 779.

The defendants, the Colorado & Southern Railway Company, the Denver, Leadville, & Gunnison Railway Company, and the Denver, Cripple Creek, & Southwestern Railroad Company could not consolidate their lines by purchase or otherwise.

4 Thomp. Corp. § 5358; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964; *Morawetz, Priv. Corp.* § 490; *Hall v. Sullivan R. Co.* *Brunner Col. Cas.* 621, Fed. Cas. No. 5,948; *Com. v. Smith*, 10 Allen, 448, 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen, 65, 87 Am. Dec. 700; *Chollette v. Omaha & R. Valley R. Co.* 26 Neb. 159, 4 L. R. A. 135, 41 N. W. 1106; *Pennsylvania R. Co. v. Com. (Pa.)* 4 Cent. Rep. 495, 7 Atl. 368; *Clarke v. Omaha & S. W. R. Co.* 4 Neb. 458; *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95.

Property taken for one public use can be condemned and taken for the same use, or for a different use.

West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535; *Greenwood v. Union Freight R. Co.* 105 U. S. 23, 26 L. ed. 965; *Metropolitan City R. Co. v. Chicago West Div. R. Co.* 87 Ill. 323; *Barre R. Co. v. Montpelier & W. River R. Co.* 4 L. R. A. 785, note, 61 Vt. 1, 17 Atl. 923; *Butte, A. & P. R. Co. v. Montana Union R. Co.* 16 Mont. 504, 31 L. R. A. 304, 41 Pac. 232; *Colorado Eastern R. Co. v. Union P. R. Co.* 41 Fed. 293; *Boston Water Power Co. v. Boston & W. R. Corp.* 23 Pick. 360; *Old Colony R. Co. v. Framingham Water Co.* 153 Mass. 561, 13 L. R. A. 332, 27 N. E. 662; *Cooley, Const. Lim.* p. 652, note, 10 Am. & Eng. Enc. Law, 2d ed. pp. 1093-1100; *Beach, Priv. Corp.* § 401; *Lewis, Em. Dom.* § 276; *Mills, Em. Dom.* § 45; *Peoria, P. & J. R. Co. v. Peoria & S. R. Co.* 66 Ill. 174; *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.* 17 W. Va. 812.

The right to appropriate and apply water for beneficial uses, originating in the arid state of California, was recognized to include milling and other power purposes, as well as irrigation and domestic uses.

Bear River & A. Water & Min. Co. v. New York Min. Co. 8 Cal. 327, 68 Am. Dec. 325; *De Necochea v. Curtis*, 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; *Yunker v. Nichols*, 1 Colo. 551; *Schilling v. Rominger*, 4 Colo. 100; *Larimer County Reservoir Co. v. People*, 8 Colo. 614, 9 Pac. 794; *Wheeler v. Northern Colorado Irrig. Co.* 10 Colo. 582, 17 Pac. 487; *Farmers' High Line Canal & Reservoir Co. v. Southworth*, 13 Colo. 111, 4 L. R. A. 767, 21 Pac. 1028; *Strickler v. Colorado Springs*, 16 Colo. 61, 26 Pac. 313; *Larimer & W. Reservoir Co. v. Cache la Poudre Irrig. Co.* 8 Colo. App. 237, 45 Pac. 525; *Cache La Poudre Reservoir Co. v.*

Water Supply & Storage Co. 25 Colo. 161, 46 L. R. A. 175, 53 Pac. 331; *Water Supply & Storage Co. v. Larimer & W. Reservoir Co.* 25 Colo. 87, 53 Pac. 386, 7 Colo. App. 225, 42 Pac. 1020; *Atchison v. Peterson*, 20 Wall. 507, 22 L. ed. 414; *Basey v. Gallagher*, 20 Wall. 670, 22 L. ed. 452; *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240; *Broder v. National Water & Min. Co.* 101 U. S. 276, 25 L. ed. 791.

Condemnation of the strip of land in controversy does not destroy the Colorado & Southern's enterprise. It can take the high line.

Messrs. Dimes & Whitted, for defendants in error:

The premises sought to be condemned by the plaintiff in error were already appropriated to a public use, and therefore, under the Constitution and statutes of this state, could not be taken by the petitioner.

Lewis, Em. Dom. § 267; *Mills, Em. Dom.* 2d ed. 1888, § 47; *New Jersey Southern R. Co. v. Long Branch*, 39 N. J. L. 28; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 63; *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359, 15 N. W. 684; *Milwaukee & St. P. R. Co. v. Faribault*, 23 Minn. 167; *Atlanta v. Central R. & Bkg. Co.* 53 Ga. 120; *Boston & M. R. Co. v. Lowell & L. R. Co.* 124 Mass. 368; *Housatonic R. Co. v. Lee & H. R. Co.* 118 Mass. 391; *Oregon Cascade R. Co. v. Baily*, 3 Or. 164; *Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144.

A railroad company cannot, under the general power to construct a railroad between certain termini, locate its railroad through land acquired for a reservoir.

State, Jersey City, Prosecutor, v. Montclair R. Co. 35 N. J. L. 328; *Junction Creek & N. D. Domestic & Irrig. Ditch Co. v. Durango*, 21 Colo. 194, 40 Pac. 356; *Lake Shore & M. S. R. Co. v. New York, O. & St. L. R. Co.* 8 Fed. 858; *Lake Erie & W. R. Co. v. Seneca County*, 57 Fed. 945; *United States v. Chicago*, 7 How. 185, 12 L. ed. 660; *Barber v. Andover*, 8 N. H. 398; *Fidelity Trust & S. V. Co. v. Mobile Street R. Co.* 53 Fed. 687; *Re Providence & W. R. Co.* 17 R. I. 324, 21 Atl. 965; *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. 511, 6 Atl. 564; *Cincinnati, S. & C. R. Co. v. Belle Centre*, 48 Ohio St. 273, 27 N. E. 464; *Ft. Wayne v. Lake Shore & M. S. R. Co.* 132 Ind. 558, 18 L. R. A. 367, 32 N. E. 215; *Re Boston & A. R. Co.* 53 N. Y. 574; *Re New York, L. & W. R. Co.* 99 N. Y. 12, 1 N. E. 27; *Twelfth Street Market Co. v. Philadelphia & R. Terminal R. Co.* 142 Pa. 580, 21 Atl. 902; *Re Rochester Water Comrs.* 66 N. Y. 413; *Seymour v. Jeffersonville, M. & I. R. Co.* 126 Ind. 466, 26 N. E. 188; *Mobile & G. R. Co. v. Alabama Midland R. Co.* 87 Ala. 501, 6 So. 404; *Milwaukee & St. P. R. Co. v. Faribault*, 23 Minn. 167; *Baltimore & O. & C. R. Co. v. North*, 103 Ind. 486, 3 N. E. 144; *Valparaiso v. Chicago & G. T. R. Co.* 123 Ind. 467, 24 N. E. 249; *Little Miami R. Co. v. Dayton*, 23 Ohio St. 510.

Plaintiff in error has no power, under the Constitution of this state, to condemn the 60 L. R. A.

lands for the purposes stated in its articles of incorporation, and the petition does not state facts showing any such right.

The time, manner, and occasion for the exercise of the power of eminent domain are wholly in the control and discretion of the legislature, except as restrained and limited by the Constitution.

Bachler's Appeal, 90 Pa. 207; *Central Branch Union P. R. Co. v. Atchison, T. & S. F. R. Co.* 28 Kan. 453; *Swan v. Williams*, 2 Mich. 427.

The power can only be exercised by individuals or corporations by virtue of an express legislative enactment.

Leeds v. Richmond, 102 Ind. 372, 1 N. E. 711; *Sholl v. German Coal Co.* 118 Ill. 427, 59 Am. Rep. 379, 10 N. E. 210.

The limitations of the Constitution, and the enactments of the legislature relating to eminent domain, cannot be extended by implication.

Lewis, Em. Dom. §§ 240, 341; *Spring Valley Waterworks v. San Mateo Waterworks*, 64 Cal. 123, 28 Pac. 447; *Sharpe v. Speir*, 4 Hill, 76; *Darlington v. United States*, 82 Pa. 382, 22 Am. Rep. 766; *Bird v. Wilmington & M. R. Co.* 8 Rich. Eq. 46, 64 Am. Dec. 739; *Glover v. Boston*, 14 Gray, 282; *Wilson v. Lynn*, 119 Mass. 174.

The plaintiff in error was endeavoring to take the lands of these railroad companies for purposes which are expressly forbidden by the Constitution.

People ex rel. Aspen, M. & S. Co. v. Pitkin County Dist. Ct. 11 Colo. 155, 17 Pac. 298; *Lewis, Em. Dom.* § 206, p. 284; *Atty. Gen. v. Eau Claire*, 37 Wis. 400; *Sadler v. Langham*, 34 Ala. 311; *Harding v. Goodlett*, 3 Yerg. 41, 24 Am. Rep. 546.

If the petitioner could not, under the Constitution of the state, condemn for power purposes, or for any purpose not named in § 14, article 2, it cannot legalize illegal acts by appending thereto, or connecting therewith, some of the purposes within the Constitution.

Re Metropolitan Elev. R. Co. 12 N. Y. Supp. 506; *Weckler v. Chicago*, 61 Ill. 142; *Howe v. Norman*, 13 R. I. 488; *Schmidt v. Densmore*, 42 Mo. 225.

Plaintiff in error cannot condemn the lands described in its petition for a reservoir, for the reason that these lands are situated in a forest reserve of the United States, set apart by a special act of Congress, and it is not shown that plaintiff in error has any right, by virtue of compliance with the acts of Congress, to go upon this land and appropriate it for a reservoir.

Yosemite Park Case, 28 Land Dec. 474; *Re Marr*, 25 Land Dec. 344; *Nippel v. Forker*, 26 Colo. 74, 56 Pac. 579; *Re Sinclair*, 18 Land Dec. 573.

Even if the contract of sale to the Colorado & Southern Railway Company by the other railway corporations was illegal and void by statute, its illegality can only be questioned in a suit upon the contract, or where the contract is directly involved, and such illegality cannot be set up by an out-

side party in a proceeding where the transaction is only collaterally involved.

6 *Thomp. Corp.* § 6030; *New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 166, 26 L. ed. 1015; *Union Nat. Bank v. Matthews*, 98 U. S. 521, 25 L. ed. 188; *Chicago, B. & Q. R. Co. v. Lewis*, 53 Iowa, 113, 4 N. W. 842; *Natoma Water & Min. Co. v. Clarkin*, 14 Cal. 544; *Taylor, Priv. Corp.* §§ 281, 297, 303; *Long v. Georgia P. R. Co.* 91 Ala. 520, 8 So. 706; *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Union Gold Min. Co. v. Rocky Mountain Nat. Bank*, 1 Colo. 531; *Barnes v. Suddard*, 117 Ill. 239, 7 N. E. 477; *New England R. Co. v. Central R. & Electric Co.* 69 Conn. 47, 36 Atl. 1061.

This proceeding cannot be converted into an action to quiet title; nor will the court permit a party seeking to exercise the right of eminent domain to drag another into court as a defendant, and then say that such defendant has no title or interest in the property sought to be condemned.

Colorado M. R. Co. v. Croman, 16 Colo. 381, 27 Pac. 256; *Knoth v. Barclay*, 8 Colo. 300, 6 Pac. 924.

If a party has no interests in the premises the court has no authority to make any order, so far as he is concerned, except to dismiss the case.

Colorado Midland R. Co. v. Ruedi, 2 Colo. App. 202, 29 Pac. 1034; *Milwaukee & N. R. Co. v. Strange*, 63 Wis. 180, 23 N. W. 432; *Re Yonkers*, 117 N. Y. 564, 23 N. E. 661; *Olean v. Steyner*, 135 N. Y. 341, 17 L. R. A. 640, 32 N. E. 9.

Messrs. **Norman M. Campbell** and **Charles O. Post**, Attorney General, for the State, intervenor:

The state is a proper party.

Central & G. R. Co. v. People, 5 Colo. 42; *Hutchinson v. McLaughlin*, 15 Colo. 492, 11 L. R. A. 287, 25 Pac. 317.

By failure of the Denver, Leadville, & Gunnison Railway Company and the Denver, Cripple Creek, & Southwestern Railway Company to commence work on their surveyed lines within two years after filing, both lost all right and title to the right of way by noncompliance with the state law of 1889.

The consolidation, or attempted consolidation, of these two companies with the Colorado & Southern was and is directly in violation of the constitutional prohibition.

The forfeiture of a franchise by reason of either one of these acts is absolute, under the statute and the Constitution, and, in such a case, the state cannot waive the forfeiture, even if it so desires; certainly not where the rights of third parties are concerned.

Chicago City R. Co. v. People, 73 Ill. 541; *State v. Old Town Bridge Corp.* 85 Me. 17, 26 Atl. 947; *People v. Manhattan Co.* 9 Wend. 351; *Elliott, Priv. Corp.* § 52.

All corporations, whether foreign or state, must obey the law of the state in which they are incorporated or do business.

Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 60 L. R. A.

77; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191.

Intervention is the proper proceeding.

Morey v. Lett, 18 Colo. 128, 31 Pac. 857; *Pom. Rem. & Rem. Rights*, 2d ed. § 411; *Stoddard v. Benton*, 6 Colo. 512; *Wheeler v. Northern Colorado Irrig. Co.* 9 Colo. 248, 11 Pac. 103; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 108, 24 Atl. 964; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 524.

Gabbert, J., delivered the opinion of the court:

Counsel for respondents present two propositions which go directly to the authority of petitioner to condemn the lands in question, and we shall, therefore, consider these matters first. The power of the petitioner to condemn is challenged upon the ground that, under the Constitution of the state, it cannot take lands for a reservoir site for all the purposes mentioned in its articles of incorporation, and the joinder of nonpermissible purposes with those which are permissible deprives petitioner of the right to condemn for any. Section 14, art. 2, of the Constitution, provides "that private property shall not be taken for private use . . . except for reservoirs . . . for agricultural, mining, milling, domestic, or sanitary purposes." The articles of incorporation of petitioner recite that its objects and purposes are "to procure . . . reservoirs . . . for the storage and use of water for power, irrigation, mining, milling, manufacturing, and other beneficial uses and purposes." According to the petition, petitioner seeks to condemn for the purposes mentioned in its articles of incorporation, and it is therefore urged that petitioner is seeking to utilize the proposed reservoir site for "power," "manufacturing," and "other beneficial uses and purposes," which, it is said, are not uses recognized by the Constitution for which a reservoir site may be condemned. This view is not tenable. The Constitution does provide that a reservoir site may be taken for milling purposes, and the term "milling," as employed in the Constitution, is synonymous with "manufacturing." *Lamborn v. Bell*, 18 Colo. 346, 20 L. R. A. 241, 32 Pac. 989. The word "power," as used in the articles of incorporation and petition, clearly means a manufactured product.—the produce of a manufacturing establishment. No use is suggested which, under "other beneficial uses and purposes," would not directly or indirectly be associated or connected with one or more of the uses for which a reservoir site may be taken, according to the express terms of the provisions of the Constitution under consideration. We conclude, therefore, that no purposes are claimed different from those embraced within the provisions of the Constitution, if the purposes therein mentioned had been specified in the articles of incorporation, and nothing more.

The next point urged against the author-

ity of petitioner to condemn is based upon the ground that the reservoir site is within the limits of a forest reserve of the United States, and it is therefore urged that, in the absence of a showing by petitioner of a compliance with the law relative to the location of reservoir sites on such reserves, it cannot take the lands in question. This proposition is not unlike the one raised in *Union P. R. Co. v. Colorado Postal Teleg. Cable Co.* (Colo.) 69 Pac. 564, where it was urged that the telegraph company could not condemn a right of way over lands extending through incorporated towns in the absence of a showing that it had obtained leave from the municipal authorities to erect its line along the streets and alleys of such towns. It was decided that the question was one which did not concern the railroad company. The fact that petitioner may not have leave from the government to maintain a reservoir site upon a forest reserve, if such leave is necessary, or has not complied with the law in this respect, if such is the case, may affect the ability of petitioner to enjoy the lands sought to be condemned, but does not affect its power to condemn such lands as against the respondents. They cannot raise a question which does not concern them, or which rests solely between the petitioner and the government. A further ground is also urged on behalf of respondents against the authority of petitioner to exercise the right of eminent domain, which will be noticed later.

We shall now consider the propositions urged on behalf of counsel for petitioner in support of their contention that the judgment of the court below should be reversed. The trial court determined that property held for a public use could not be taken, under the exercise of the power of eminent domain, when such taking entirely prevented its use for the public purposes to which it was devoted. This conclusion, it is claimed, is erroneous, for the reason, as we understand the argument of counsel, that corporate property devoted to a public use is subject to condemnation the same as private property of individuals, and may be taken for a different public use, even though such taking would render it impossible for the party from whom taken to in any manner utilize it for the purpose to which it was devoted, provided the requisite degree of necessity for the second taking be shown to exist, or where the party from whom taken can secure other property equally available. In support of this proposition we are referred to § 8, art. 15, of the Constitution, which provides: "The right of eminent domain shall never be abridged, nor so construed as to prevent the general assembly from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals." It is unnecessary to attempt an analysis of this constitutional provision,—whether or not it is self-executing, or the legislature has provided laws by which its provisions may be enforced,—further than to say that neither the constitutional pro-

vision referred to, nor any statute to which our attention has been directed, changes or modifies the general rule that property already devoted to a public use cannot be taken for another in such manner or to such an extent that the use to which it is devoted will be wholly defeated or superseded, unless the power to so take be granted expressly or by necessary implication (*Cincinnati, S. & C. R. Co. v. Belle Centre*, 48 Ohio St. 273, 27 N. E. 464; *Seymour v. Jeffersonville, M. & I. R. Co.* 126 Ind. 466, 26 N. E. 188; *Lake Erie & W. R. Co. v. Seneca County*, 57 Fed. 945; *Little Miami R. Co. v. Dayton*, 23 Ohio St. 510), except it may be in cases where a public exigency requires that it be taken. If the property sought to be condemned is already devoted to railroad purposes, then the facts which we consider as established by the record, or as claimed to exist by counsel, do not authorize the petitioner to take the property of the respondents. As we understand the record, the property to be condemned is claimed as a right of way for railroad purposes by the Colorado Southern and Rio Grande companies, or at least wholly includes lands which these companies claim for such purposes; and that it is the intention of petitioner to utilize those lands by the construction and maintenance of a dam and reservoir, which will submerge them for a distance of 7 or 8 miles. It is claimed that the railroad companies can build a line of railroad around the proposed reservoir site at some additional cost, which will be equally as good as one constructed over their present rights of way; that the necessity of the reservoir company to such site is absolute, because it must take the bed of the stream or abandon its enterprise. Conceding that petitioner has the right, under the laws of the state, to ordinarily exercise the right of eminent domain in acquiring property held for railroad purposes, no statute is pointed out which would authorize it to take such property to an extent which would totally deprive the railroad companies of its use. No public exigency is shown to exist of a character which demands the location of a reservoir site at the point selected by petitioner. It may be true that the site thus selected is convenient, or it may even be true that it is the only available one on the stream; but that is a matter which affects the rights of petitioner, and not the public. It is not claimed that, in order to serve the needs of any community, it is necessary that the reservoir site be located at this particular point, or in fact at any. While it may be true that the enterprise of petitioner is public in its nature, the public necessity which must be shown to exist before it can entirely deprive respondents of their lands is the necessity of the public to be in some manner served by the projected enterprise, and not the necessities of the projector, in order to make such enterprise a success. So far as the authority to exercise the right of eminent domain for public uses is concerned, it is based upon the theory that the property granted the subject is upon the condition

that it may be retaken to serve the necessities of the sovereign power (*Mills, Em. Dom.* § 1; *United States v. Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346), and to this end agencies created by the state, the purpose of which is to serve the public, may exercise this right. Where, however, land is already devoted to a public use, it would be wholly unreasonable to permit it to be taken for another public use which would nullify and defeat the one to which it is already devoted, except in cases where the overwhelming necessities of the public were such that, in order to serve their needs, or supply their necessities, the taking of such property became necessary. Unless so limited, no rule governing the rights of those engaged in conducting a business for the benefit of the public could be formulated which would afford them protection against others desiring to also engage in the transaction of a public business. While corporations engaged in business of a nature which requires them to serve the public are said to be public corporations, they are, in fact, but private enterprises, inaugurated for the benefit of their stockholders; and if one such corporation may take the property of another so as to deprive the latter of the use to which it is devoted, except public necessity demands such taking, there would be no reasonable limit to the conditions under which the power of eminent domain might be exercised. Without the limitation suggested, the most absurd results could follow. The second might take from the first, others take from the latter, and the first turn about and retake, and thus the process go on *ad infinitum*. *Lake Erie & W. R. Co. v. Seneca County*, 57 Fed. 945. The taking of property already devoted to a public use to an extent which wholly defeats such use, for another public use, cannot be justified when it would merely result in a change of ownership, without in any manner tending to meet or serve the exigencies of public needs, or where the change of ownership would become a mere matter of private concern. *Chicago & N. W. R. Co. v. Chicago & E. R. Co.* 112 Ill. 589. In the circumstances of this case neither comparative convenience, benefits, nor cost to the respective parties can be taken into consideration.

The next point urged is that the Colorado Southern has no interest in the property in dispute as a right of way for railroad purposes. In support of this contention two propositions are urged: (1) That parallel and competing lines of railroad cannot be consolidated under the Constitution and laws of this state; and (2) that neither the Colorado Southern nor its grantors have complied with the law of the United States relative to the steps which must be taken in order to hold a right of way for railroad purposes obtained from the general government, and that a failure on the part of the grantors of the Colorado Southern to comply with the law of the state with respect to the construction of railroads by corporations organized under the laws of this state resulted in a dissolution of their corporate 60 L. R. A.

existence before the Colorado Southern purchased such right of way from those companies. We do not deem it necessary to state the facts upon which these claims are based. It is averred in the petition that the Rio Grande company owns a right of way through the lands which it is intended to include in the reservoir site, and that the Leadville, Cripple Creek, and Colorado Southern companies each claim an interest in the property sought to be condemned, the nature and extent of which is unknown. These several parties are made respondents. The prayer is to the effect that the right and interest of the several respondents be assessed according to the statute; for a decree that petitioner have the right to appropriate and occupy the premises for a reservoir site; and that the compensation of respondents and each of them be fixed, when ascertained. One whose rights are not injuriously affected cannot complain that a corporation has acted in excess of its powers, or without warrant of law. 6 *Thomp. Corp.* § 6030; *Taylor, Priv. Corp.* 3d ed. § 281; *New Orleans & M. T. R. Co. v. Ellerman*, 105 U. S. 166, 23 L. ed. 1015; *New England R. Co. v. Central R. & Electric Co.* 69 Conn. 47, 36 Atl. 1061. The ultimate object of this action, so far as petitioner is concerned, is to acquire the title of respondents in the right or rights of way through the reservoir site. Petitioner has no interest in these premises. In compliance with the statute, it has made all claimants to any interest in them parties respondent in order that they may have an opportunity to establish the damages which they will sustain by taking the land in question. It is wholly immaterial to petitioner what the respective interests of these parties may be. If the law under which these rights were acquired by the respondents has been violated, or not complied with, certainly no rights of petitioner have thereby been invaded, because at no time has it had any interest to be affected. It cannot assume the inconsistent positions of conceding, by commencing an action to condemn, that it has no interest in the premises in dispute, and then, after bringing in the parties whom it says do own, or claim to own, some interest, assert that they have none. Its right to condemn depends primarily upon the fact that the land thus sought to be taken belongs to another. *Colorado M. R. Co. v. Croman*, 16 Colo. 381, 27 Pac. 256. It must pay for the land taken. As to which respondent may be the owner of such land, the petitioner has no interest, further than to bring before the court those claiming an interest. If any dispute exists between these parties as to which may be the owner, that is a matter which they must settle between themselves. When the damages are assessed for taking the disputed premises, if the case reaches that stage, the amount which must be paid on this account can be turned into the registry of the court by the petitioner, and the parties who claim to be entitled to it can have that matter adjudicated. Petitioner cannot convert the action into one to

quiet title or forfeit corporate or property rights. So far as it is concerned, it must remain an action to condemn, and no issue can be injected into the case by it which will change its character in this respect. *Colorado M. R. Co. v. Croman*, 16 Colo. 381, 27 Pac. 256. Many authorities are cited by counsel in support of the propositions just considered, but they are not in point. They were cases brought either directly for the purpose of testing such questions, or to forfeit corporate rights, or where the authority of a corporation seeking to exercise the power of eminent domain was challenged.

In this connection we shall dispose of the petition of intervention. Since the cause was brought here, the people, through the attorney general, have filed a petition, and ask to be permitted to intervene. In this petition facts are alleged from which it is claimed the conclusion can be deduced that the railroad companies have no interest in the premises embraced in the proposed reservoir site. The evident purpose and object of the intervention is to forfeit the corporate rights and franchises of the respondent railroad companies in the premises sought to be taken. The Leadville, Cripple Creek, and Colorado Southern companies move to strike this petition from the files. We are cited to decisions of this court where parties have been permitted to intervene in condemnation proceedings. In those cases the interveners were interested in the subject-matter of controversy. No such interest is exhibited by the people in this instance. They have no claim whatever to any part of the premises sought to be condemned, and are entitled to no damages which may be awarded. It is only parties who have an interest in the subject-matter of dispute between litigants who are entitled to intervene. Aside from these considerations, an intervention cannot be permitted when the result would be to change the entire character of the action,—as in this instance, from proceedings in condemnation to that of quo warranto. Cases are cited from this and other courts where language has been employed to the effect that the sovereignty conferring a franchise may at any time and in its own appointed way and form inquire into the manner in which the franchise granted is used. Those cases, however, were where the court had under consideration the method provided for direct proceedings in quo warranto, and have no application whatever to the case at bar, in view of the fact that it is a condemnation proceeding pure and simple, and cannot be converted into one of an entirely different character and nature, which would eliminate that feature as between petitioner and either of the respondents.

At the oral argument it was suggested that the Colorado Southern could not successfully object to the condemnation of the right of way in question, for the reason that it has never been used for railroad purposes. The trial judge found that at the time the

petition in condemnation was filed the Colorado Southern "was in possession of the premises sought to be taken, and had constructed thereon, and had in operation, a line of railroad," and concluded "the lands so occupied and used were by such occupation and use devoted to public purposes." This finding and conclusion are not supported by the evidence, in the circumstances of this case. It appears from the pleadings and evidence and the claims of the respective parties that the predecessor in interest of the Rio Grande company made claim to this right of way about 1883, and subsequently constructed a railroad grade thereon. According to the answer of the respondents the Leadville, Cripple Creek, and Colorado Southern companies, the Leadville company, about 1889, made claim to the same right of way; that by virtue of an act of Congress passed in 1896 the Cripple Creek company claims to have acquired this right of way, or an interest therein; and that the Colorado Southern, organized in 1898, purchased from the Leadville and Cripple Creek companies their rights therein. Neither of the railroads, except the predecessor of the Rio Grande company, ever did any work in the way of grading or constructing a road on this right of way until in September, 1899, at which time the Colorado Southern did lay rails and ties substantially or partially on the old grade belonging to the Rio Grande company, and through the lands embraced in the reservoir site. The petition in condemnation was filed in November, 1899. It does not appear that the Colorado Southern at this time was using the line constructed, or ever intended to use it, for railroad purposes. No claim is made that trains were run over such road for the purposes of traffic, or that it is the intention of the company to utilize this track for such purposes, or to extend its line of road beyond the point reached about the time these condemnation proceedings were instituted and heard below. In short, so far as advised from the present record, the laying of the rails and ties upon the right of way through the reservoir site appears to have been for the one purpose of merely showing the existence of a railroad at this point by putting in place the materials from which a railroad is usually constructed. We have said that property already devoted to a public use cannot be taken under the exercise of the power of eminent domain to an extent which will wholly defeat or supersede that use; but land which is not employed in, or needed for, such use is not within the reason or operation of this rule. *Cincinnati, S. & C. R. Co. v. Belle Centre*, 48 Ohio St. 273, 27 N. E. 464. Corporations like railroad companies are organized for the transaction of public business, and to further this end it is the policy of the national and state governments to permit them to acquire rights of way over the public domain. Such rights, however, cannot be held indefinitely. They must, within a rea-

sonable time, be subjected to the use for which they were granted. The general government, as well as this state, has provided laws which are intended to require railroad companies to complete their lines of road over a designated way within a definite period; otherwise the rights in the right of way to the incompleted part of the road shall revert or be forfeited. We refer to these, not for the purpose of establishing a forfeiture, but as indicating an intent on the part of Congress and the legislature of the state to prevent railroad companies from indefinitely holding a right of way to the exclusion of others who may desire to appropriate it to some other use. For something like sixteen years the right of way in question has been held by different companies for railroad purposes. During all that period it does not appear that it has ever actually been devoted to any such use. The fact that ties and rails were laid by the Colorado Southern a short time prior to the commencement of these proceedings is not sufficient to show conclusively, or even *prima facie*, after the lapse of so many years, that it is the bona fide intention of the company to construct or maintain a railroad over this right of way. True, the Colorado Southern had not been in existence a year at the time it did this work, but that is immaterial, in view of the fact that its rights to such right of way were acquired from other companies, which never made any attempt to construct a railroad over it. The mere laying of rails, in the absence of a showing of a bona fide purpose to construct and maintain a railroad, is of no avail. The right of way must actually be devoted to, or needed for, railroad purposes, and the outward semblance of the existence of a road which is not used is of no more avail than if none had been constructed.

The further point is made by the respondent railroad companies that petitioner has no power to condemn the right of way, because it is only a private corporation, and that a corporation of this character cannot condemn lands held for a public purpose. Whether petitioner is a public or private corporation is immaterial. As a private corporation, it is authorized, under the Constitution, as we have already pointed out, to condemn lands for a reservoir site. By the provisions of § 1716, 1 Mills's Anno. Stat., it is provided that under the act of eminent domain private property may be taken for private use for reservoirs for agricultural, mining, milling, domestic, or sanitary purposes. Property held by a public corporation, which is not devoted to or needed for a public use, is as much private property as though held by an individual. Hence it follows that, if the right of way is neither used nor needed for railroad purposes, it is private property, and petitioner, though a private corporation, may, under the provisions of the law on the subject of eminent domain, condemn for the purposes for which it is sought to be taken.

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On behalf of the respondents, the Leadville, Cripple Creek, and Colorado Southern companies, a motion to dismiss was filed in this court, based upon the ground that it is without jurisdiction to hear or determine this case on error. No brief has been filed in support of this motion, but at oral argument it was suggested that final judgment had never been entered in the court below. The effect of the judgment rendered was to deny the right of petitioner to take the premises by condemnation proceedings. This was determined on the issues made by the pleadings, and the testimony introduced by the respective parties at the time when a motion which had been interposed by petitioner for the appointment of commissioners, and the motion of respondents to dismiss, were heard, and was a final judgment, because it denied the right of petitioner to condemn, and effectually settled the rights of the respective parties, so far as the proceedings in condemnation were concerned. The motion to strike the petition of intervention is sustained, and the motion to dismiss denied.

The judgment of the trial court is reversed, and the cause remanded for further proceedings not in conflict with the views expressed, as though no trial had been had.

Campbell, Ch. J., not participating.

A petition for rehearing having been filed, the following response was handed down July 5, 1902:

Per Curiam:

In determining what the evidence establishes with respect to the appropriation or need of the premises in dispute for railroad purposes, the record as a whole must be considered. Over three years elapsed between the date the power company commenced actual operations in the way of constructing a dam and the time when either of the respondents asserted any claim or objected to such use of these premises. During that period the power company expended many thousands of dollars in carrying on these operations. These are important features to consider in determining the good faith of the use and needs of the Colorado Southern company. The question of whether or not there has been such an appropriation by that company as will preclude the power company from now condemning the premises is not foreclosed. We have merely held that in the circumstances of this case a use and need for railroad purposes have not been established, and these questions are remitted to the trial court for determination in connection with such others as may be proper and in harmony with the views expressed in this and the principal opinion. The petition for rehearing is denied.

Petition for rehearing denied.

Campbell, Ch. J., not participating.

ILLINOIS SUPREME COURT.

CHICAGO & ALTON RAILWAY COMPANY, *App't.*,
v.
City of CARLINVILLE.

(200 Ill. 314.)

1. The reasonableness of an ordinance limiting the speed of trains within municipal limits, passed under general statutory authority, which merely prescribes the minimum rate, without prescribing the details of the regulation, is subject to review by the courts.
2. That an ordinance limiting the speed of railroad trains within the corporate limits will prevent the railroad company from giving its passengers the service they demand, and also its successful competition with rival roads, does not make the ordinance void for unreasonableness.
3. An ordinance limiting the speed of trains to 10 miles per hour within the corporate limits is not unreasonable, where the road lies for a mile and a quarter within such limits, and crosses four streets, two of which are main thoroughfares, and buildings located near the road obstruct, to a considerable extent, a view of the tracks and approaching trains, although the principal part of the buildings of the municipality are located to one side of the road.
4. An ordinance limiting the speed of trains on an interstate railway which carries United States mail to 10 miles an hour within the corporate limits of the municipality, which is passed for the safety of the public and the protection of life and property, is not void as imposing an unreasonable restriction upon interstate commerce and the speedy transportation of the mail.

(December 16, 1902.)

APPPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Macoupin County inflicting a penalty upon defendant for violating an ordinance regulating the speed of trains in the plaintiff city. *Affirmed.*

The facts are stated in the opinion.

Mr. William Brown, with *Messrs. Patton & Patton*, for appellant:

What are reasonable regulations, and what are subjects of the police powers, must necessarily be judicial questions.

Toledo, W. & W. R. Co. v. Jacksonville, 67 Ill. 37, 16 Am. Rep. 611; *Lake View v. Tate*, 33 Ill. App. 78, *Affirmed* in 130 Ill. 247, 6 L. R. A. 268, 22 N. E. 791; 2 *Elliot, Railroads*, § 670; *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 57 N. W. 680; *Meyers v. Chicago, R. I. & P. R. Co.* 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896; *Evison*

NOTE.—For other cases in this series as to ordinance limiting speed of railroad trains within municipality, see *Grube v. Missouri P. R. Co. (Mo.)* 4 L. R. A. 776, and *note*; *Lake View v. Tate (Ill.)* 6 L. R. A. 268; and *Evison v. Chicago, St. P. M. & O. R. Co. (Minn.)* 11 L. R. A. 434.

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v. Chicago, St. P. M. & O. R. Co. 45 Minn. 370, 11 L. R. A. 434, 48 N. W. 6.

Where an ordinance is questioned, the burden is on the city to show authority for its passage.

Braceville v. Doherty, 30 Ill. App. 645; *Schott v. People*, 89 Ill. 195.

The state may make reasonable regulations to secure the safety of passengers, even on an interstate train, while within its borders. But it can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic.

Illinois O. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Cleveland, C. O. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

Messrs. William H. Steward and A. J. Duggan, for appellee:

What the legislature says may be done cannot be set aside by the courts because they may deem it unreasonable or against sound policy.

Lake View v. Tate, 130 Ill. 247, 6 L. R. A. 268, 22 N. E. 791; *Mason v. Shawneetown*, 77 Ill. 533; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369; *Taylor v. Carondelet*, 22 Mo. 105; *Dill. Mun. Corp.* 4th ed. §§ 994, 995; *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *Tudor v. Chicago & S. S. Rapid Transit R. Co.* 154 Ill. 129, 39 N. E. 136.

Where a city council is authorized by statute to pass an ordinance within certain fixed limits, its acts, although discretionary, are not open to review, and cannot be judicially interfered with so long as the council remains within the limits of the power conferred, unless fraud or bad faith of some sort is imputed and shown, or unless there has been a manifest invasion of private rights.

Dill. Mun. Corp. § 94.

The city had the right to limit the speed of the train to 10 miles per hour.

Duggan v. Peoria, D. & E. R. Co. 42 Ill. App. 536; *Chicago, B. & Q. R. Co. v. Haggerty*, 67 Ill. 113; *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91.

The presumption is always in favor of the validity of a statutory ordinance passed in pursuance of competent legal authority.

Harmon v. Chicago, 140 Ill. 374, 29 N. E. 732; *People ex rel. Morrison v. Oregier*, 138 Ill. 401, 28 N. E. 812.

The legislature, for the safety, security, and welfare of society, may control the acts of the governed, even as to the time and manner of performing labor, and in the manner in which persons shall use their property, to prevent injury to others.

Hawthorn v. People, 109 Ill. 302, 50 Am. Rep. 610.

It may delegate its police power to municipal corporations.

Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698.

The police powers of the states have been reserved to themselves, and never surrendered to the general government; and any local enactment made to secure the lives, health, and property of the people will be sustained as a police regulation, even though such legislation may, for a limited time or to a limited extent, affect commerce among the states.

Gibbons v. Ogden, 9 Wheat. 203, 6 L. ed. 71; *Crutcher v. Kentucky*, 141 U. S. 61, 35 L. ed. 654, 11 Sup. Ct. Rep. 851; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Harmon v. Chicago*, 140 Ill. 374, 29 N. E. 732, 110 Ill. 401, 51 Am. Rep. 698.

Hand, J., delivered the opinion of the court:

This was a suit brought by the appellee against the appellant before a police magistrate to recover a penalty for a violation of the following ordinance of the city of Carlinville: "Sec. 261. No railroad company, or conductor, engineer, or other employee of such company managing or controlling any locomotive engine, car, or train upon any railroad track, shall run, or permit to be run, within the limits of said city, any passenger train or car at a greater rate of speed than 10 miles per hour, nor any freight train or car at a greater rate of speed than 6 miles per hour, under a penalty, in either case, of not exceeding \$25 for each offense." A trial was had, and judgment was rendered against the appellant, from which it appealed to the circuit court, where a jury was waived, and a trial had before the court, which resulted in a judgment against the appellant for \$5 and costs, which judgment has been affirmed by the appellate court for the third district, and a further appeal has been prosecuted to this court.

The appellant objected to the introduction of said ordinance in evidence on two grounds: First, that said ordinance was unreasonable, and therefore void; second, that said ordinance is an unreasonable restriction upon interstate commerce, and an unnecessary hindrance to the speedy carrying of the United States mail, and in conflict with the Constitution of the United States. The court overruled said objections, and admitted the ordinance in evidence, to which ruling of the court the appellant excepted, and has assigned the same as error in this court. The objections will be disposed of in the order in which they were made and are here presented.

The city of Carlinville is located upon the main line of the appellant's railroad, and is about midway between the cities of Springfield and East St. Louis. It has a population of about 3,600, and is the county seat of Macoupin county. The tracks of appellant run through the incorporated limits of the city from the northeast towards the southwest for about one mile and a quarter. The principal part of the city is located

on the east side of its tracks, which cross four streets within the city, two of which are among the principal thoroughfares of the city. The city has the usual residences, stores, shops, and public buildings common to a county seat of its size, and a coal shaft, grain elevator, and pickle factory are located within the city near the main line of appellant, which obstruct, to a considerable extent, the view of its tracks and approaching trains. The Alton Limited is a fast train, which was equipped for the accommodation of through passengers between the cities of Chicago and St. Louis. It makes but few stops, and runs in competition with similar trains operated between said points by the Illinois Central and Wabash railroads, which very nearly parallel its route. The distance between Chicago and St. Louis by appellant's line is about 280 miles, about 65 miles of which is within incorporated cities, towns, and villages in the state of Illinois. The distance between said cities by the other railroads referred to is about the same as that over appellant's line, but the Illinois Central and Wabash railroads have a less amount of track within the limits of incorporated cities, towns, and villages. The Alton Limited schedule time between Chicago and St. Louis is seven and three fourths hours. It carries the United States mail, and runs to make connection with railroad lines from the east and northwest entering and leaving Chicago, and from the west and southwest entering and leaving St. Louis, carrying through passengers and the United States mail. It was admitted that the Alton Limited had been run by the appellant within the incorporated limits of the city of Carlinville at from 50 to 60 miles per hour, and at a prohibited rate of speed, and in violation of said ordinance, if said ordinance was valid, and binding upon it. The city of Carlinville is organized under the general law providing for the incorporation of cities and villages, and passed the ordinance in question under and by virtue of the power conferred upon it by that act, subject to the limitation imposed by the act in regard to fencing and operating railroads. Paragraph 21 of § 1 of article 5 of the general incorporation act (Hurd's Rev. Stat. 1899, p. 275) provides that cities shall have the right "to regulate the speed of . . . cars and locomotives within the limits of the corporation," and § 24 of the act in regard to fencing and operating railroads (Hurd's Rev. Stat. 1899, p. 1332) provides "that no such ordinance shall limit the rate of speed, in case of passenger trains to less than 10 miles per hour, nor in any other case to less than 6 miles per hour." Subject to the limitation that no ordinance shall be passed which limits the speed of a passenger train to less than 10 miles per hour, and in any other cases to less than 6 miles per hour, the matter of regulating the speed of trains within incorporated cities and villages is left entirely to the municipal authorities. *Lake View v. Tate*, 130 Ill. 247, 6 L. R. A. 18, 22 N. E. 791. That cities and villages have the

power, by ordinance, to regulate the speed of trains within their corporate limits, is recognized by the courts of this country, so far as we have been able to discover, without exception, provided such regulation is reasonable. *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91; *Chicago, B. & Q. R. Co. v. Haggerty*, 67 Ill. 113; *Meyers v. Chicago, R. I. & P. R. Co.* 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 898; *Crowley v. Burlington, C. R. & N. R. Co.* 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918; *Whitson v. Franklin*, 34 Ind. 392; *Cleveland, C. C. & I. R. Co. v. Harrington*, 131 Ind. 426, 30 N. E. 37; *Weyl v. Chicago, M. & St. P. R. Co.* 40 Minn. 350, 42 N. W. 24. In *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91, on page 93, it is said: "Though the legislature has granted franchises to railway corporations, and authorized them to procure the right of way and operate their trains by the power of steam, yet they have not unlimited discretion in the regulation of the speed of trains. They cannot act recklessly, and in disregard of the safety and rights of others. The state has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. Prominent amongst the rights reserved, and which must inhere in the state, is the power to regulate the approaches to and the crossing of public highways and the passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains. The exercise of their franchises by corporations must yield to the public exigencies and the safety of the community." In *Chicago, B. & Q. R. Co. v. Haggerty*, 67 Ill. 113, an objection was made to the admission in evidence of an ordinance of the town of Camp Point prohibiting the running of trains within the town at a greater rate of speed than 6 miles per hour. On page 115, 67 Ill., the court says: "It is contended that the ordinance is null and void because the town had no authority to pass such an ordinance, and because the company was expressly authorized by law to fix and regulate the rate of speed of trains upon its road. There is no grant of power to this town, in express terms, to regulate the rate of speed of railway trains passing through the town, but by its charter (Private Laws 1857, pp. 540, 541) the board of trustees of the town have the power to declare what shall be considered as nuisances, and to prevent and remove the same, and to regulate the police of the town, and to make such ordinances as the good of the inhabitants of the town may require. Under these powers we think the town possessed the authority so to order the use of private property within its limits as to prevent its proving dangerous to the safety of the persons and property of citizens; and we view the ordinance in question as but a police regulation for the preservation of the safety of persons and property, the adoption of which was no more than a fair exercise of the police power vested in the town."

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The books and reported cases seem to agree that courts may declare void an ordinance passed by a city or village by virtue of its implied powers, if, in the opinion of the court, it is unreasonable; but when the ordinance is passed by express authority conferred upon the municipality by the legislature, such power is not so clear, and there is conflict of authority upon that proposition. *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 100, 57 N. W. 680. The rule adopted in this state is that, where the ordinance is passed in pursuance of power expressly conferred by the legislature, and the details of such municipal legislation are prescribed by the legislature, an ordinance passed in pursuance of such power cannot be held invalid by the courts as being unreasonable; but when the details of such legislation are not prescribed, an ordinance passed in pursuance of such power must be a reasonable exercise thereof, or it will be pronounced invalid. *Lake View v. Tate*, 130 Ill. 247, 6 L. R. A. 268, 22 N. E. 791; *Hawes v. Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373; *Wice v. Chicago & N. W. R. Co.* 193 Ill. 351, 56 L. R. A. 268, 61 N. E. 1084. It is said in the *Tate Case*, on page 252, 130 Ill., page 269, 6 L. R. A., and on page 793, 22 N. E.: "Where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." In *Hawes v. Chicago*, 158 Ill. 653, 30 L. R. A. 225, 42 N. E. 373, Mr. Justice Baker, in speaking for the court, in discussing the question when a court may rightfully hold an ordinance unreasonable, on page 658, 158 Ill., page 227, 30 L. R. A., and page 374, 42 N. E., said: "Where the power to legislate on a given subject is conferred on a municipal corporation, yet, if the details of such legislation are not prescribed by the legislature, there the ordinance passed in pursuance of such power must be a reasonable exercise thereof, or it will be pronounced invalid." The *Hawes Case* was cited in *Wice v. Chicago & N. W. R. Co.* 193 Ill. 351, 56 L. R. A. 268, 61 N. E. 1084, and the language thereof quoted with approval. The legislature did not distinctly say what may be done by municipalities in regulating the speed of trains passing through their limits. It only said that the speed of trains should not be limited below a certain rate per hour, and with that exception left the matter wholly within the discretion of the municipal authorities; and we think it clear the legislature did not prescribe the details to be observed in the passage of an ordinance regulating the speed of trains in their passage through incorporated cities and villages, and that the court has the power to decide such an ordinance as this invalid if it clearly appear that it be an unreasonable exercise of such power. This ordinance, to be valid, must not, therefore, be unreasonable. The presumption, however, is in favor of its validity, and that it is reasonable, and it is in-

cumbent upon appellant to point out and show affirmatively wherein such unreasonableness consists. *People ex rel. Morrison v. Cregier*, 138 Ill. 401, 28 N. E. 812. Ordinances of the character of the one under consideration are passed under and by virtue of the police power, which has been defined, in general terms, "as comprehending the making and enforcement of all such laws, ordinances, and regulations as pertain to the comfort, safety, health, convenience, good order, and welfare of the public." *Culver v. Streator*, 130 Ill. 238, 6 L. R. A. 270, 22 N. E. 810. The determination of the question whether or not the ordinance in question was reasonably necessary for the protection of life and property within the city was committed in the first instance to the municipal authorities thereof by the legislature. When they have acted, and passed an ordinance, it is presumptively valid, and, before a court would be justified in holding their action invalid, the unreasonableness or want of necessity of such a measure for the public safety and for the protection of life and property should be clearly made to appear. It should be manifest that the discretion imposed in the municipal authorities has been abused by the exercise of the power conferred by acting in an arbitrary manner. *Knobloch v. Chicago, M. & St. P. R. Co.* 31 Minn. 402, 18 N. W. 106; *Evison v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 370, 11 L. R. A. 434, 48 N. W. 6. The argument of appellant amounts to but this: If this ordinance and similar ordinances in the other municipalities along its line are valid and are enforced, its schedule time must be lengthened, the effect of which will be that it will be unable to give to its patrons the service which they demand, and which its competitors offer them; and it cannot successfully operate its road. This may seem, in some degree, to be true. But a requirement that it stop its trains at railroad crossings and drawbridges has the same effect; still such regulations are held valid. The mere fact that an ordinance may operate to restrain trade or retard rapid transportation will not justify a court in holding an ordinance invalid regulating the speed of trains when the speed limit is not below that prescribed by the legislature, and when it does not clearly appear that such ordinance is unreasonable and unnecessary for the safety of the public and for the protection of life and property. "An ordinance of this character may restrain trade, and yet be necessary and reasonable as a police regulation. The rapid transaction of business by the railway company may be hindered and trammelled by an ordinance controlling and regulating the rate of speed with which railway trains may be sent over and through the streets and populous portions of our towns and cities; but, when necessary for the proper protection of life and property, the celerity and despatch with which business may be accomplished is but secondary." *Weyl v. Chicago, M. & St. P. R. Co.* 40 Minn. 351, 42 N. W. 24. In *Knobloch v. Chicago, M. & St. P. R. Co.* 31 60 L. R. A.

Minn. 402, 18 N. W. 106, which was an action for damages, the supreme court of Minnesota held an ordinance limiting the speed of trains within the city of St. Paul to 4 miles per hour not to be unreasonable, although the accident took place at a crossing in a sparsely settled portion of the city. To the same effect is *Weyl v. Chicago, M. & St. P. R. Co.* 40 Minn. 350, 42 N. W. 24. The court of appeals of the state of New York in *Buffalo v. New York, L. E. & W. R. Co.* 152 N. Y. 276, 46 N. E. 496, held an ordinance limiting the speed of trains in the city of Buffalo to 6 miles an hour reasonable. In *Whitson v. Franklin*, 34 Ind. 392, the supreme court of Indiana held an ordinance limiting the speed of trains in the city of Franklin to 4 miles per hour reasonable. In *Larkin v. Burlington, C. R. & N. R. Co.* 85 Iowa, 492, 52 N. W. 480, the supreme court of Iowa sustained an ordinance prohibiting passenger trains from running at a higher rate of speed than 10 miles per hour through the corporate limits of West Liberty, where it appeared the crossing at which the injury took place was $\frac{1}{4}$ of a mile from the depot, the principal part of the town on the east side of the railroad, and the land upon the west side of the track used mainly for agricultural purposes.

The appellant has cited three cases, in each of which a speed ordinance was held invalid by reason of the limitation as to the time per hour in which trains were permitted to run within the corporate limits of a city: *Evison v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 370, 11 L. R. A. 434, 48 N. W. 6; *Meyers v. Chicago, R. I. & P. R. Co.* 57 Iowa, 555, 42 Am. Rep. 50, 10 N. W. 896, and *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 100, 57 N. W. 680. In each of these cases the train was running through a sparsely settled section of the outskirts of the city, at a point where the court held there was no necessity that the speed of the train be decreased for the safety of the public, or the protection of life and property. In each case (they being actions to recover damages) the ordinance was held void as applied to the particular place where the injury occurred, and not as to the entire ordinance, while here the ordinance is challenged as a whole. We have no doubt an ordinance may provide for different rates of speed upon the same line of railroad in different sections of a city or village, as one part thereof may run through a thickly settled section, while another part may run through a sparsely populated section, where there are but few inhabitants, and where the possibilities that an injury to persons or property would occur would be extremely improbable. *Lake View v. Tate*, 130 Ill. 247 6 L. R. A. 268, 22 N. E. 791. Taking into consideration the existing circumstances and conditions, the necessity for its adoption, the object sought to be accomplished, and the effect upon the business of the appellant, we are unable to say the ordinance is unreasonable, but are of the opinion that it is a valid exercise of the police power by the city.

The next question which presents itself for consideration is, Does the ordinance in question impose an unreasonable restriction upon interstate commerce and the speedy transportation of the United States mail? We are of the opinion it does not. The ordinance was passed as a police regulation for the preservation of the safety of the public and the protection of life and property, and was no more than a fair exercise of the police power vested in the city. *Toledo, P. & W. R. Co. v. Deacon*, 63 Ill. 91; and *Chicago, B. & Q. R. Co. v. Haggerty*, 67 Ill. 113. The ordinance does not undertake to regulate commerce between the states, or interfere with the transportation of the mail, and amounts to but a reasonable regulation of the speed of trains within the corporate limits of the city, and such legislation has uniformly been held to be valid. In *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, approved in *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, it was held that a statute of Indiana giving a right of action to the personal representatives of the deceased, where his death was caused by the wrongful act or omission of another, was applicable to the case of a loss of life occasioned by a collision between steamboats navigating the Ohio river, engaged in interstate commerce, and did not amount to a regulation of commerce, in violation of the Constitution of the United States. On this point the court said (p. 103, 93 U. S., and 23 L. ed. 819) "General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce. In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation in a great variety of ways may affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution. . . . And it may be said, generally, that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." In *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191, it was held that in case of a railroad whose construction had been aided by Congress, so 60 L. R. A.

as to establish a route of travel through several states, a state has the power to make all needful regulations of a police character for the government of the company operating the road within the jurisdiction of the state; and it was there said: "By the settled rule of decision in this court . . . it may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. In this way it may certainly require the company to fence so much of its road as lies within the state; to stop its train at railroad crossings; to slacken speed while running in a crowded thoroughfare; to post its tariffs and timetables at proper places; and other things of a kindred character affecting the comfort, the convenience, or the safety of those who are entitled to look to the state for protection against the wrongful or negligent conduct of others." In *Crutcher v. Kentucky*, 141 U. S. 61, 35 L. ed. 654, 11 Sup. Ct. Rep. 851, the court, speaking through Mr. Justice Bradley, said: "It is also within the undoubted province of the state legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts, and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect, to some extent, the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections and unquestionably valid." In *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722, wherein the court held the statute of this state requiring all regular passenger trains to stop at county seats to be unconstitutional, as constituting a direct burden upon interstate commerce, so far as it required through interstate passenger trains to stop at such stations when adequate train service, had otherwise been provided for local traffic, in distinguishing that case from a class of cases similar to the case at bar, the court said: "The distinction between this statute and regulations requiring passenger trains to stop at railroad crossings and drawbridges, and to reduce the speed of trains when running through crowded thoroughfares, requiring its tracks to be fenced, and a bell and whistle to be attached to each engine, signal lights to be carried at night, and tariff and timetables to be posted at proper places, and other similar requirements contributing to the safety, comfort, and convenience of their patrons, is too obvious to require discussion." We think it clear that the Supreme Court of the United States, as shown by the above decisions, is committed to the doctrine announced by this court in numerous cases, to the effect that the passage of this ordinance was a valid exercise of the police power. In *Whitson v. Franklin*, 34 Ind. 392, it was

ruled that the ordinance passed upon in that case, which limited the speed to 4 miles per hour, was not invalid on the ground that the railroad company was engaged in carrying the mail under a contract with the United States, and was required, by its contract, to transport the mail within a prescribed time, which could not be done if the towns and cities through which the road ran were allowed to regulate the speed of trains in passing through them. And in *Clark v. Boston & M. R. Co.* 64 N. H. 323, 10 Atl. 676, the supreme court of New Hampshire held that the fact that a railroad was engaged in interstate commerce does not deprive the legislature of the state through which it passes of the power to limit the rate of speed to 6 miles an hour across a highway in or near the compact part of a town. We find nothing in *Illinois C. R. Co.*

v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096, and *Cleveland, O. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 866, 20 Sup. Ct. Rep. 722, in conflict with the former decisions of the Supreme Court of the United States, or the views herein above expressed. Those cases held the statute requiring passenger trains to stop at county seats in Illinois, as applied to the facts then before the court, an unreasonable restriction upon interstate commerce and the speedy transportation of the mail, but recognized the right of the state to make all necessary police regulations, and particularly pointed out legislation of the character of this as being within the police power.

The judgment of the Appellate Court will be affirmed.

INDIANA SUPREME COURT.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, *Appt.*, v.

Charles ADAMS.

(.....Ind.....)

1. Violation of a state statute in sending a claim out of the state for the purpose of garnishment will not deprive the garnishee of the protection of the foreign judgment, under which he pays the claim, from liability to pay the debt a second time to his creditor within the state, if he has disclosed all defenses within his knowledge to the foreign court, and notified the debtor of the proceedings, notwithstanding which the foreign court, which has jurisdiction over the parties and the res, compelled him to pay the claim.
2. The effect of a foreign judgment against a garnishee to protect him from paying the claim a second time to the principal debtor will not be defeated by the fact that, after the foreign proceedings were instituted, the principal debtor brought suit upon the claim against the garnishee within the state, which he pressed to judgment before the foreign judgment was entered.

(January 28, 1903.)

APPEAL by defendant from a judgment of the Circuit Court for Jackson County in plaintiff's favor in an action brought to recover compensation for services performed, which defendant claimed to have paid, under garnishment proceedings, to a third person. *Reversed.*

The facts are stated in the opinion.

NOTE.—As to situs of debt for purpose of garnishment, see also, in this series, *Tootie v. Coleman* (C. C. App. 8th C.) 57 L. R. A. 120, and cases in *note* thereto.

For a case in this series holding that payment by a garnishee in a suit when out of the state of his residence will not protect him from a suit in favor of his creditor, see *Balk v. Harris* (N. C.) 45 L. R. A. 257.
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Messrs. Edward Barton, O. H. Montgomery, and McMullen & McMullens, for appellant:

The decision of the court is not sustained by sufficient evidence.

Chicago, St. L. & P. R. Co. v. Meyer, 117 Ind. 563, 19 N. E. 320; *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 433, 24 N. E. 83; *Louisville, N. A. & C. R. Co. v. Parish*, 6 Ind. App. 89, 33 N. E. 122; *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398.

The decision of the court is contrary to law.

Ibid.; *Crescent City L. S. L. & S. H. Co. v. Butcher's Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575; *Dupasseur v. Rochereau*, 21 Wall 130, 22 L. ed. 588.

The court erred in admitting evidence of the validity of the claim in the foreign suit.

Essig v. Lower, 120 Ind. 239, 21 N. E. 1090; *Louisville, N. A. & C. R. Co. v. Parish*, 6 Ind. App. 89, 33 N. E. 122.

Messrs. Joseph H. Shea and Carl E. Wood, for appellee:

The appellant was required to plead all defenses of appellee before the foreign court.

Terre Haute & I. R. Co. v. Baker, 122 Ind. 433, 24 N. E. 83.

Had appellant availed itself of all defenses, the Kentucky justice would have been required to give full faith and credit to the judgment of appellee in the city court of Seymour, Indiana.

U. S. Const. art. 4; *Kingman v. Paulson*, 126 Ind. 509, 26 N. E. 393.

Where suits between the same parties and

their privies in relation to the same subject-matter are pending at the same time in different courts of concurrent jurisdiction, a judgment on the merits in one may be used as a bar to further proceedings in the other.

Stout v. Iye, 103 U. S. 66, 26 L. ed. 428.

In an action between the same parties, or those in privity with them, upon the same claim or demand, the prior judgment or decree upon the merits is conclusive of every matter that was, or might have been litigated in the earlier suit.

Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co. 37 C. C. A. 146, 95 Fed. 457; *Gilmore v. McClure*, 133 Ind. 571, 33 N. E. 351; *Stanton v. Kenrick*, 135 Ind. 382, 35 N. E. 19; *Parker v. Obenchain*, 140 Ind. 211, 39 N. E. 869; *Zimmerman v. Savage*, 145 Ind. 124, 44 N. E. 252.

Gillett, J., delivered the opinion of the court:

Appellee commenced this suit before the judge of the city court of Seymour to recover for services performed by him. There was an appeal to the court below. In the latter court appellant asserted a partial defense, based on the fact that it had been garnished before a justice of the peace in the state of Kentucky on account of the indebtedness here sued for, and that it had been compelled to pay the judgment of garnishment rendered in said cause. The record of the justice of the peace was exhibited, and a full showing made as to the statute and unwritten law of Kentucky relative to his jurisdiction. There was a finding and judgment for appellee in the circuit court for the full amount of his claim. Appellant unsuccessfully moved for a new trial. By a proper assignment of error, based on the overruling of said motion, appellant questions the correctness of the finding below, and here contends that "the decision of the court is contrary to law, in this: that it does not give full faith and credit to the records and judicial proceedings of the state of Kentucky." It is not necessary to set out the proceedings of said Kentucky court in detail, further than to state that appellee had personal notice of said suit. No question is raised as to the jurisdiction of the Kentucky court over the *res*, or as to its jurisdiction over the parties litigant in this action. See, upon the subject of jurisdiction, *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797. If the judgment is valid, there has been a sequestration of the original debt; and if it can be said that the appellant has been compelled to pay the same to a third person, it should now be credited with the payment.

It was declared by Prof. Kent that "it has become a settled principle in the English courts that where a debt has been recovered of a debtor under the process of foreign attachment, fairly and not collusively, the recovery is a protection to the garnishee against his original creditor, and he may plead it in bar." 2 Kent, Com. 119. As said by Shaw, Ch. J., speaking for the su-

preme court of Massachusetts, in the case of *Meriam v. Rundlett*, 13 Pick. 511, 515: "He who pays under the judgment of a tribunal having legal jurisdiction to decide, and adequate power over the person or property, to compel obedience to its decisions, has an indisputable claim to protection." As stated by the supreme court of Connecticut: "It was his [the garnishee's] duty to pay it. He had no choice on the subject, and when paid he is entitled to the benefit of its being a coercive payment." *Palmer v. Woodward*, 28 Conn. 248, 251. In fact, as against a garnishee who has been compelled to pay a debt to another, after full disclosure of the material facts known to him, in compliance with a judgment of a court of competent jurisdiction, we do not think that an authority will be found that denies the garnishee protection. We cite, as supporting the rule, *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *Harmon v. Birchard*, 8 Blackf. 418; *Enbree v. Hanna*, 5 Johns. 101; *Holmes v. Remsen*, 4 Johns. Ch. 460, 8 Am. Dec. 581; *Hull v. Blake*, 13 Mass. 153; *Wilkinson v. Hall*, 6 Gray, 568; *Barrow v. West*, 23 Pick. 270; *Cottle v. American Screw Co.* 13 R. I. 627; *Taylor v. Phelps*, 1 Harr. & G. 492; *Seward v. Heflin*, 20 Vt. 144; *Coates v. Roberts*, 4 Rawle, 100; *Wigmore v. Union Coal & Min. Co.* 37 Iowa, 129; *Smith v. Dickson*, 58 Iowa, 444, 10 N. W. 850; 2 Black, Judgm. 2d ed. 598; *Cuah. Trustee Process*, 118; *McConnell, Trustee Process*, § 297.

It has been pointed out by Mr. Wade that attachment laws are purely statutory, and so loosely fitted into the general body of the law that it is difficult to formulate rules as to the duty of the garnishee. 2 Wade, *Attachm.* § 398. The governing principle of the garnishee's exemption from a second liability is the injustice of compelling him to pay, at the suit of his creditor, that which a court having authority so to do has compelled him to pay to another. It is obvious, therefore, that he must act fairly and without collusion. See cases last cited. Where the principal debtor is not actually in court, and there is reason to suppose that he is not advised of the suit, the garnishee ought at least to answer all facts within his knowledge, that, if the court were advised of, would presumably lead it to refuse to subject the fund to sequestration. As said in *McConnell, Trustee Process*, § 300, in speaking of the duties of the garnishee, to avoid a charge of laches: "If he could have prevented a judgment from being rendered by appearing, or if, having appeared, he denies a fact he ought to have disclosed, or does not disclose facts he ought to have disclosed, payment by him will be of no avail." But the whole burden of contesting the suit is not cast upon the garnishee. Thus he is not obliged to gratuitously defend the main action (*Harmon v. Birchard*, 8 Blackf. 418, *Cottle v. American Screw Co.* 13 R. I. 627), or to appeal, where a true disclosure has been made (*Cottle v. American Screw Co.* 13 R. I. 627; *Webster v. Lowell*, 2 Allen, 123;

Hull v. Blake, 13 Mass. 157). It was said in the latter case: "It is true, there are higher tribunals in the state to which the present defendant might have resorted, but we do not think that he was obliged to do so. It was enough for him to present to the court a true state of his relation to Billings, his creditor, and he might safely acquiesce in the decision of that tribunal to which the laws of the state had given authority over the subject."

We need not here undertake to state the measure of the garnishee's duty in all cases, but it may be said, so far as the main action is concerned, that, where the principal defendant has personal knowledge of the suit, the former is not bound to go further than to look to the jurisdiction, act fairly, and make a full disclosure. In *Wigwall v. Union Coal & Min. Co.* 37 Iowa, 130,—a case much like this,—it was said: "The defendant in this case has once paid the amount due plaintiff to a creditor of his, whereby plaintiff has had the full benefit of it. The defendant ought not to be required to pay the amount a second time, unless guilty of some negligence or wrong toward the plaintiff. The finding of facts show that the defendant answered truly and fully every known fact, and also stated that the plaintiff herein, its creditor, claimed to be the head of a family, whereby the debt sought to be garnished would be exempt. The plaintiff herein was a party to the case, and was fully notified of the garnishment proceedings. It was his duty to furnish defendant the information and means to prove the fact, or himself to prove it. *Walters v. Washington Ins. Co.* 1 Iowa, 404, 63 Am. Dec. 451; *Drake*, *Attachm.* §§ 717, 718, and cases cited; *Wood v. Partridge*, 11 Mass. 488. The plaintiff, having notice of the garnishment proceedings, and being in effect a party thereto, is bound or concluded by the judgment therein, as well as the defendant. It was his privilege and duty, if that judgment was erroneous, to have it set aside or appeal from it. He cannot allow it to stand, and at the same time impeach it collaterally. The garnishee, having answered truly and fully and in good faith, is entitled to protection." See also *Webster v. Lowell*, 2 Allen, 123; *Morrison v. New Bedford Inst. for Savings*, 7 Gray, 269; *Boynton v. Fly*, 12 Me. 17; *Goddard v. Collins*, 25 Vt. 712; *Chicago, St. L. & P. R. Co. v. Meyer*, 117 Ind. 563, 567, 19 N. E. 320, where the garnishee procured and filed the affidavit of the principal defendant, stating that the debt was exempt, but where no further steps were taken by way of defense, it was said by this court: "There were no facts found by the trial court which could justify an inference, even, that at the time of the institution of such proceeding in garnishment, and at all times since, Blazius Meyer was not and had not been a man of sound mind and mature years, and fully capable of interposing or causing to be interposed, at the proper time and place, every defense he had, or thought he had, legal or equitable, to such proceedings. Nor were any facts found by the court 60 L. R. A.

which would authorize the conclusion, whether of law or fact, that it was the duty of the defendant or of its attorneys, as such, to make any defense whatever for or on behalf of plaintiff, Meyer, to the proceeding in garnishment." As far back as the case of *Harmon v. Birchard*, 8 Blackf. 418, 419, this court said: "A garnishee in attachment is not bound to superintend a defense for the principal debtor, and is not answerable for such defects and irregularities in the proceedings as relate only to the mutual rights of the original parties to the attachment suit, but he should know that the proceedings against himself are valid, and such as he is legally compelled to obey." The case of *Terre Haute & I. R. Co. v. Baker*, 122 Ind. 433, 24 N. E. 83, rests on the ground that there was a lack of jurisdiction over the *res*, because the claim was exempt from garnishment under the laws of Missouri, where the proceeding was instituted. The failure to make disclosure of such a known defense might, even apart from the matter of jurisdiction, where the principal defendant had no notice, subject the garnishee to such an imputation of fraud or laches that he might be compelled to pay the debt again, but it cannot be held that the existence of the exemption laws of this state could be pleaded. It has often been held that exemption laws relate to the remedy, and have no extraterritorial effect. *Bolton v. Pennsylvania Co.* 38 Pa. 261; *Leiber v. Union P. R. Co.* 49 Iowa, 688; *Mineral Point R. Co. v. Barron*, 83 Ill. 365; 2 Wade, *Attachm.* §§ 373, 395. This point has been expressly ruled, in a case much like this, by the Supreme Court of the United States. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

In this case appellant caused appellee to be personally notified of the pendency of the suit in Kentucky (aside from the judicial notice that he received), and disclosed to the court the nature of the demand, and sought to claim the exemption of appellee under the laws of Indiana. The burden was on appellee, the judgment being shown to be valid on its face, to show facts that would render it equitable and just to require appellant to pay again. As declared by Chancellor Kent in *Holmes v. Remsen*, 4 Johns. Ch. 460, 467, 8 Am. Dec. 581: "If money be duly attached in the hands of a party, and he has paid it, pursuant to the judgment of a competent foreign court, I am to presume *omnia rite acta*; and it may be laid down as a clear principle of justice that a person compelled by a competent jurisdiction to pay a debt once shall not be compelled to pay it over again." See also *Taylor v. Phelps*, 1 Harr. & G. 492. We are not judicially advised as to whether the claim in question was exempt from garnishment in Kentucky. The presumption, in the absence of any showing, would be that the common law prevailed there. *Smith v. Muncie Nat. Bank*, 29 Ind. 158; *Jackson v. Pittsburgh, O. C. & St. L. R. Co.* 140 Ind. 241, 39 N. E. 663.

The evidence in this case tends to show that the original creditor violated our stat-

utes, in sending the claim without the state for the purpose of garnishment (Burns's Rev. Stat. 1901, §§ 2283, 2284); but it does not appear that appellant failed to disclose any defense within its knowledge. A wrong has been done the appellee, but its consequences ought not to be visited upon the appellant, in the absence of any showing that it was a party to, or responsible for, such wrong.

Counsel for appellee wholly misapprehended the effect of the fact that appellee obtained a judgment on his claim in this state before judgment was rendered in the Kentucky court. It is to be remembered that the action in Kentucky was commenced, and service was there had upon appellant, before the institution of this suit. To quote from the language of the court in *Embree v. Hanna*, 5 Johns. 101, 103: "The attachment of the debt in the hands of the defendant fixed it there in favor of the attaching creditors; the defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt binding upon the defendant, and which the courts of all other governments, if they recognize

such proceedings at all, cannot fail to regard. '*Qui prior est tempore potior est jure.*'" The fact that a judgment was obtained in this state was in no wise inconsistent with, but was based on, the fact that the appellant owed the appellee, and that was the basis of the garnishment in Kentucky. The effect of the pendency of said suit merely conferred a privilege upon the appellant to seek a stay of proceedings in this action. *Smith v. Blatchford*, 2 Ind. 184, 52 Am. Dec. 504; *Drake*, Attachm. § 70. See also *Nevian v. Poschinger*, 23 Ind. App. 395, 698, 55 N. E. 1033.

We think it clear that the court below did not give the judgment of the Kentucky court, duly certified as it was, the full faith and credit that it was entitled to under the Federal Constitution. *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

A motion has been made to dismiss the appeal in this case, but, in view of the question involved, the motion is overruled.

Judgment reversed, with an instruction to the Circuit Court to grant appellant's motion for a new trial.

IOWA SUPREME COURT.

Mrs. William ANDREWS, Admr., etc., of
William Andrews, Deceased,
v.

MARSHALL CREAMERY COMPANY et
al., Appts.

(.....Iowa.....)

1. Merely holding over after the expiration of the term, under a lease which provides for a renewal on the same terms, is not sufficient to show an affirmative election to renew the lease for an additional term.
2. An option to renew a lease in accordance with the terms of the instrument giving the lessee the privilege of renewal is exercised, so as to be binding on the lessee, by the statement of his authorized agent, shortly before the expiration of the term, that the lease will be renewed, on the faith of which the landlord makes improvements which he is under no obligations to make, followed by the assurance by the agent of intention to remain, and that no written renewal is necessary, when pressed for such writing after the expiration of the term, and while the lessee is still in possession.

(December 20, 1902.)

APPEAL by defendants from a decree of the District Court for Marshall County in plaintiff's favor in an action brought to restrain defendants from abandoning certain premises. *Affirmed*.

NOTE.—As to effect of holding over as renewal of lease, see also, in this series, *Valentine v. Healey* (N. Y.) 43 L. R. A. 667.

As to what constitutes holding over, so as to render tenant liable for rent of another term, see *Herter v. Mullen* (N. Y.) 44 L. R. A. 703, and *Byxbee v. Blake* (Conn.) 57 L. R. A. 222, 60 L. R. A.

Statement by McClain, J.:

Plaintiff, as administratrix, brings action to restrain defendants from abandoning, and removing their property from, certain premises which defendants had, prior to the bringing of the action, taken possession of as tenants under a lease from one Brown, assignee, to plaintiff's intestate. Decree for plaintiff, from which defendants appeal.

Messrs. Meeker & Meeker, for appellants:

The presumption of the common law, that when a party holds over after the termination of a written lease for one or more years, and pays the same rent, he is a tenant from year to year, is not applicable to a tenant holding over in the state of Iowa; but he is always presumed to be a tenant at will, when he thus holds over, until the contrary is shown, under the provisions of Code, § 2991.

O'Brien v. Trowel, 76 Iowa, 761, 40 N. W. 704; *Dubuque v. Miller*, 11 Iowa, 583; *German State Bank v. Herron*, 111 Iowa, 26, 82 N. W. 432; *Thorpe Bros. v. Fowler*, 57 Iowa, 542, 11 N. W. 3.

To make the contract of leasing binding for more than one year it must be in writing; and taking and holding possession for a longer period than one year will not take the case out of the statute of frauds.

Burden v. Knight, 82 Iowa, 586, 48 N. W. 985; *Hunt v. Coe*, 15 Iowa, 201; *Thorpe v. Bradley*, 75 Iowa, 52, 39 N. W. 177; *Powell v. Crampton*, 102 Iowa, 365, 71 N. W. 579.

The provisions in a written lease giving the lessee the privilege to renew for a further term upon the same terms means a new

lease, or new contract of leasing, and not an extending of the old lease.

Wood, Land. & T. 689-674; *Kollock v. Soribner*, 98 Wis. 104, 73 N. W. 778; *Orton v. Noonan*, 27 Wis. 279; *Cunningham v. Pattee*, 99 Mass. 252; *Swank v. St. Paul City R. Co.* 72 Minn. 380, 75 N. W. 594; *Thibaud v. First Nat. Bank*, 42 Ind. 212; 12 Am. & Eng. Enc. Law, p. 1008, note 2; *Rutgers v. Hunter*, 6 Johns. Ch. 215; *Carr v. Ellison*, 20 Wend. 178; *Renoud v. Daskam*, 34 Conn. 515; Taylor, Land. & T. 8th ed. § 332; *Thorpe Bros. v. Fowler*, 57 Iowa, 541, 11 N. W. 3.

The meaning and understanding of the parties from their acts and surroundings must be considered in construing the contract.

Ditson v. Ditson, 85 Iowa, 276, 52 N. W. 203; *Chicago Lumber Co. v. Tibbles Mfg. Co.* 80 Iowa, 369, 45 N. W. 893; *Oskaloosa College v. Western Union Fuel Co.* 90 Iowa, 380, 54 N. W. 152, 57 N. W. 903; *Capital City Gaslight Co. v. Des Moines*, 93 Iowa, 547, 61 N. W. 1066.

Messrs. Binford & Snelling and Boardman, Aldrich, & Lawrence for appellee.

McClain, J., delivered the opinion of the court:

The lease to the premises, executed in April, 1898, was for the term of one year from May 2, 1898, with a yearly rental of \$600, payable in monthly payments in advance, "with the privilege of renewal for four years longer on the same terms." It was further stipulated therein that, in case immediate possession was not given at the termination of the term, the lessees should pay to the lessor "\$10 per day for each and every day said premises shall be withheld." And the lessees further agreed "to surrender said premises at the end of the lease, or sooner determination thereof, in as good condition as reasonable use thereof will permit, damage by the elements excepted." After the expiration of the one-year term defendants continued to occupy the premises and pay rent at the rate stipulated in the lease for several months, when they gave to the lessor notice that they would terminate their occupancy of the premises, and surrender possession, at the expiration of thirty days from that time. The question is whether defendants became tenants for a four-year term, after the expiration of the one-year term provided for in the lease, under the provision with reference to renewal, or whether they became tenants at will at the expiration of the one-year term, and had the right to terminate such tenancy on giving thirty days' notice. There seems to be no doubt under the authorities that, where a lease provides that the tenant may have, at his option, an extension for a specified time after the expiration of the term agreed upon in the lease, or may occupy for an extended term including the term specified, the mere holding over after the expiration of the specified term will constitute an election to hold for the additional or extended term, and 60 L. R. A.

the tenant, after holding over beyond the first term without any new arrangement, is bound for the additional or extended term as fully and completely as though that term had been originally included in the lease when executed. *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392; *Terstegge v. First German Mut. Ben. Soc.* 92 Ind. 82, 47 Am. Rep. 135; *Montgomery v. Hamilton County*, 76 Ind. 362, 40 Am. Rep. 250; *Peesh v. Bumbalek*, 99 Wis. 62, 74 N. W. 545; *Harding v. Seeley*, 148 Pa. 20, 23 Atl. 1118; *Marshon v. Williams*, 62 N. J. L. 779, 42 Atl. 778; *Clarke v. Merrill*, 51 N. H. 415. According to this view, the continuance in possession is sufficient proof of an election to enjoy the privilege of extension provided for. *Kramer v. Cook*, 7 Gray, 550; *Stone v. St. Louis Stamping Co.* 155 Mass. 267, 29 N. E. 623; *Holley v. Young*, 66 Me. 520. In well-reasoned cases in Massachusetts the view is expressed that holding over is merely evidence of an intention to occupy under the privilege of an extension, which may be overcome by evidence of a contrary intention. *Jones v. Tilton*, 139 Mass. 418, 1 N. E. 741; *Kimball v. Cross*, 136 Mass. 300. There is good reason, however, supported by authority, for a distinction between a privilege of an extension and a right to renew. The extended term or additional term is one provided for in the lease itself, and the mere enjoyment of the privilege by continuing in possession is enough to bring the extended occupancy within the original contract. But an agreement for an option of renewal would seem to imply that the parties contemplated some affirmative act by way of the creation of an additional term. It is no doubt true that this affirmative act may be something different from, and less than, the execution of a new lease; for, when the tenant has indicated affirmatively the election to avail himself of the privilege of renewal, he has done all that is necessary to create a renewal, for the conditions under which the new term is to be enjoyed will be the same as those under which the first term was enjoyed, save as to the condition which provides for the renewal. *Brand v. Frumveller*, 32 Mich. 215; *Darling v. Hoban*, 53 Mich. 599, 19 N. W. 545; *Willoughby v. Atkinson Furnishing Co.* 93 Me. 185, 44 Atl. 612; *Orton v. Noonan*, 27 Wis. 272; *Kollock v. Soribner*, 98 Wis. 104, 73 N. W. 776. A covenant to renew gives a privilege to the tenant, but is nevertheless an executory contract, and, until the tenant has exercised the privilege, he cannot be held for the additional term. *Swank v. St. Paul City R. Co.* 61 Minn. 423, 63 N. W. 1088; 72 Minn. 380, 75 N. W. 594. There is authority for the view that the mere holding over is sufficient evidence of an election to renew, even where that is the privilege given in the lease. *Insurance & Law Bldg. Co. v. National Bank*, 71 Mo. 58; *Ranlet v. Cook*, 44 N. H. 512, 84 Am. Dec. 92; *Clarke v. Merrill*, 51 N. H. 415; *McBrier v. Marshall*, 126 Pa. 390, 17 Atl. 647. But with better reason, as we think, it has been held in other cases, after a full consideration of the question and the

authorities bearing upon it, that the act of holding over is not sufficient to show an affirmative election to renew the lease for an additional term under a stipulation giving the privilege of such renewal. *Thiebaud v. First Nat. Bank*, 42 Ind. 212; *Terstegge v. First German Mut. Ben. Soc.* 92 Ind. 82, 47 Am. Rep. 135; *Renoud v. Daskam*, 34 Conn. 512; *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776. The arguments in favor of the doctrine supported by the cases last cited seem to us to be controlling. The covenant of renewal itself implies the creation of a new term, and some exercise of the right of election to assume the obligations involved therein should appear. *Cooper v. Joy*, 105 Mich. 374, 63 N. W. 414; *Bradford v. Patten*, 108 Mass. 153. The distinction between the privilege of extension, involving the mere election to treat the original lease as for a longer term than that agreed upon at its execution, and the privilege of renewal, involving the creation of another term, distinct from that provided for in the lease as executed, is implied in the language selected to express the intention of the parties. Where the stipulation is for privilege of renewal, the situation at the end of the first term is this: The tenant may, if he sees fit, by any appropriate act indicating his intention to do so, and before the privilege has expired by the expiration of the term, bind himself to a new lease, the terms and conditions of which are expressed in the first lease. But, on the other hand, he may, if he sees fit, become a tenant holding over after the expiration of his term: that is, a tenant at will under the provisions of our statute (Code, § 2991; *O'Brien v. Troael*, 76 Iowa, 760, 40 N. W. 704; *German State Bank v. Herron*, 111 Iowa, 25, 82 N. W. 430); or, in some states, a tenant from year to year, and bound to continue in possession for an additional term, as fixed by law (*Haynes v. Aldrich*, 133 N. Y. 287, 31 N. E. 94); and by thus holding over he creates a new tenancy for an additional term, or at will, as the case may be, which he can only terminate as provided by law (*Baltimore & O. R. Co. v. West*, 57 Ohio St. 161, 49 N. E. 344; *Gladwell v. Holcomb*, 60 Ohio St. 427, 54 N. E. 473). It is true, the landlord is not bound in this state to accept him as a tenant at will, but may at once proceed to recover possession of the premises. But, if the landlord allows him to remain for thirty days, then a tenancy at will is created for the occupancy of the premises on the terms of the former lease, which can be terminated only by notice, as provided by statute. Code, § 2991; *Dubuque v. Miller*, 11 Iowa, 583; *McClelland v. Wiggins*, 109 Iowa, 673, 81 N. W. 156; *Shuyer v. Klinkenberg*, 67 Iowa, 544, 25 N. W. 770. Now, it seems to us more reasonable to assume that the tenant holding over after the expiration of his term, without more, elects to become a tenant at will, provided his landlord allows him to remain in possession, than that he thereby elects to bind himself for an additional term, which he might have availed himself of by acting under the provisions of his lease, but 60 L. R. A.

which he has in fact indicated no intention to claim or become bound for.

As the holding over alone was not sufficient to establish an exercise of the option to renew, it becomes necessary to consider whether there was other evidence, which, in addition to that fact, was sufficient to show such election. It appears that less than two months prior to the expiration of the first term the lessor asked one Collyer, the agent in charge of the premises for defendants, who were nonresidents, whether defendants intended to remain after the expiration of the term, and was given assurance in a general way that such was their purpose. On this assurance some improvements were made, which the landlord was under no obligation to make. A few days after the expiration of the first term the lessor asked Collyer to execute for defendants a written renewal of the lease. Collyer claimed he had no authority to execute such an instrument, but promised that within a few days he would present it for signature to the officers of the defendant company in Chicago, where they resided, at the same time assuring lessor that he could have a written renewal if he wanted it. Afterward Collyer told lessor that he had omitted to call the attention of the officers to the matter, and assured lessor that defendants would stay, and needed no renewal. It is to be borne in mind that in all of the conversations between lessor and Collyer the evident purpose of lessor, as it must have been understood by Collyer, was to ascertain whether defendants were intending to elect or had elected to renew, and that he had the right to put them out of possession at the expiration of the term, or afterwards to terminate their possession on thirty days' notice, in the absence of a renewal, and the evident intention of Collyer was to induce lessor to allow the possession to continue. We have no doubt, under the evidence, of Collyer's authority to bind the defendants by a renewal, no written agreement to that effect being necessary, nor of the purpose of Collyer to induce lessor to allow defendants to remain in possession under the belief that they were so remaining in pursuance of the renewal privilege. This was enough to bind defendants.

Our conclusion is that the option to renew was exercised, and that defendants became bound for the additional term provided for in the lease, and the decree of the lower court is affirmed.

Stewart McFADDEN, by Next Friend, J. F. McFadden, Appt.,
v.

JEWELL

(.....Iowa.....)

A city exercises its police power in clearing an alley of weeds, so that it

NOTE.—As to distinction between public and private functions of municipality in respect to liability for negligence, see note to *Barron v.*

is not responsible for negligence in the performance of the work by one whom it has employed for that purpose, which results in the injury of a child attracted there by his operations.

(January 30, 1903.)

APPEAL by plaintiff from a judgment of the District Court for Hamilton County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Wesley Martin, for appellant:

The negligence of the person directly employed is necessarily the negligence of the corporation employing him.

The employee was in the pay and under the immediate control of the defendant. This being true, the defendant is liable for his negligence.

The rule for which we contend is plainly stated in—

Kellogg v. Payne, 21 Iowa, 575; *Callahan v. Burlington & M. River R. Co.* 23 Iowa, 502; *Buchanan v. Chicago, M. & St. P. R. Co.* 75 Iowa, 393, 39 N. W. 663; *Blink v. Hubinger*, 90 Iowa, 642, 57 N. W. 593.

Messrs. Hyatt & Hyatt and J. M. Blake, for appellee:

The town had the right, and the law makes it its duty, to cut down the weeds and grass in the streets and alleys thereof,—especially to keep it free from noxious weeds. The mowing machine is the only means now employed for the purpose of cutting weeds and grass, either in field or highway. No more danger could result from its ordinary use than might result from the use of a scythe, and there is no averment in the petition that its use in the manner charged was more dangerous than a scythe or any other means that might be employed for the purpose.

Wood v. Independent School Dist. 44 Iowa, 27.

The incorporated town, defendant herein, cannot be held liable for Foster's negligence.

Miller v. Minnesota & N. W. R. Co. 76 Iowa, 655, 39 N. W. 188; *Brown v. McLeish*, 71 Iowa, 381, 32 N. W. 385; *Van Winter v. Henry County*, 61 Iowa, 684, 17 N. W. 94; *Callahan v. Burlington & M. River R. Co.* 23 Iowa, 562; *Kellogg v. Payne*, 21 Iowa, 575; *Jansen v. Jersey City*, 61 N. J. L. 243, 39 Atl. 1025; *Berg v. Parsons*, 90 Hun, 267, 35 N. Y. Supp. 780; *Wood v. Independent School Dist.* 44 Iowa, 27.

Bishop, Ch. J., delivered the opinion of the court:

The allegations of the petition are substantially as follows: That prior to July 15, 1899, a public alley within the limits of the defendant town had been allowed to become obstructed and grown up with weeds

and grass; that on said day the defendant employed one Foster to mow and cut down such weeds and grass, and that said Foster, pursuant to his employment, and under the direction of defendant as to the means and manner of said employment, proceeded with the work for which he was employed, using therefor a mower drawn by a team of horses; that the operation of the mower attracted to the alley a number of children from the homes near to and adjoining the same; that plaintiff then about two years old, and residing with his parents near said alley, was attracted by the operation of the mower and by the voices of other children in the alley; that, as said Foster was driving south through said alley with his team and mower at work, the plaintiff entered the alley, and proceeded to walk north, so that the child and team were approaching each other from opposite directions; that from the time plaintiff entered the alley until he was injured said Foster could have seen him by the exercise of ordinary care, and thus prevented the accident; that the children in the rear of the team and mower saw plaintiff, and one of them called loudly to Foster to attract his attention, and that, while he heard the call, and asked the cause thereof, he paid no further attention thereto, and did not stop his team; that he (said Foster) negligently and carelessly drove said mower upon and against plaintiff, causing an injury, which is set forth and described. It is then said that defendant was guilty of negligence in employing said Foster to mow said alley by the use of a team and mower, as plaintiff and other children were in the habit of playing therein, which fact, and of the danger to such children incident thereto, was well known at all times to defendant and said Foster. The demurrer in terms puts in issue the sufficiency of the petition as stating a case of actionable negligence on the part of the defendant.

Conceding, for the purposes of this opinion, that the petition states a cause of action as against Foster, we proceed to the inquiry whether a case of actionable negligence is stated as against the defendant town. It does not appear by whom—that is, by what official board or officer of the town—Foster was employed. Nor is it stated what were the terms of his employment, save that it is said he was under the direction of the defendant as to the means and manner of his employment. The defendant being a municipal corporation, it follows of necessity that the contract of employment with him must have been entered into by some official board, committee, or officer. Now, whether it was the town council, or a committee thereof on public health or streets and alleys, or the street commissioner of the town, is immaterial, in our view. Certain it is that in the matter of its control over the streets and alleys with-

Detroit (Mich.) 19 L. R. A. 452. Also the later cases in this series of *Gibson v. Huntington* (W. Va.) 22 L. R. A. 561; *Corning v. Saginaw* (Mich.) 40 L. R. A. 526; *Colwell v. Water-*

bury (Conn.) 57 L. R. A. 218; *Nicholson v. Detroit* (Mich.) 56 L. R. A. 601; *Peterson v. Wilmington* (N. C.) 56 L. R. A. 959; and *Hall v. Concord* (N. H.) 58 L. R. A. 453.

in the incorporate limits—and, to make the reference direct, in the matter of clearing the alley in question of weeds—the town was in the exercise of police powers possessed by it as an incident to its existence as a municipal corporation. It is well settled that where an act done by an officer or employee of a municipal corporation is essentially in the line of the performance of an official duty, public in character, the municipality cannot be made liable for a tort committed or wrong done by such officer or employee while engaged as such in the performance of the duty in question. That acts done in the execution of police powers and in the enforcement of police regulations are in the nature of the performance of a service for the benefit of the general public cannot well be questioned. In this connection it has been held that “the grounds of exemption from liability are, that the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community; that the members of the fire department, although appointed by the city corporation, are not, when acting in the discharge of their duties, servants or agents in the employment of the city, for whose conduct the city can be held liable, but they act rather as public officers, or officers of the city charged with a public service, for whose negligence or misconduct in the discharge of official duty no action will lie against the city, unless expressly given; and hence the maxim of *respondet superior* has no application.” *Hoyes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760. And in *Condict v. Jersey City*, 46 N. J. L. 157, it was held that, where a person was employed by the board of public works of a municipality to drive a horse and cart owned by such municipality, and used in

carting refuse to the dumping ground, and by the negligence of such driver in making a dump from such cart the plaintiff's intestate was killed, the doctrine of *respondet superior* had no application. And a city cannot be made liable for the negligence of a teamster employed in transporting stone to repair a highway, the employment being by the superintendent of streets, who is charged with the duty of keeping the streets in repair. *Barney v. Lowell*, 98 Mass. 570. An employee of the committee of public charity, an adjunct of the city government, charged with the duty of driving an ambulance wagon, and through whose negligent driving a person was struck and killed, has been held to be engaged in a public service, and hence the municipality could not be made liable under the doctrine of *respondet superior*. *Mazilian v. New York*, 62 N. Y. 160, 20 Am. Rep. 468. So it has been held that a city cannot be made liable for the personal torts or wrongs committed by its police officers (*Calwell v. Boone*, 51 Iowa, 687, 33 Am. Rep. 154, 2 N. W. 614); or its sanitary officers (*Ogg v. Lansing*, 35 Iowa, 495, 14 Am. Rep. 499); or its firemen (*Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Grube v. St. Paul*, 34 Minn. 402, 26 N. W. 228). The general doctrine is that, unless the charter of the city, or some general statute of the state, impose a liability upon the city for the torts or wrongs of its officers and agents engaged in the execution of police powers or regulations, then no such liability exists. *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87, 6 Am. Rep. 196; Dill. Mun. Corp. 4th ed. §§ 967, 974. Accepting such to be the rule, it follows that the court below committed no error in holding that the defendant could not be made liable for the negligent act of Foster, and accordingly in sustaining the demurrer to the petition.

Affirmed.

Weaver, J., took no part.

MINNESOTA SUPREME COURT.

A. W. SANDERSON and Wife, *Appts.*,
v.
NORTHERN PACIFIC RAILWAY COMPANY, *Respt.*

(.....Minn.....)

*1. No appeal lies from an order granting a motion for judgment notwithstanding the verdict.

*Headnotes by START, CH. J.

NOTE.—For freight as basis for cause of action, see also, in this series, *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (Pa.) 14 L. R. A. 666, and note; *Haile v. Texas & P. R. Co.* (C. C. App. 5th C.) 23 L. R. A. 774; *Sloane v. Southern California R. Co.* (Cal.) 32 L. R. A. 193; *Mitchell v. Rochester R. Co.* (N. Y.) 34 L. R. A. 781; *Spade v. Lynn & B. R. Co.* (Mass.) 38 L. R. A. 512; *Mack v. South Bound* 60 L. R. A.

2. There can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant.

(December 26, 1902.)

A PPEALS by plaintiffs from orders of the District Court for Ramsey County in an action brought to recover damages for al-

R. Co. (S. C.) 40 L. R. A. 679; *Braun v. Craven* (Ill.) 42 L. R. A. 199; *Gulf, C. & S. F. R. Co. v. Hayter* (Tex.) 47 L. R. A. 325; *Smith v. Postal Teleg. Cable Co.* (Mass.) 47 L. R. A. 323; *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 49 L. R. A. 77; *Tuttle v. Atlantic City R. Co.* (N. J. L.) 54 L. R. A. 582; and *Watson v. Dilts* (Iowa) 57 L. R. A. 559.

leged breach of a carriage contract; A. W. Sanderson appealing from an order granting a motion for judgment in favor of defendant notwithstanding a verdict in his favor, and Caroline Sanderson appealing from an order denying a new trial after judgment in favor of defendant. *First appeal dismissed. Order affirmed on the second appeal.*

The facts are stated in the opinion.

Mr. Charles Butts, for appellants:

In ejecting one child, and attempting to eject the other, without first having tendered back the tickets taken up, the conductor's actions were wrongful.

Braun v. Northern P. R. Co. 79 Minn. 404, 412, 49 L. R. A. 319, 322, 82 N. W. 675, 984; *Wardwell v. Chicago, M. & St. P. R. Co.* 46 Minn. 514, 13 L. R. A. 596, 49 N. W. 206.

Mr. Charles Roberts also for appellants.

Messrs. C. W. Bunn and L. T. Chamberlain, for respondent:

An order for judgment is not appealable.

State ex rel. Lembke v. Bechdel, 38 Minn. 278, 37 N. W. 338; *St. Anthony Falls Bank v. Graham*, 67 Minn. 318, 69 N. W. 1077; *Oelschlegel v. Chicago G. W. R. Co.* 71 Minn. 50, 73 N. W. 631; *Ames v. Mississippi Boom Co.* 8 Minn. 467, Gil. 417; *McMahon v. Davidson*, 12 Minn. 357, Gil. 232; *Rogers v. Holyoke*, 14 Minn. 514, Gil. 387; *Croft v. Miller*, 26 Minn. 317, 4 N. W. 45.

Neither Caroline Sanderson nor her husband could recover for injuries sustained by the former as a result of fright arising because of the expulsion of her child, when even the child itself was in no manner injured, and there was no threat or possibility of personal injury to it or to her.

Bucknam v. Great Northern R. Co. 76 Minn. 373, 79 N. W. 98; *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85, 50 N. W. 238; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203, 50 N. W. 1034; *Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 290, 30 N. W. 888; *Ewing v. Pittsburgh, C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 660, 23 Atl. 340; *Wood's Mayne, Damages*, p. 74; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Lynch v. Knight*, 9 H. L. Cas. 577; *Haile v. Texas & P. R. Co.* 23 L. R. A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88; *Braun v. Craven*, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354.

There is no evidence which would show any implied authority on the part of the agent at Rice lake to make a bargain to carry two passengers for one fare, or to carry a passenger free.

1 Am. & Eng. Enc. Law, title, *Agency*, p. 351.

Even if the preceding conductors, knowing the boy's age, carried him free, it is immaterial. Defendant is not bound thereby, not even if preceding conductors on the defendant's own road had done so.

Cor v. Los Angeles Terminal R. Co. 109 Cal. 100, 41 Pac. 794; *Poulin v. Canadian* 60 L. R. A.

P. R. Co. 17 L. R. A. 800, 3 C. C. A. 23, 6 U. S. App. 298, 52 Fed. 202; *Dietrich v. Pennsylvania R. Co.* 71 Pa. 422, 10 Am. Rep. 711; *Weikle v. Minneapolis, St. P. & Ste. M. R. Co.* 64 Minn. 296, 66 N. W. 963; *National Bank of Commerce v. Chicago, B. & N. R. Co.* 44 Minn. 224, 9 L. R. A. 263, 46 N. W. 342, 500.

Start, Ch. J., delivered the opinion of the court:

The plaintiff A. W. Sanderson on May 7, 1900, with his wife, Caroline Sanderson, and their four children, aged respectively four, six, eight, and twelve years, boarded one of the passenger trains of the Omaha Railway at Rice lake, in the state of Wisconsin, for the purpose of going to St. Paul, and thence over the Northern Pacific Railway to Cedro, in the state of Washington. The father and mother each had a full through ticket, and the child twelve years of age, a boy, had a through half-fare ticket. The tickets were purchased of the station agent at Rice lake. The party transferred to the defendant's passenger train at St. Paul. Before the train reached Minneapolis, the conductor took up the tickets of the plaintiff and his wife, and the half-fare ticket of the boy, and demanded half-fare tickets for the other two children who were over five years old, or the payment of \$40, the price thereof. The father declined to pay any fare for the two children, for the reason, as he stated to the conductor, that he had an agreement with the agent when he purchased the tickets that the price paid therefor should entitle himself and his family to be carried to their destination. The conductor upon such refusal caused the child eight years old, a boy, to be put off the car at Minneapolis, but he immediately returned into the car. The conductor attempted to get hold of the six year old child, a girl, to put her off, who was in a seat with her mother. In such attempt it is alleged that the conductor assaulted the mother, and that she was frightened by what took place in the attempt to remove the children from the car, whereby her health was seriously impaired. The father paid the \$40 demanded, to avoid further trouble, and the party were carried to their destination. The conductor did not tender back any of the tickets which he had taken up. The father and mother each brought an action in the district court of Ramsey county against the defendant for damages which each claimed to have sustained by reason of the premises. The action of A. W. Sanderson was brought for the recovery of damages in the sum of \$2,040, which he alleged he sustained on account of the \$40 paid, and the loss of the services and society of his wife, and for medical treatment for her, all of which were due to the injuries she received by reason of the wrongful act of the conductor. The action of Caroline Sanderson, the wife, was brought to recover damages in the sum of \$2,000 on account of personal injuries sustained by the alleged assault made upon her by the conductor, and

by reason of fright and shock due to the attempt to separate her children from her. The parties stipulated to try the cases at the same time and upon the same evidence, and that one record should cover both cases, but each should be separately submitted to the jury. The trial court at the close of the evidence directed a verdict for the defendant in the case of Caroline Sanderson, and she appealed to this court from an order denying her motion for a new trial. The case of A. W. Sanderson was submitted to the jury, and a verdict was returned in his favor for \$42; being the sum paid to the conductor, and interest. Thereupon the defendant made a motion for judgment in its favor notwithstanding the verdict, and the court made its order granting the motion, from which the plaintiff appealed. The plaintiff made a separate motion for a new trial, but the record discloses no order disposing of it, and the only appeal on his part is from the order granting the defendant's motion for judgment.

1. An order granting or denying a motion for judgment is not appealable, for such an order is simply one for a judgment, or one refusing it. *McMahon v. Davidson*, 12 Minn. 357, Gil. 232; *Rogers v. Holyoke*, 14 Minn. 515, Gil. 387; *St. Anthony Falls Bank v. Graham*, 67 Minn. 318, 69 N. W. 1077; *Oelschlegel v. Chicago G. W. R. Co.* 71 Minn. 50, 73 N. W. 631; *Kalz v. Winona & St. P. R. Co.* 76 Minn. 351, 79 N. W. 310. Therefore the appeal in the case of A. W. Sanderson must be, and is, dismissed.

2. The question to be determined on the appeal of Mrs. Sanderson, hereafter designated as the plaintiff, is whether the evidence tends to show any legal basis for the recovery of damages by her. The evidence relevant to her case tends to show that her husband was on the train with and in charge of his family, and that he made the arrangements for their transportation, and that the station agent of whom he bought the tickets agreed that the sum paid to him therefor should be in full for the transportation of the entire family to their proposed destination, and, further, that the rules and rates of the defendant required that each of the children over five and under twelve years should be provided with half-fare tickets; that when the conductor caused the boy to be removed from the train, and attempted to eject the girl because the father refused to pay their fare, the plaintiff was greatly frightened by what occurred, and as a result of such fright she was made ill, and her health permanently impaired. The evidence, however, failed to show that any assault was committed upon her by the conductor, or anything done by him to cause her to apprehend any violence or injury to herself. She testified that her injury resulted wholly from fright, and that the conductor did not touch her, any more than to crowd in by her; that is crowd her in trying to get past her to where the girl was. It may be assumed for the purpose of this decision, only, that his act was wrongful as to the children. The plaintiff's case is, then, 60 L. R. A.

one where it is sought to recover damages for personal injuries due solely to fright and grief because an attempt was made to put her children off the car, and one where there was no tort against her, and no fear on her part of any physical injury or personal violence. The great weight of authority sustains the doctrine that there can be no recovery for fright which causes injury without impact; that is, in the absence of any contemporaneous physical injury to the plaintiff. Notes to *Gulf, C. & S. F. R. Co. v. Hayter* (Tex.) 77 Am. St. Rep. 862. This rule, as thus broadly stated, has not been accepted by this court; but, with the modification hereafter stated, it is the law of this state. In the case of *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435, the defendant shot a dog in the highway; and the plaintiff, a woman, standing near, whom the defendant did not see at the time he fired, was so seriously frightened by the report of the gun that she had a miscarriage, as the result thereof. It was held in that case that the plaintiff could not recover, for the reason that the fright was not the result of any legal wrong to her. It was held in the case of *Keyes v. Minneapolis & St. L. R. Co.* 36 Minn. 290, 30 N. W. 888, that the mental distress and anxiety which may be proven in actions for personal injuries must be confined to such as are connected with bodily injury; that fear and anxiety for the safety of others cannot be made the basis for the recovery of damages. In the case of *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85, 50 N. W. 238, it was stated as a rule that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. The case of *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L. R. A. 203, 50 N. W. 1034, was one where a pregnant woman was a passenger on one of the defendant's cars, and by its negligence in the management of its cars at a street crossing a collision seemed inevitable, and she was placed in a position of such apparent imminent peril as to cause fright, which caused a miscarriage; and it was held, though there was in fact no collision and no impact, that the defendant's negligence was the proximate cause of the plaintiff's injury, and that she was entitled to recover for the consequences of her fright. It is to be noted in this case that the defendant's negligence which caused the fright was a legal wrong to the plaintiff as well as to all of her fellow passengers. In other words, the act of the defendant which caused the plaintiff's fright was a tort against her. In the case of *Bucknam v. Great Northern R. Co.* 76 Minn. 373, 79 N. W. 98, the plaintiff, a married woman, entered with her husband the ladies' waiting room in the defendant's depot; and the station agent unlawfully and untruthfully charged her companion with not being her husband, and used violent, offensive, threatening, and abusive language to him, and ordered him to leave the room, whereby she suffered a nervous shock which resulted in

serious physical injuries. It was held that these facts afforded no legal basis for the recovery of damages by her, for the reason that the use of abusive language to her husband was not an infraction of her legal right, and hence not a legal wrong to her, and for the further reason, as stated by Buck, J., that "she apprehended no danger to herself, at least, she could not reasonably do so. She was not in any place of peril. If an action of this kind can be maintained, we do not see why nervous and sensitive persons present at a riot or public disturbance cannot have a cause of action if thereby they become nervous and sick, or suffer mentally, even if they do not receive bodily injury." This *Purcell Case* has been criticised by some eminent courts, and approved by others, but it would seem that the trend of the more recent cases is to approve it. See 15 Harvard Law Rev. 304; 41 Am. L. Reg. 141. However this may be, it is the law of this state, and we are not disposed to

question it, much less to overrule it. It is in entire harmony with the other decisions of this court which we have cited, for it is distinguishable from them by the fact that the fright of the plaintiff was due to a legal wrong of the defendant against the plaintiff, which was not the fact in the other cases. The question whether fright alone would constitute such injury that the law will allow a recovery for it was not involved in that case.

From a consideration of the decisions of this court cited, we hold that there can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant. As already stated, the plaintiff's case is not within the exception, and it follows that the trial court rightly directed a verdict for the defendant.

Order affirmed.

WISCONSIN SUPREME COURT.

S. OPPENHEIMER et al., Respds.,

v.

Esther W. COLLINS et al., Appts.

(.....Wis.....)

1. A withdrawal of an action for divorce, brought by the wife, is not sufficient to support a conveyance by defendant to plaintiff of his interest in his father's estate as against the claims of his creditors.
2. The mere fact that a debtor's interest in his father's estate consists in part of real estate, upon which an execution might be levied, will not prevent the maintenance of a creditor's bill to reach such

interest if an execution has been returned "no property found," and it is not shown that the value of such real estate was sufficient to satisfy the costs of sale.

3. Personal judgment should not be entered against defendants for the full amount of the claim, in the absence of anything to show that they had become personally liable therefor, in a creditor's suit to subject assets in the hands of third persons to the payment of a judgment debt.
4. In applying assets which have been wrongfully assigned in fraud of creditors to the payment of debts of the assignor, real estate should be first exhausted, to the exoneraton of personality.
5. That the personality was errone-

NOTE.—*Validity of contract between husband and wife to compromise pending or contemplated divorce suit.*

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 - b. Third party necessary, 416.
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I. Introduction.

The proposition that a contract or agreement entered into between persons about to intermarry for the transfer of property, the only consideration of which is the intended marriage, is valid and subsisting if the marriage afterwards takes place, is a plain one.

And the agreement to marry as a consideration has always been affirmed to be not only good, but valuable; and will be held so even as against creditors, except in a case where it appears that the whole scheme of the marriage and the settlement of the property was prompted by a collusion between the parties to divert the property from the payment of debts. Again, a promise to marry, made by one party, is sufficient consideration for a like promise by the other; and, upon the marriage taking place, each becomes obligated to assume and perform the marital duties resulting therefrom.

Sometimes, after a marriage has been had, one of the parties thereto will claim that, on account of the nonperformance of those marital duties by the other, he or she has been, or should be, released from his or her corresponding duties; and indicates the same by a withdrawal from the state of community, and the initiation or commencement of an action or proceeding for annulment, divorce, or separation; thus seeking absolute or qualified release from the marriage obligations.

usually directed to be exhausted before the real estate, by a judgment subjecting to payment of debts of the assignor property assigned in fraud of the rights of creditors, will not require a reversal of the judgment if the entire property is insufficient to satisfy the creditors' claims.

(September 23, 1902.)

A PPEAL by defendants from a judgment of the Circuit Court for Douglas County in plaintiffs' favor in an action brought to subject to plaintiffs' claim the interest of John Collins, Jr., in his father's estate, which he was alleged to have transferred in fraud of his creditors. *Modified and affirmed.*

Statement by Dodge, J.:

In 1894 and 1895 judgments were recov-

ered and docketed in Douglas county, Wisconsin, against John Collins, Jr., which judgments, at the time of the commencement of this action, were unsatisfied, and were the property of the plaintiffs. Thereafter, at a date not proved, but prior to September, 1900, the father of John Collins, Jr., died intestate in Douglas county, leaving an estate of about \$4,800, partly real and partly personal; but the amounts of the respective classes of property are left wholly without evidence. One George B. Hudnall was appointed administrator of the senior Collins's estate. In December, 1900, an action for divorce was pending between the wife of said John Collins, Jr., and himself, and at that time a settlement was made, whereby, in consideration of the dismissal of that action, he assigned, by written instrument, to his wife, all of the interest in his father's

Thereafter in some instances the parties have come together (for the time being), and entered into an agreement by which the party who had commenced, or proposed to commence, such action—generally the wife—agreed to withdraw, discontinue, and compromise, or not to commence the same, in consideration of some payment or performance by the other party. And the validity of such a contract is—as its title indicates—the subject considered in this note.

II. When the agreement is that the parties shall live separate.

An inspection of the cases wherein the discontinuance, withdrawal, or compromise of an action initiated or commenced for annulment, divorce, or separation is a consideration for the contract of the other party discloses the fact that in some cases contracts are made with a view to the parties living separate from each other, and in others looking to a resumption of the marital relation.

The first cases considered are those in which the agreement to compromise the divorce suit was made with reference to the parties living separate.

In *Rogers v. Rogers*, 4 Paige, 516, 27 Am. Dec. 84, the chancellor said: "Although the agreement for a separation was not binding upon the wife, and could not be pleaded in bar to a suit against her husband, it was undoubtedly competent for her, with the consent of her next friend, to agree to a discontinuance of the suit. I should, therefore, have considered the present suit as actually discontinued, and should have directed an order to be entered accordingly, without prejudice to her right to proceed anew, had not her counsel insisted upon the objection that the agreement to discontinue the suit was not in writing, as required by the 121st rule." The decision was made upon an application on the part of the wife, complainant in the action, for an allowance for the purpose of enabling her to carry on a suit against her husband for a separation, and also for alimony, which was opposed by the defendant husband on the ground that the suit had been settled between him and the complainant with the consent of her next friend, and that the parties had agreed to live separate; he having given bond to a trustee named by herself to secure to her the payment of the annual allowance during her life.

Under the New York Code of Civil Procedure and Revised Statutes, a next friend for the wife is no longer necessary in a matrimonial action; and the effect of this decision, adapted to the present state of affairs, would undoubtedly

ly be that the wife is competent to agree to discontinue a divorce or separation suit.

An agreement between husband and wife, made after an actual separation and the beginning of an action against him for separation, by which, in consideration of the payment by him to her of a sum certain, she released him from all liability for support, and interest in his property, and agreed to live separate and apart from him, is valid; and a subsequent unlawful marriage by the husband, entitling the wife to a divorce, will not vitiate the separation agreement, so as to give the wife alimony in a suit brought by her for a divorce. *Taylor v. Taylor*, 32 Misc. 312, 66 N. Y. Supp. 561.

Where a wife had commenced an action against her husband for a divorce, an agreement made between them, that the suit should be dismissed, and that they would in the future live separate and apart from each other, and providing for the relinquishment by each of all rights in the other's estates, and for the division of certain property between them, there being no proof of fraud in the execution thereof, contravenes no public policy, and is valid. *Parsons v. Parsons*, 23 Ky. L. Rep. 223, 62 S. W. 719.

An action to enforce a promise by a husband to pay money to his wife in consideration of the discontinuance of an action for divorce brought by her against him for alleged adultery, the condonation of such adultery, and her agreement that he should have the custody of their child and that she would relinquish her dower and claims on his estate, was held not to be maintainable, because the condonation of adultery would be a violation of rules of law, and principles of public policy, while the agreement as to the child was not a good consideration, and there was no valid release of dower. *Van Order v. Van Order*, 8 Hun, 315. The court said that, as the plaintiff insisted that it was not an agreement for separation, it was unnecessary to consider whether it was invalid when viewed in that light.

As an authority the case is of no present value in New York, because, under the statute (Laws 1896, chap. 272, § 21), a husband and wife may now enter into such a contract with each other (*France v. France*, 38 Misc. 459, 77 N. Y. Supp. 1015, *infra*); and the other proposition, that condonation of adultery is not a good consideration for such an agreement, is overruled by the court of appeals in *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675, *infra*, III.

In *Armstrong v. Armstrong*, 1 N. Y. S. R. 529, it was held that an agreement would not be enforced in which a wife agreed to discon-

estate, real and personal. At that time an order of partial distribution had been made, assigning to John Collins, Jr., about \$186, which was thereupon paid to the wife, Esther Collins, appellant, by the administrator. After renewal of cohabitation for a few months, Collins's habits of intoxication continuing, a new action of divorce was commenced by Esther, and a decree of divorce entered, with no provision whatever for alimony, she simply retaining, as she supposed, her rights under the assignment of his interest in said estate. On February 15, 1901, executions upon the several judgments owned by plaintiffs were issued, and returned unsatisfied, and on May 13, 1901, they commenced this action against John Collins, Jr., said Hudnall, as administrator, and Esther W. Collins, seeking to apply to the satisfaction of said judgments the inter-

est of John Collins, Jr., in his father's estate, alleging nonexistence of any other property to satisfy the same. The judgments then amounted to about \$680. The court found the facts substantially as above stated, held that the pretended transfer to Esther W. Collins while still the wife of John Collins, Jr., was without consideration, and void as against his creditors, and thereupon entered judgment: First, declaring void such assignment as to the residue remaining in the hands of the administrator; second, adjudging personal recovery of \$681.51 damages and the costs of the action of and from the defendants, making the same a lien upon the interest of John Collins, Jr., in his father's estate; requiring Hudnall, as administrator, to pay to plaintiffs' attorneys all sums thereafter payable to John Collins, Jr.; and authorizing the

continue a divorce suit brought by her against her husband upon the ground of adultery, and to release her inchoate right of dower in all of his real estate, and whereby the parties were thereafter to live separate, while the husband agreed to pay the costs and expenses of the action, and the further sum of \$1,200 annually, and under which, for the purpose of carrying out his agreement, he executed and delivered to the trustee for the wife his mortgage to secure the payment of such sum. Therefore, a complaint setting forth these facts, and asking that the trustee be compelled to place such mortgage upon record, and that he be removed as trustee for reasons stated, was held demurrable.

The court distinguished *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675, *infra*, III., saying that the distinct and express ground upon which that case was affirmed by the court of appeals was that the agreement between the parties was to bring them to living together, and was, therefore, in line with public policy, rather than an agreement to live separately, which was opposed to public policy; and that in this case, as there was no allegation in the complaint that the husband and wife were living separately, and inasmuch as it was alleged that they were man and wife and both residents of the same place when the action was commenced, the presumption should be that they were living together when the contract was made.

This would seem to be rather a violent presumption, as the fact appears very plainly that the contract was made after the wife had commenced her action for divorce, and, therefore, it would seem hardly fair to presume that a wife commenced an action for divorce against her husband while she was living with him. The court approved the case of *Van Order v. Van Order*, 8 Hun, 315, *supra*, stating that that case was, in its essential features, like the case under consideration. And, it might be added, its present value as an authority is the same. The case is plainly overruled by the court of appeals in the following case of *Pettit v. Pettit*.

An agreement providing for the settlement of an action brought by a wife for a divorce on the ground of cruel and inhuman treatment, by a division of the property of the husband as mentioned therein, and that the parties should live separate, is a valid contract; and an action upon it is maintainable. *Pettit v. Pettit*, 107 N. Y. 677, 14 N. E. 500. To the objection that it was against public policy because, by its terms, the wife agreed to live separate and apart from her husband, the court said that, in the pending action for divorce, the plaintiff would have been entitled, if successful, to a de-

creed of separation and a suitable allowance, from the estate of her husband, for her support and maintenance; and that it was difficult to see how it could be in accord with public policy to award such relief, and yet against public policy for the husband to concede it in advance of the decree and as a compromise of the existing litigation; that public policy does not turn on the question whether the husband fights out the quarrel to a final judgment, and that, where the separation exists as a fact, and is not produced or occasioned by the contract, the consideration of the husband's agreement to pay is his release from liability for the support of his wife.

In *Besant v. Wood*, L. R. 12 Ch. Div. 605, 40 L. T. N. S. 445, which was an action brought by the husband to enforce an agreement made between the husband and wife and trustees in behalf of the wife, to the effect that the parties should live separate, and for an injunction to restrain her from commencing an action against him for the restitution of conjugal rights, the master of the rolls, in an opinion which concluded with giving judgment in favor of the plaintiff and granting the injunction, said: "Is it conceivable that a court of justice which allows a married woman to institute a suit for divorce, or to institute a suit for restitution of conjugal rights, shall say 'You have no right to anything beyond that; you have no right to effect a compromise, but must go on to the bitter end';—to say that she can accede to no terms which can be binding; that no terms shall be binding on her, because she is incapable of entering into an agreement? I think that is not conceivable. . . . I think the moment you empower a married woman to sue or defend in her own name you must empower her also to compromise that suit on terms which may be fairly arranged; and, consequently, in all those cases, . . . she must take, as an incident to the right to sue, the right to contract,—to compromise that suit. . . . If, after instituting a suit for divorce, or having a suit for a divorce instituted against her, and she defending it, she can compromise by agreeing to live separate on terms as regards maintenance of herself, custody of her children and so forth, why not before? Why not after the quarrel and before the litigation commenced? The very same reasons appear to me to apply to the one case as to the other."

For statement in regard to suit for restitution of conjugal rights, see *infra*, VI.

A mortgage given by a husband to the next friend of the wife in a bill in chancery for a judicial separation on the ground of his cruel

plaintiffs, in the event that such payments from the administrator were insufficient to satisfy the judgments, to sell the interest of John Collins, Jr., as heir, in the real property of which his father died seised. John Collins's share of the estate was one seventh of the personalty and one sixth of the realty, subject to his mother's dower. The real estate was all situated in Douglas county, and no attempt had been made to enforce the judgments by execution against the same. From this judgment Esther W. Collins and George B. Hudnall, administrators, bring this appeal.

Mr. H. V. Gard, for appellants:

The assignment was made in settlement of the action for divorce, so one of the considerations, while it was not marriage in the first instance, was a continuation of the

treatment, for the benefit of the wife and their infant child, they to live together separate from himself, in consequence of which the proceedings in the suit are suspended, is a valid executed conditional transfer of the real estate mortgaged, and may be enforced after the death of the husband, wife, and trustee, at the instance of the child after attaining her majority. *Bucklin v. Bucklin*, 1 Keyes, 141.

In *France v. France*, 38 Misc. 459, 77 N. Y. Supp. 1015, it was held that a bond given by a husband to his wife to carry out an agreement to pay her a sum weekly for the support of herself and infant child was valid where the consideration was the agreement by the wife to discontinue a divorce action commenced by her, to make no defense to an action brought by him for divorce in another state, and to release all claim upon his property; and it was held to be enforceable by the wife under § 21, chap. 272, Laws of 1896, which authorizes husband and wife to make any contracts with each other, except a contract to alter or dissolve the marriage, or to relieve the husband from his liability to support his wife, as the contract does not come within either of those exceptions. It must be remembered, however, that another consideration than the discontinuance of her divorce action by the wife entered into her agreement, *viz.*, to release all claim upon his property. The case as an authority outside of New York is somewhat tempered by the fact that it was made under the statute referred to.

For other cases sustaining agreement to live separate on compromise of divorce suit, see *Hart v. Hart*, L. R. 18 Ch. Div. 670, 50 L. J. Ch. N. S. 697, 45 L. T. N. S. 13, 30 Week. Rep. 8; *Wilson v. Wilson*, 1 H. L. Cas. 538, 12 Jur. 467; and *Bateman v. Ross*, 1 Dow P. C. 235, *infra*, IV.; *Rowley v. Rowley*, 3 Swabey & T. 338, affirmed in L. R. 1 H. L. Sc. App. Cas. 63, 35 L. J. M. C. N. S. 110, *infra*, VI.

But a distinction appears to be made where the contract between the husband and wife is in reality to facilitate the dissolution of the marriage contract, instead of simply making a provision for the wife in lieu of one which would inevitably be made in a decretal judgment of divorce or separation.

And so, after the wife has brought an action for a divorce charging the husband with extreme cruelty, desertion, habitual intemperance, and adultery, and in his answer the husband has, by a cross-complaint, recriminated with charges of adultery against the wife, an agreement executed between them, entirely to settle the whole case and causes of action set forth in the complaint and cross-complaint, that defend-

marriage relation after it had been broken. Marriage, in contemplation of law, is not only a valuable consideration for a contract or conveyance between the parties to it, but is a consideration of the highest value.

6 Am. & Eng. Enc. Law, 2d ed. p. 724.

Although the grantor be insolvent, the settlement will not be set aside at the instance of the creditors unless it is made to appear that the grantee was a party to the fraud.

6 Am. & Eng. Enc. Law, 2d ed. p. 725; *Prewitt v. Wilson*, 103 U. S. 22, 26 L. ed. 360; *Smith v. Allen*, 5 Allen, 454, 81 Am. Dec. 758.

Mr. Philip H. Perkins, for respondents:

An administrator is subject to garnishment.

J. I. Case Threshing Mach. Co. v. Mira-

ant will withdraw his defense and his allegations against the plaintiff; that plaintiff will withdraw all her charges against defendant except the charge of desertion; and that defendant will make no defense, and permit the charge of desertion to be proved by plaintiff unchallenged, and providing for the manner in which their property shall be divided,—is void as against public policy. *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801. In this case the court, after deciding that the agreement was void, as stated, proceeded to try the issues in the original divorce action, grant a divorce to the wife, and determine the property rights of the parties and the custody of the children, without considering the agreement.

In *Friedman v. Bierman*, 43 Hun, 390, *infra*, V., there was a dictum to the effect that an agreement between husband and wife to discontinue an action for a divorce commenced by her, and to live separate, is condemned by public policy. See also *Morgan v. Potter*, 17 Hun, 403, *infra*, V.

III. Where the agreement is that the parties shall resume marital relations.

In some cases differing from those in the preceding division the agreement is that the party who has initiated or commenced the divorce action shall not only not prosecute, or shall discontinue the same, but shall also return to the performance of marital duties, and not live separately from the other. An examination of the cases indicates that the weight of authority is in favor of the validity of such an agreement, and that the consideration to abandon or withdraw the divorce proceeding, coupled with a promise to return and resume marital relations, is a good one.

Where, by a deed of separation, a husband agreed with the trustee of the wife to pay her an annuity; and afterwards, being in ill health and desiring her return to him, agreed, in consideration of her doing so and of her trustee consenting to her doing so, to continue the annuity after his death, during her life, and to make the same a charge upon his real estate,—such an agreement will be enforced in equity, and the real property of the husband will be charged accordingly. *Webster v. Webster*, 27 L. J. Ch. N. S. 115, 3 Jur. N. S. 655.

A conveyance by a husband to his wife of his real property in consideration of her agreement to discontinue a suit for divorce commenced by her, to resume marital relations with him, and to pay him a sum of money will be upheld where she dismisses the divorce suit and gives him an

cle, 54 Wis. 295, 11 N. W. 580; 8 Am. & Eng. Enc. Law, p. 1137.

A wife who receives a transfer of property from her husband as a gift, not being a purchaser for value, takes the property subject to the charges placed thereon by the husband, though she has neither actual nor constructive notice thereof.

Dodson v. Dodson, 11 Ohio L. J. 198.

The alleged consideration in this case is not a valuable one, and will not sustain an executory contract. It is, if anything, what is called in the books a mere nominal consideration, which is no consideration at all.

14 Am. & Eng. Enc. Law, p. 557.

The husband must be just before he is generous.

Re Grant, 2 Story, 312, Fed. Cas. No. 5,693.

The only right of husband and wife to

contract with each other is such as necessarily arises from her separate ownership of property.

Kelley v. Case, 18 Hun, 472.

It is for the courts, and not the parties, to determine whether proper grounds for a separation exist or not.

Baum v. Baum, 109 Wis. 47, 53 L. R. A. 650, 85 N. W. 122.

Where rights of creditors are involved, before the wife can recover she must show, by clear and satisfactory evidence, that her purchase from her husband was made in good faith and for a valuable consideration, paid out of her separate estate, or by a third person for her.

Wallace v. Perales, 109 Wis. 320, 53 L. R. A. 644, 85 N. W. 371.

The presumptions are in favor of the creditors.

agreement to pay the money, although she afterwards, in a second suit, obtains a divorce from him on account of his subsequent adultery and drunkenness. *Rozell v. Bedding*, 59 Mich. 381, 28 N. W. 498.

In *Duffy v. White*, 115 Mich. 264, 78 N. W. 363, it was held that a conveyance of real property by the wife to the husband in trust for the benefit of their child is valid; and that the condonation by the husband of the adultery of the wife, and the resumption of marital relations with her, are a good consideration therefor. The court, after saying that it had been held, almost without exception, that the discontinuance of a meritorious suit for divorce, and the resumption of marital relations, are a good consideration for such a conveyance, further stated that, while the authorities are not uniform as to the effect of mere condonation, where no suit for divorce has been commenced, the weight of authority supports the above proposition, and alluded to *Merrill v. Peaselee*, 146 Mass. 460, 16 N. E. 271, *infra*, with apparent disapproval, saying that in the latter case the opposite view received the approval of a bare majority of the court.

Where a wife has left her husband, being legally justified in doing so, her agreement to return, and actually returning and living with him for the remainder of her life, are a sufficient consideration for an agreement on his part to bestow, at his death, a portion of his property upon the heirs of her son by a former husband. *Burkholder's Appeal*, 105 Pa. 31.

Where a wife had separated from her husband and brought suit against him for a divorce on account of his drunkenness and cruel treatment; and thereafter the husband, in consideration of her agreement to dismiss the divorce suit and return and live with him, made his note to a third person for her use, payable whenever he should become intoxicated, or drink, or mistreat or abuse her; and she did return and live with him,—such note is a valid obligation; and, in the event of the happening of any of the matters rendering it payable, an action may be maintained thereon. *Phillips v. Meyers*, 82 Ill. 67, 25 Am. Rep. 295.

A note given by a husband to his wife in consideration of a settlement of the difficulties between them and the discontinuance by her of a divorce suit theretofore commenced against him, and her returning to live with him, which note was payable thirty days after his death, is a valid claim, and enforceable against his estate, as it is an absolute agreement, given upon a good and valuable consideration. *Reithmaier v. Beckwith*, 35 Mich. 110.

60 L. R. A.

In an action for divorce, brought by the wife against her husband on account of his adultery, in which one witness had testified to acts of adultery committed by the defendant, the defendant made and delivered to the father of the plaintiff a note in consideration that the plaintiff would discontinue the action for divorce and return to and live with the defendant. This she did, and, after living with him for about ten years, left him for alleged cruel treatment, and began an action upon the note. It was held that the action could be maintained, as there was ample consideration to support the agreement. *Adams v. Adams*, 24 Hun, 401. The court approved *Phillips v. Meyers*, 82 Ill. 67, 25 Am. Rep. 295, *supra*.

In affirming the above judgment of the general term, the court of appeals said: "She was in a condition to apply to the court for alimony and counsel fees, and, had she prosecuted her action to its termination, might have compelled the payment of permanent alimony, and the costs and expenses of the action. In consideration of the giving of this note, she discontinued this action . . . without costs. She also condoned the adultery charged, and returned to live with the defendant. By this arrangement the defendant not only got rid of the pending action, and the payment of costs and counsel fees therein, and of temporary alimony, but, by the condonation, the plaintiff precluded herself from bringing a new action, founded upon the adultery of which she had given proof. These were substantial benefits to the defendant, abundantly sufficient to support the note which he gave to her father for her use." *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675.

Where a wife had filed her petition praying a divorce from bed and board on the ground of intolerable treatment, and the parties afterwards became reconciled and an agreement was entered into between the husband and wife and a person as trustee, in which it was stipulated that the suit by her for divorce should be discontinued, which was done, and also that an antenuptial agreement by which she was to receive \$4,000 out of his estate at his death should be so altered that it should read \$10,000; that the husband should execute a bond secured by a mortgage on a certain farm for the purpose of securing to the wife the payment of the \$10,000 at his death; and that each should behave towards the other kindly and faithfully; and, in case he behaved otherwise towards his wife, so that her life should by his conduct become miserable and intolerable, in that contingency the bond and mortgage were to become immediately due and payable to the trustee for

Horton v. Dewey, 53 Wis. 414, 10 N. W. 599.

Mr. Isaac Ross also for respondents.

Dodge, J., delivered the opinion of the court:

The first question naturally arising on this appeal is as to the efficacy, as against creditors, of the attempted conveyance by John Collins, Jr., to his wife, of his interest in his father's estate. The decisions of this court are substantially without conflict that a conveyance from husband to wife, in order to be of any validity against his creditors, must not only have been made in entire good faith, and without intent to hinder, delay, or defraud them, but also must be upon a valuable consideration, paid out of her separate estate, or by a third person for her.

the absolute use of the wife; and that she should alone and exclusively determine the happening of such contingency,—such bond is not void, and, upon the maltreatment of the wife by the husband, payment of the bond may be enforced by action. *Reamey v. Bayley* (Pa.) 9 Cent. Rep. 640, 11 Atl. 438.

In *Goldstein v. Goldstein*, 35 Misc. 251, 71 N. Y. Supp. 807, it was decided that, under § 21, art. 8, chap. 272, Laws 1896, authorizing husband and wife to make any contracts with each other, except a contract to alter or dissolve the marriage, or to relieve the husband from his liability to support his wife, an agreement by a husband with his wife, although by parol, that, in consideration that she would abandon proceedings threatened by her, and in which steps had been taken for the commencement of an action to secure the separation to which she claimed she was entitled, and would return to and live with him, he would make a will, which he afterwards did execute,—is valid; and, where she returns and lives with him in performance of the agreement on her part, the agreement will be enforced in equity against his estate and personal representatives; and such a contract is not within the exceptions contained in the statute.

In *Cahill v. Martin*, Ir. L. R. 7 Eq. 361, the court of appeal in Ireland affirmed a decree of the vice chancellor to the effect that an agreement between a husband and wife, made after the wife had abandoned her husband, in settlement of a suit brought by the husband against her for a restitution of conjugal rights, whereby the wife agreed to surrender a portion of her jointure under her marriage settlement, was valid and enforceable; and that, in an action against the heirs of her deceased husband to enforce such jointure, she would be allowed to recover only the amount of it as reduced by such agreement.

On appeal to the House of Lords, this judgment was reversed, and it was held that to the general incapacity of husband or wife to sue or be sued by each other there were necessary exceptions, *viz.*, matrimonial suits between them for a divorce *a mensa et thoro*, for a dissolution or nullity of marriage, or for restitution of conjugal rights; and that some power to terminate such suits by way of compromise would appear, on sound principles, to have been reasonably incident to the power to institute and to defend them. And, in regard to such agreements, the court held that the wife had full power to contract concerning her separate estate, the same as she would have with any stranger, but that, as she could not contract on such an occasion

To this end, of course, existence of separate estate is essential. *Horton v. Dewey*, 53 Wis. 410, 10 N. W. 599; *Gettelmann v. Gits*, 78 Wis. 439, 442, 47 N. W. 660; *Rosiek v. Redzinski*, 87 Wis. 525, 530, 58 N. W. 262; *Wallace v. Perceles*, 109 Wis. 316, 320, 53 L. R. A. 644, 85 N. W. 371. The necessity of this condition has even been extended to the technical validity of transfers where no rights of creditors were involved. *Baum v. Baum*, 109 Wis. 47, 53 L. R. A. 650, 85 N. W. 122. In the present case the absence of separate estate and the actual consideration for the transfer are left in no doubt, for that consideration consisted solely and exclusively in the withdrawal of Mrs. Collins's action for divorce, or substantially in her consent to continue the already existing marital relation between herself and husband. For reasons so obvious as hardly to

concerning her freehold estate not separate, with a stranger, she therefore could not with her husband. And the wife, in such case, is not to be regarded as a *feme sole* in such an absolute sense as to give her an unqualified power to contract with her husband, on the occasion of such a compromise, concerning her real or personal estate, in a manner in which she could not contract for any consideration with any other person. *Cahill v. Cahill*, L. R. 8 App. Cas. 420, 49 L. T. N. S. 605, 31 Week. Rep. 861.

There are, however, a few cases in which the position is taken that a promise or agreement by a party to the marriage to return to and resume marital duties is but to promise to do what the party contracted to do at the marriage, and is, therefore, simply doing what is incumbent upon the party as an owing duty, and so falls within the rule that, where a person is legally bound to perform an act, his doing, or agreeing to do it, cannot be deemed a sufficient consideration of a valid contract.

After a wife had left her husband, alleging his cruel treatment toward her, and had consulted counsel with a view to obtaining a divorce and alimony; and thereafter an agreement was made between them that he should give his note for \$5,000 to a trustee to be paid after his death, provided the wife return to and live with him as such, to which she agreed; and thereafter plaintiff returned and lived with her husband until his death,—the consideration for such note is illegal, and payment of it will not be enforced, as it is as much against public policy to restore interrupted conjugal relations for money as it is to continue them without interruption for the same consideration; and the fellowship and communion of a wife are not a service which the wife can sell, or the husband buy. *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271. The judge delivering the opinion in this case made the statement that, "had the consideration of the note been an agreement not to prosecute proceedings for a divorce, a different question would have been presented, upon which we express no opinion." Three of the justices dissented from the opinion of the majority in this case, holding that this was not a case like those where the wife was doing what she was legally bound to do, and that she had a right to refuse to return to cohabitation; and it would follow that, apart from illegality, the return itself was sufficient consideration for the note; and that, at all events, the giving up, or refraining from, proceedings for a divorce and alimony, which the wife was entitled to main-

require mention, this cannot be accepted as an equivalent for a valuable pecuniary consideration moving from the wife's separate estate. The first of these reasons is that neither the law nor public policy can favor or approve bargaining between husband and wife as to continuance or severance of the marital status, in the existence of which the public, as a third party, is interested, as well as the two spouses. *Baum v. Baum*, 100 Wis. 47, 53 L. R. A. 650, 85 N. W. 122. Another most cogent reason is the utter inability to protect the rights of creditors in the property of a husband if such contracts can be deemed a valid consideration. Apparently the present case presents as nearly a meritorious situation for pecuniary arrangement between husband and wife as any likely to arise; but, if the principle be established that merely continuing the mari-

tain, was both a sufficient, and a legal, consideration.

In *Copeland v. Boaz*, 9 Bart. 223, 40 Am. Rep. 89, where it appeared that, while the parties were living in a state of separation, the husband, to induce his wife to return, executed to a trustee for her benefit a promissory note, it was held that it was not enforceable; that it was a *nudum pactum*, as it contravened public policy, was promotive of separation of husband and wife, and not tolerable in law.

A post-nuptial contract in which a husband hires his wife to live with him will not be recognized as a legal obligation; and a note given by the husband to his wife's brother to compromise a difficulty between the husband and wife is not enforceable at the suit of the wife's brother. *Roberts v. Frisby*, 38 Tex. 210. Nothing is said in the case to indicate whether or not divorce proceedings had been commenced, or were pending.

A wife's refraining from carrying out an oral, unexecuted threat to institute a suit for divorce and alimony, and her returning to live with her husband thereafter, where there is no action for divorce pending, are no consideration for an agreement on the part of the husband to cancel and annul an antenuptial agreement by which the wife relinquished her rights in the husband's property. *Fisher v. Koontz*, 110 Iowa, 498, 80 N. W. 551, 81 N. W. 702. In the opinion the court recognizes the fact that "the discontinuance of a meritorious suit for a divorce, and the resumption of the married relations, have been held a sufficient and valid consideration for a conveyance of land or promise to pay money."

The above case should be considered in connection with *Besant v. Wood*, L. R. 12 Ch. Div. 605, 40 L. T. N. S. 445, *supra*, II.; *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 875, *supra*, III.; and *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227, *infra*, IV. Its reasoning would seem to be, in different ways, opposed to all of them.

For other cases sustaining agreement to resume marital relations on compromise of divorce suit, see *Jodrell v. Jodrell*, 9 Beav. 45, 15 L. J. Ch. N. S. 17, 9 Jur. 1022, and *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227, *infra*, IV.; *Smith v. Smith*, 35 Hun, 878, *infra*, VIII.

IV. When specific performance will be decreed.

Not only will a contract to perform certain acts or things in consideration that the other party to it will withdraw, discontinue, or compromise a divorce suit be enforced as a valid agreement at law, but, if occasion requires, and

tal relation is a sufficient consideration to support conveyance from husband to wife against creditors, there will be no difficulty in supporting such conveyances even in most flagrant cases. It would but be necessary to establish any reasonable degree of exasperating circumstances or of conjugal infelicity to enable an insolvent husband to place his property within the shelter of his wife's name, because, forsooth, she condones his alleged misconduct; which, for the purpose of effectuating a fraudulent scheme, he may well be willing to admit. Of course, the reasons here suggested fail in the case of actual divorce by decree of court and pecuniary arrangements between thus separated parties, and to that situation very different principles may be applicable. Here we can have no doubt that the court was right in holding that the attempted

the giving of the full benefit secured by it to the party demands it, equity will, as in other cases, intervene, and compel a specific performance of the contract.

Where a suit was commenced by the wife for the purpose of obtaining a divorce on the ground of cruelty, and the husband, with a view of preventing publicity, and trying to live in harmony again, and to prevent disputes, made a proposal for an arrangement, which ended in a deed by which the husband assigned to trustees certain real estate for the use of the wife and her children, and also agreed to pay her a sum yearly, specific performance of such agreement will be decreed in equity. *Jodrell v. Jodrell*, 9 Beav. 45, 15 L. J. Ch. N. S. 17, 9 Jur. 1022.

An agreement by a husband with his wife that he would convey to her the house and lot where they had been living, provided she would, in consideration thereof, again live with him and have her suit for divorce dismissed, is valid and binding upon him; and, if she afterwards causes the proceedings for divorce to be dismissed, and returns and is faithful to her promise and to her marriage vows, such agreement will be enforced in equity, and the title to the premises will be passed from the husband to the wife. *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227.

In *Hart v. Hart*, L. R. 18 Ch. Div. 670, 50 L. J. Ch. N. S. 697, 45 L. T. N. S. 13, 30 Week. Rep. 8, it appeared that the husband had filed a petition against the wife for a divorce, which she had answered; and before trial the parties agreed that the petition and answer should be dismissed, and a deed of separation executed, which the husband afterwards refused to execute; and the court made a decree for the specific performance of the agreement.

In *Wilson v. Wilson*, 1 H. L. Cas. 538, 12 Jur. 467, it was held that an agreement on the part of a wife to discontinue a suit commenced by her against her husband for annulment of the marriage was, alone, a sufficient consideration for the agreement by the husband to execute a deed of separation; and specific performance on his part of the contract thus entered into between them was decreed. An interesting case in the House of Lords was thus alluded to by the lord chancellor: "In *Bateman v. Ross*, 1 Dow. P. C. 235, there was a suit pending for a divorce. Why is not the compromise of such a suit to afford consideration for an agreement?"

In the last-mentioned case, which was originally a suit by the wife against the husband for divorce, the parties had agreed to submit their matters to arbitrators, and an award by the latter was confirmed by order upon consent, all

transfer from John Collins, Jr., to his wife was without any sufficient consideration such as the law requires to give it validity as against his creditors, the plaintiffs.

Having reached the conclusion that the attempted transfer by John Collins, Jr., was and is void as against plaintiffs, the right of the latter to reach such assets and apply them to their judgments follows of course. But here appellants insist that a court of equity will not entertain a creditors' bill when there is a legal remedy plain and adequate, and point out the conceded fact that part of the senior Collins's estate was realty in Douglas county, on which the lien of plaintiffs' judgments fastened before the attempted transfer to Esther, and in which the interest of John Collins, Jr., could at any time have been sold on execution. Neither the general rule of law contended for nor the alleged fact can be disputed. If the interest of John Collins, Jr., in the realty can be sold on execution for enough to satisfy the judgments, plaintiffs have no need of equitable relief, and should not be

permitted to trouble the court. *Williams v. Sexton*, 19 Wis. 43; *Level Land Co. No. 3 v. Siryer*, 112 Wis. 442, 453, 88 N. W. 317. It is, however, settled by the decisions of this court that return upon execution that no property can be found establishes *prima facie*, at least, the exhaustion of legal remedies. *Zweig v. Horicorn Mfg. Co.* 17 Wis. 363; *Hopkins v. Joyce*, 78 Wis. 443, 47 N. W. 722; *Daskam v. Neff*, 79 Wis. 161, 47 N. W. 1132; *Davelaar v. Blue Mound Invest. Co.* 110 Wis. 470, 86 N. W. 185. If such fact is not conclusive, it surely cannot be said that its *prima facie* effect has been overcome in this case by other evidence. True, there appears—indeed, plaintiffs allege—the descent and ownership of a fractional interest in some real estate, but defendants have offered no proof as to its situation, character, or value. *Non constat* it may not have value to satisfy the costs of a sale. The burden of proving such facts was upon appellants, who by no means have lifted it. In the light of the *prima facie* case made by the *nulla bona* returns to the exe-

of which was acquiesced in by the husband for nearly five years before moving to set the award aside. It was decided by the House of Lords, affirming a decree of the lord chancellor, that the award, being founded on an agreement by both sides, must and would be carried into effect.

V. When inadequate as against creditors of insolvent husband.

In *OPPENHEIMER V. COLLINS* the principal question discussed was whether a withdrawal of an action for divorce, brought by the wife, was sufficient to support a conveyance by the husband to the wife of an interest in his father's estate, as against the claims of his creditors; and it was decided that it was not. This is exactly in line with a case decided by the general term of the supreme court of New York, in which it was held that transfers executed by a husband to his wife in pursuance of an agreement between them, whereby she agreed to discontinue a suit then pending against him for a limited divorce, and by which the parties agreed to live apart from each other, when there was no other consideration for the transfers, and they conveyed nearly all the debtor's property, leaving him insolvent,—are void as against the creditors of the husband, as the necessary consequence of the transaction was to deprive his creditors of the means of collecting their debts; and, as he must be presumed to have foreseen and intended the inevitable result of his own act, the transaction itself was conclusive evidence of a fraudulent intent. *Morgan v. Potter*, 17 Hun, 403.

The only difference between the cases is that, in the principal case, the agreement of the wife evidently was that she would return to cohabitation with her husband, which it appears that she did; and in the other, the agreement was that the parties should live apart from each other.

The only other case upon, or akin to, the particular subject, wherein a different view appears to have been taken, is an English equity action in which it was held that, where the husband has behaved in such a manner as to entitle the wife to obtain a divorce, and she, instead of pursuing her right in the proper court, agrees to accept maintenance offered by him without litigation, an agreement for such maintenance

of the husband's property will be upheld as based upon a valuable consideration, even against the claims of creditors of the husband to have it set aside as fraudulent. *Hobbs v. Hull*, 1 Cox Ch. Cas. 445.

A note is void, as against creditors, when given by a husband to his wife for a sum of money loaned him by her, which he had previously paid to her under an agreement that she would discontinue a suit for a divorce which she had commenced against him, and that they should live separate and he should pay her that sum, which he did, and she afterwards, of her own volition, returned to live with him as his wife and loaned him the sum paid her, and took the note therefor. *Friedman v. Bierman*, 43 Hun, 390.

In *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799, which was an action in the nature of a creditor's bill, to have declared void a conveyance from husband to wife, the wife had applied to an attorney to obtain a divorce and alimony; and an agreement was made between the husband on one side and the wife and two sons on the other side, by which, in consideration that the wife would abandon any suit for a divorce, and that she and the sons would pay and satisfy certain debts, amounting to over \$800, which he affirmed was all that he then owed, he agreed to, and did, convey to the wife the house and lot, which did not exceed in value the amount of the debts. At the same time the wife and sons assumed the payment of said debts, and afterwards paid and satisfied the same. The court held that the consideration for the conveyance was adequate, but did not say whether it meant the payment of the debts,—which, of course, of itself was,—or the agreement of the wife to abandon the suit for a divorce, or both.

VI. English decisions on application to reinstate divorce suit.

It will be noticed that some of the cases given as authority upon the subject under consideration are stated to be for the "restitution of conjugal rights." It is an action unknown in the United States, but has always existed in the British dominion, where, until 1884, the court having jurisdiction of matrimonial actions would command by its judgment a recalcitrant wife or husband to return to and resume cohabi-

cutions, it was not error for the court to maintain the complaint, and proceed to apply the disclosed property to the unpaid judgments.

When, however, we come to consider the judgment finally entered, we find it far from correct. First we find a personal judgment against all the defendants, including these appellants, for the entire amount of plaintiffs' former judgments. This is inexplicable. There is no evidence, nor any finding of fact or conclusion of law, that either Hudnall or Esther W. Collins ever became in any way personally liable for these debts. In this respect the judgment is clearly erroneous, to the prejudice of each of the appellants. In addition to this, the judgment directs application of the realty and personalty in an order reverse of the proper one, *viz.*, that the personalty in the hands of the administrator be first applied, and afterwards the realty be sold on execution. Obviously, the legal rights should be first exhausted against the real estate, to the ex-

operation of the personalty claimed by others. In this respect we are, however, unable to discover any prejudice to the appellants; for, apart from the possibility under the proofs already suggested that the realty may be but *de minimis*, it affirmatively appears that both together will fall short of satisfying plaintiffs' claims, and both must be fully exhausted. The entire estate of John Collins, Sr., was but \$4,800, of which John, Jr.'s, share was not more than one seventh, or \$685, of which \$185 had already been drawn, leaving but possibly \$500 to satisfy some \$680 of plaintiffs' judgments and some \$100 of costs in this action. Not being prejudicial, we cannot reverse that part of the judgment.

The judgment of the Circuit Court is modified by striking out therefrom the portion awarding personal recovery against the appellants, George B. Hudnall and Esther W. Collins, of the sum of \$681.51, and, as so modified, is affirmed. Appellants will recover costs of this appeal.

tation, and, in case of disobedience, would enforce its decree by attachment.

But by 47 & 48 Vict. chap. 68, it is provided that "a decree for restitution of conjugal rights shall not be enforced by attachment;" and further, that a respondent failing to comply with a decree for the restitution of conjugal rights "shall thereupon be deemed guilty of desertion without reasonable cause," etc. While not changing the name of the suit, the statute in effect makes it a medium for procuring a judicial separation.

In *Hayward v. Hayward*, 1 Swabey & T. 333, which was a suit by the wife for a restitution of conjugal rights, the counsel for the respective parties, with the assent of both parties, agreed to a compromise, and the suit did not proceed. Thereafter counsel for the wife moved the court to allow the case to be heard, and the counsel for the husband contended that the wife was bound by her counsel's arrangement. In granting the motion, the judge ordinary said: "I think whatever arrangement may have been made between the parties, as the cause is still on the books and the petition has not been dismissed, I ought to hear it. I much doubt, however, whether this court can sanction or consider as binding any agreement between the parties to live asunder. Although such an agreement would be recognized at law or in equity, it would not have been recognized in the ecclesiastical courts."

Hooper v. Hooper, 1 Swabey & T. 602, was originally a petition by the wife for a judicial separation for the husband's cruel treatment. Before the hearing the parties agreed that the record should be withdrawn, proceedings stayed, and the suit not moved, the consideration being that the husband should pay the present alimony ordered by the court and £50 additional annually. Dispute having arisen as to the powers of a referee under the agreement of the parties, the wife applied to re-enter the record and have the cause set down for trial, relying upon *Hayward v. Hayward*, 1 Swabey & T. 333. The judge ordinary, in distinguishing that case, said: "Here the parties have agreed that the record should be withdrawn, proceedings stayed, and the suit not further moved; there the case was adjourned on the representation of counsel that an agreement out of court had been, or would be, arranged. One of the parties refused to abide by that agreement, and the cause sim-

ply remained on the books as it was before, unheard; here the cause remains on the books subject to an agreement made in court that the suit should not be moved any further. I am of opinion that I ought not to grant the application." And the motion was rejected.

This decision of the judge ordinary was practically affirmed by the dismissal of an appeal therefrom. 3 Swabey & T. 251. The principal distinction drawn would appear to have been that in one case the agreement was made "out of," and in the other "in," court.

In *Stanes v. Stanes*, L. R. 8 Prob. Div. 42, 47 L. J. Prob. N. S. 19, 39 L. T. N. S. 46, 26 Week. Rep. 238, the wife had filed a petition for a restitution of conjugal rights, to which the husband had answered, and, before hearing, an agreement was made whereby, in consideration of certain things to be performed by the husband, the suit was to be stayed and petition and counter-prayer dismissed. It was decided that a wife could bind herself not to prosecute a suit for restitution of conjugal rights, and her application to have the case set down for a hearing was denied.

Where, pending an action for divorce by the wife against the husband, an agreement in writing is entered into by the parties, whereby the wife, in consideration of the promise by the husband to execute a separation deed and do certain other things, agrees to have the petition taken off the file, and undertakes not to institute other proceedings in the divorce court, such an agreement is binding, and will be sustained. And, upon an application to the court to give directions as to the mode of trial of a suit for divorce subsequently brought by the wife, the court declined to give such directions. *Rowley v. Rowley*, 3 Swabey & T. 338.

Thereafter the wife appealed to the full court, which made no order on the appeal, but directed that, in case the husband did not apply for a dismissal of the petition, the wife might ask the judge ordinary's direction as to another trial. The petition was afterwards dismissed by the judge ordinary on the motion of the husband and the wife appealed to the House of Lords. The lord chancellor, in delivering the opinion of that body, said that the whole question turned upon the meaning of the words in the agreement, "the petitioner undertaking not to institute other proceedings in the divorce," and that it appeared to be difficult to apply any other

KENTUCKY COURT OF APPEALS.

Beatrice MOAYON *et al.*, Appts.,

v.

Max MOAYON.

(.....Ky.....)

1. The resumption of marital relations by a wife living separate from her husband, and about to commence proceedings for divorce against him, to which she was entitled because of his wrongdoing, is a sufficient consideration for his promise to convey property in trust for the benefit of their children, and, in the event of their death, for her benefit.
2. Specific performance of a contract by a man to convey one third of his property in trust for the benefit of his children will not be denied because the interest might be reconveyed so as to let into joint management and ownership with him of his business undesirable persons whose interference might jeopardize, if not destroy, its value.

3. A contract by a man whose wife is living separate from him, and about to begin a suit for divorce because of his wrongdoing, that, in case she will resume her marital relations, he will convey one third of his property in trust for their children, and for her in the event of their death, is not void because it is not mutually binding upon the parties, and the remedy for its enforcement is not mutual to them.
4. Lack of mutuality of obligation and remedy will not, after the wife has resumed marital relations, defeat specific performance at her instance of a contract by a man to convey property to his children in consideration that the wife, who is living separate from him, and about to begin a suit for divorce, for which she has good grounds, resume her marital relations and live with the other contracting party as his wife after the full execution of the agreement; and the fact that she cannot be compelled to maintain such relations during life is immaterial.

than one meaning to these words; that it was not contended that they amounted to an undertaking never to institute any other proceedings, but that they seemed to have been intended to prevent future proceedings in respect of matters forming the ground of a petition for a divorce which had occurred prior to the agreement. *Id.* L. R. 1 H. L. Sc. App. Cas. 68.

VII. Necessity of third party.

a. Third party unnecessary.

Upon the question as to whether, in a contract between husband and wife to compromise, or not to commence, a divorce suit, it is essential that the wife act through the medium of a third party or trustee, the authorities are not entirely agreed; but it may be safely stated that the weight is in favor of the doctrine that it is not.

The foundation for this exception to the general rule that the wife cannot contract directly with her husband is that, when an actual separation (which is the prelude to such a suit) occurs, she is said to be at "arms length" with him, the meaning of which is,—in the language of a learned Irish judge,—"that she is, by the circumstances in which she is placed in her relations with her husband, completely and effectually freed from that marital influence and control which the law regards as depriving her of independent volition." *Cahill v. Martin*, *Ir. L. R. 5 Eq. 227*.

And for this reason it is said that she is to be considered, when she enters into such a contract, as a *feme sole*.

In *Bateman v. Ross*, 1 Dow P. C. 235, IV. *supra*, it was objected that the next friend of the wife in the divorce suit was not made a party to the submission to arbitration; and that she (alone) could not agree to it so as to render it binding. The court said that there was nothing in this objection, as the award was founded on an agreement on both sides, and the husband had filed a cross bill against the wife, which she had answered; so that, under the circumstances of the case, she was to be regarded as a *feme sole*, and there was no occasion to make the next friend a party.

In *Cahill v. Cahill*, L. R. 8 App. Cas. 420, 49 L. T. N. S. 606, 81 Week. Rep. 861, *supra*, III., the agreement was made without the interven-

tion of a third party. The vice chancellor (*Ir. L. R. 5 Eq. 227*), and court of appeal (*Ir. L. R. 7 Eq. 361*), in Ireland, had held that the agreement was good. On appeal the House of Lords decided that it was not good, for the reason that it was in regard to an interest or right in regard to which the wife would not have power to contract, even with a stranger. One headnote states that it was held "that the wife was not, when she signed the document, in all respects, in the same position as a *feme sole*;" but a perusal of the several opinions will hardly justify it. That she was, had been elaborately argued and distinctly held by the vice chancellor and court of appeal in Ireland.

In *Vanstittart v. Vanstittart*, 4 Kay & J. 62, 27 L. J. Ch. N. S. 222, 4 Jur. N. S. 276, there was no third party to the agreement, and Vice Chancellor Wood affirms the proposition that, when contracting with her husband as to discontinuing a divorce suit she has commenced against him, a wife is to be considered as a *feme sole*. The contract was decided to be void for another reason.

The report of the case in 2 De G. & J. 249, 27 L. J. Ch. N. S. 290, 4 Jur. N. S. 519, shows that it was merely an affirmation of the case in 4 Kay & J. 62, and for substantially the same reasons, *i. e.*, that the agreement must be taken in its entirety, and that, as it contained a provision contrary to law, equity would not enforce it. The question as to its validity without the intervention of a third party was not decided.

In *Hart v. Hart*, L. R. 18 Ch. Div. 670, 50 L. J. Ch. N. S. 697, 45 L. T. N. S. 13, 80 Week. Rep. 8, *supra*, IV., the court stated that, as the husband and wife are at arms length in a divorce suit, it was competent for them to make the agreement to dismiss it.

The effect of these English decisions, and the reasons given in and for them, would seem to be: (1) That, whenever difficulties and discussions arise between husband and wife to such an extent that it is plainly apparent that the aid of the proper tribunal will be necessary, and will be invoked to settle the same, the wife is competent to enter into an agreement with her husband for the purpose, either of preventing a suit, or of compromising one if already commenced; and such a contract will be valid and binding on both, whether it be for a return to and resumption of marital relations, or to live

5. The description of the property is sufficient to uphold the contract, where the agreement is to convey one third of all grantor's estate, real, personal, or mixed, of whatever kind or nature, belonging to him in his own right, which he acquired under the will of his mother, as well as all the other estate otherwise acquired and now owned by him.
6. Parol evidence is admissible to designate the particular property described and identified by a written contract for its conveyance, and which was in the contemplation of the parties in making the contract.
7. A married woman may maintain a suit in equity against her husband to enforce his contract to convey property in trust for their children and herself in consideration of her resumption of marital relations which she had abandoned because of conduct on his part entitling her to a divorce, where the statute permits her to sue alone in actions between her and her husband.

(February 18, 1903.)

separate and apart. And the reason is that, under such circumstances and in regard to such matters, she is to be treated as if she were a *feme sole*. (2) And that, for the same reason, the wife will be permitted to enter into covenants in such an agreement only when the same relate to her separate estate or property; and that rights of property or interests held by her with her husband she cannot anticipate, nor in any way divest herself of by agreement.

In some jurisdictions statutes have been enacted clothing the wife with enlarged power to contract, not alone with strangers, but with her husband also. And in such the application of the rule just stated will largely depend upon the extent to which the local enabling act goes.

It is suggested that in those states where, in the absence of such statutes, the English rule would be applicable, and in which the tenancy by the entirety has not been abrogated, she would be incompetent to contract in regard to the latter.

A transfer by a husband to his wife of a slave woman and her children, made to secure the discontinuance of an action for alimony and the discharge of an interlocutory decree therefor, is valid, although made without the intervention of a trustee. *Wallingsford v. Allen*, 10 Pet. 583, 9 L. ed. 542.

And, in regard to the property so transferred, the wife is to be considered as a *feme sole*; and her right to dispose of it follows as a matter of course; and her deed manumitting the slaves is valid and effectual. *Ibid*.

A contract is valid by which a wife agrees to discontinue proceedings instituted by her against her husband to dissolve the marriage contract, upon receiving a separate maintenance. In such cases the wife is, by statute, authorized to proceed as a *feme sole*, and has, therefore, a right to compromise the suit in the same manner as any other party. *Kirby v. Kirby*, 1 Paige, 565.

It will be noticed, from the foregoing cases, that in nearly all the doctrine is asserted, expressly or by clear implication, that the agreement between husband and wife to compromise the divorce action is valid, although made without the intervention of a third party; and this notwithstanding the rigid rule of law that contracts between husband and wife are void.

There are several reasons given for holding such agreements valid, two of them depending upon whether the contract is to live separate
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A PPEAL by plaintiffs from a judgment of the Circuit Court for Christian County in favor of defendant in an action brought to enforce specific performance of a contract *Reversed*.

The facts are stated in the opinion.

Messrs. Hunter Wood & Son, Kohn, Baird, & Spindle, and Barker & Woods, for appellants:

If a wife, having reasonable grounds for believing she has good cause for a divorce, separates from her husband, and, while living apart, in consideration of his promise to treat her according to the full measure of his marital obligations, and his agreement to convey one third of his property to a trustee for the benefit of their children, condones his wrongs, and returns to his home, and makes him a dutiful wife,—a court of equity will decree a specific performance of the contract by compelling him to make the necessary conveyances.

A contract between husband and wife,

and apart, or to return to and resume the marital relation. In the former instance a reason would seem to be that the parties, after they have so far separated as that an action is seriously contemplated, or actually commenced, may do, by agreement, just what the court would decree in the action. In the other instance the peculiar reason is that both law and equity favor continued fulfillment of the marriage contract, and will lean heavily toward the support of an agreement looking that way.

And a reason common to all agreements to compromise such actions is found in the argument, so well stated by the master of the rolls in *Besant v. Wood*, L. R. 12 Ch. Div. 606, 40 L. T. N. S. 445, *supra*, II., which, in substance, is that the right to institute the suit comprehends the right to discontinue it. But the chief and best general reason probably is, that, when a wife so far separates from her husband as to initiate proceedings for a divorce, she is to be regarded and treated as a *feme sole* in reference to any agreement she may make with him looking to a stoppage of the proceedings or a discontinuance of the action. But such agreement is only valid when made after an actual separation.

b. Third party necessary.

There are, however, cases which seem, by implication at least, to indicate that a third party is necessary to render such a contract valid. As in *Van Order v. Van Order*, 8 Hun, 315, *supra*, I., where the court, in declining to enforce such a contract, said that there was a general disability of married women to contract directly with their husbands.

And in *Phillips v. Meyers*, 82 Ill. 67, 25 Am. Rep. 295, *supra*, III., where the note which was the subject of the action, and the consideration of which was the dismissal by the wife of the divorce suit brought by her against her husband, was given to the plaintiff for the use of the wife,—the court said that the power of a husband to make a settlement of property or funds on his wife, by the intervention of a trustee, had never been questioned.

In *Reamey v. Bayley* (Pa.) 9 Cent. Rep. 640, 11 Atl. 438, *supra*, III., the agreement was between the husband as the first party and the plaintiff, as trustee for the wife, and the wife, as the other parties. The action on the bond given by the husband to secure his performance of the agreement was brought by the trustee of

made in consideration of a separation which has already taken place, or in contemplation of an immediate separation, is good, and will be enforced.

Gaines v. Poor, 3 Met. (Ky.) 503, 79 Am. Dec. 559; *Flood v. Flood*, 5 Bush, 170; *Loud v. Loud*, 4 Bush, 455; *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605; *Bishop, Marr. Div. & Sep.* § 1279; *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675; *Phillips v. Meyers*, 82 Ill. 70, 25 Am. Rep. 295; *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227; 1 Nelson, Div. & Sep. § 507; *Reithmaier v. Beckwith*, 35 Mich. 110; *Reamey v. Bailey* (Pa.) 9 Cent. Rep. 640, 11 Atl. 439; *Buttler v. Buttler*, 57 N. J. Eq. 645, 38 Atl. 300, 42 Atl. 755; *Foote v. Nickerson*, 70 N. H. 496, 54 L. R. A. 554, 48 Atl. 1088; *Hart v. Hart*, L. R. 18 Ch. Div. 670; *Stanes v. Stanes*, L. R. 3 Prob. Div. 42; *Smith v. Smith*, 35 Hun, 378; *Phillips v. Thompson*, 1 Johns. Ch. 131; *Wakeman v. Dodd*, 27

N. J. Eq. 564; *Shepard v. Shepard*, 7 Johns. Ch. 57, 11 Am. Dec. 396.

An agreement not to sue for a divorce is a sufficient consideration for a contract.

Casto v. Fry, 33 W. Va. 449, 10 S. E. 799.

The consideration given by the wife in the case at bar was a valuable one in law.

3 Parsons, Contr. p. 314; *Steadman v. Guthrie*, 4 Met. (Ky.) 147; *Talbott v. Stemmons*, 89 Ky. 222, 5 L. R. A. 856, 12 S. W. 297; *Allen v. Pryor*, 3 A. K. Marsh. 305; *Lemaster v. Burckhart*, 2 Bibb, 30; *Sanders v. Miller*, 79 Ky. 520, 42 Am. Rep. 237; *Loud v. Loud*, 4 Bush, 455; *Cotton v. Graham*, 84 Ky. 672, 2 S. W. 647; *M'Intire v. Hughes*, 4 Bibb, 187; *Stovall v. Barnett*, 4 Litt. (Ky.) 208; *Ford v. Ellingwood*, 3 Met. (Ky.) 350; *Arnold v. Park*, 8 Bush, 3.

The doctrine of mutuality, as a necessary element to the specific enforcement of a contract, applies only where the contract is executory on the part of all the contracting parties.

the wife against the husband. Throughout the making of the agreement, and the trial and argument down to the final decision, it seems to have been taken for granted that the intervention of a trustee was essential to the making of a valid agreement, although it is not so expressly stated.

e. Third party; but necessity for, not stated.

The following are cases in which the agreement which was upheld was made through the intervention of a third party; but the necessity of such party to render the contract valid does not appear to have been considered. *Besant v. Wood*, L. R. 12 Ch. Div. 605, 40 L. T. N. S. 445, and *Bucklin v. Bucklin*, 1 Keyes, 141, *supra*, II.; *Webster v. Webster*, 27 L. J. Ch. N. S. 115, 3 Jur. N. S. 655; *Duffy v. White*, 115 Mich. 264, 73 N. W. 363; *Burkholder's Appeal*, 105 Pa. 31; and *Adams v. Adams*, 24 Hun, 401, 91 N. Y. 381, 43 Am. Rep. 675, *supra*, III.; *Wilson v. Wilson*, 1 H. L. Cas. 538, 12 Jur. 467, and *Jodrell v. Jodrell*, 9 Beav. 45, 15 L. J. Ch. N. S. 17, 9 Jur. 1022, *supra*, IV.; *Hobbs v. Hull*, 1 Cox Ch. Cas. 445, *supra*, V.; *Newsome v. Newsome*, L. R. 2 Prob. 306, 40 L. J. M. C. N. S. 71, 25 L. T. N. S. 204, 19 Week. Rep. 1039, *infra*, VIII.

In *Rogers v. Rogers*, 4 Paige, 516, 27 Am. Dec. 84, *supra*, II., the court said that it was competent for the wife, with the consent of her next friend, to agree to discontinue the suit; but did not in terms decide that such consent was necessary.

d. Contract held valid without third party; but absence of, not mentioned.

There are instances where there appears to have been no third party to the contract, and where the court, without reference to that fact, held the contract valid.

In *MOAYON v. MOAYON* there was a trustee for the children, but none for the wife.

In *Reithmaier v. Beckwith*, 35 Mich. 110, *supra*, III., the note which was held valid was given directly to the wife by name.

In *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227, *supra*, IV., the agreement by the husband to convey the house and lot to the wife was oral, and the statement of facts indicates that there was no third party, and, as the contract which was upheld was not reduced to writ-
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ing, it would seem impossible that there could have been.

e. Agreement without third party void; but not for that reason.

Again, there are cases in which there was no third party representing the wife, but the contract in which was declared void; but not on account of the absence of a third party, but for some other reason affecting its validity.

In *Friedman v. Bierman*, 43 Hun, 390, *supra*, V., it was evident that there was no third party. The husband paid the wife the money, which she afterwards loaned to him, taking therefor the note which was held void.

The following are cases in none of which there was a third party to the agreement, and in each of which the contract was held void for another reason; and the fact of the absence of the third party was not considered: *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801, *supra*, II.; *Fisher v. Koontz*, 110 Iowa, 498, 80 N. W. 551, 81 N. W. 702, *supra*, III.; *Morgan v. Potter*, 17 Hun, 408, *supra*, V.

f. Third party to contract; but contract void for other reason.

The following are cases in each of which there was a third party to the contract, and the agreement was held invalid on some other ground: *Armstrong v. Armstrong*, 1 N. Y. S. R. 529, *supra*, II.; *Merrill v. Peaslee*, 146 Mass. 460, 16 N. E. 271; *Copeland v. Boaz*, 9 Baxt. 223, 40 Am. Rep. 89; and *Roberts v. Frisby*, 38 Tex. 219, *supra*, III.

g. Cases in which it does not appear whether there was, or was not, a third party.

Taylor v. Taylor, 32 Misc. 312, 66 N. Y. Supp. 561, and *Pettit v. Pettit*, 107 N. Y. 677, 14 N. E. 500, *supra*, II.; *Rozell v. Redding*, 59 Mich. 331, 26 N. W. 498, *supra*, III.; *Smith v. Smith*, 35 Hun, 378, *infra*, VIII.

VIII. Other cases.

After a wife had brought an action against her husband for a separation for cruel and inhuman treatment, an agreement was made between them by which she was to return to his bed and board upon certain conditions which do not appear in the case, but a part of which

Pom. Eq. Jur. 2d ed. § 1405, note; *Green v. Richards*, 23 N. J. Eq. 32; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 1 L. R. A. 380, 16 Atl. 4; *Wilks v. Georgia P. R. Co.* 79 Ala. 180; *Welch v. Whelpley*, 62 Mich. 15, 28 N. W. 744; Pom. Eq. Jur. § 932; 22 Am. & Eng. Enc. Law, pp. 1020-1022; 2 Warvelle, Vendors, 2d ed. § 739; *Simon v. Wildt*, 84 Ky. 157; Fry, Spec. Perf. 207; *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 1 L. R. A. 380, 16 Atl. 4; *Logan County Nat. Bank v. Townsend*, 8 Ky. L. Rep. 694, 3 S. W. 122; *Boucher v. Vanbuskirk*, 2 A. K. Marsh. 345.

The contract was a reasonable one.

Gooding v. Gooding, 104 Ky. 755, 47 S. W. 1090, 48 S. W. 432; *Irwin v. Irwin*, 105 Ky. 632, 49 S. W. 432.

Whenever there is a distinct mutual understanding as to the identity of the tract and the amount of lands covered by the contract, the contract will be enforced.

White v. Hermann, 51 Ill. 243, 99 Am. Dec. 543; *Gerrish v. Towne*, 3 Gray, 82; *Nichols v. Johnson*, 10 Conn. 199; 3 Starkie, Ev. 1621; *Johnson v. Ronald*, 4 Munf. 77; *Jackson ex dem. VanVechten v. Sill*, 11 Johns. 201; *Doolittle v. Blakesley*, 4 Day, 265, 4 Am. Dec. 218; *Barry v. Coombe*, 1 Pet. 640, 7 L. ed. 295; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; 22 Am. & Eng. Enc. Law, p. 965; *Ragsdale v. Mays*, 65 Tex. 255; 1 Warvelle, Vendors, § 96; *Holcomb v. Hays*, 23 Ky. L. Rep. 352, 62 S. W. 1028.

Under our statutes, such contracts will be sustained in courts of equity where fair and reasonable, even without the intervention of a trustee.

agreement was that he should pay the costs and expenses of the suit to her attorney. The husband thereafter refused to pay the amount of a bill for such costs and expenses, and put in a verified answer to the complaint in the action. The action was held not to have been discontinued, and the court was held to have power to make an order fixing the amount of such costs and expenses and directing that the amount thereof be paid by the husband, together with the referee's fees and costs of the motion, and that on such payment the action be discontinued. *Smith v. Smith*, 35 Hun, 378.

In *Polson v. Stewart*, 167 Mass. 211, 36 L. R. A. 771, 45 N. E. 737, it was held that forbearance by a wife to bring a well-founded suit for divorce against her husband is a sufficient and legal consideration for a covenant by the husband to surrender all his marital rights in land belonging to the wife. In this case the parties were domiciled in North Carolina at the time the agreement was made, and the wife had taken steps under the statutes of that state, which gave her the right to contract as a *feme sole* with her husband as well as with others; and the Massachusetts court decided that, the contract being made in North Carolina, the law of that state governed, and that that part of it by which the husband agreed to release his marital rights in land of the wife in Massachusetts was binding and enforceable in the latter state, although an actual conveyance of the land directly from the wife to the husband would be void. It does not appear whether, by the terms of the agreement, the wife was to return or live separate.

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Evans v. Evans, 93 Ky. 510, 20 S. W. 605; *Bohannon v. Travis*, 94 Ky. 59, 21 S. W. 354; *Ward v. Orotty*, 4 Met. (Ky.) 59; *Maraman v. Maraman*, 4 Met. (Ky.) 84; *Sanders v. Miller*, 79 Ky. 520, 42 Am. Rep. 237; *Kalfus v. Kalfus*, 92 Ky. 542, 18 S. W. 366; *Leahy v. Leahy*, 97 Ky. 59, 29 S. W. 852; *Campbell v. Galbreath*, 12 Bush, 459.

Messrs. Landes & Allensworth, John O. Duffy, John Feland, Jr., John Phelps, and Hazelrigg & Chenuault for appellees.

O'Rear, J., delivered the opinion of the court:

Appellant Birdie Moayon and appellee, Max Moayon, are husband and wife. They have two children, who are infants. The Fidelity Trust & Safety Vault Company is the guardian of these children. Prior to December 4, 1900, there was a separation of these parties on a ground, as is alleged, which entitled the wife to a divorce *a vinculo*. It is not material to this decision as to the nature of this cause. The wife had retained counsel, who had prepared for filing a petition for divorce from appellee. On the 4th of December, 1900, at the instance of appellee, the parties treated for a settlement of their differences, resulting in a contract in writing between them, which we copy in full, as follows:

This agreement, made and entered into this 4th day of December, 1900, by and between Max J. Moayon and his wife, Birdie Moayon, and the Fidelity Trust & Safety Vault Company, trustee for Beatrice and Jessamine, children of the said Max and

In *Newsome v. Newsome*, L. R. 2 Prob. & Div. 306, 40 L. J. M. C. N. S. 71, 25 L. T. N. S. 204, 19 Week. Rep. 1039, there was an agreement that the wife, in consideration that the husband would surrender to her his interest in a copartnership and live apart from her, would not prosecute divorce proceedings against him so long as he remained true in love and duty. The judge ordinary said that an agreement not to come to the divorce court was not at all derogatory to the marriage vow, but the reverse; and there was no reason why it should not be upheld by the court; citing *Rowley v. Rowley*, and *Hooper v. Hooper*, *supra*, VI. But, on account of his violating his part of the agreement by a subsequent adultery, the wife was released from her part of it, and the original cause for divorce was revived, and a divorce decreed the wife on account of it.

In *Rose v. Rose*, L. R. 3 Prob. Div. 98, 52 L. J. Prob. N. S. 25, 48 L. T. N. S. 378, 31 Week. Rep. 573, the master of the rolls said that, unless a married woman was allowed to contract herself out of her rights in the divorce court, no proceedings in that court could ever be compromised, but must be fought out to the end; and that it was absurd to say that a married woman is competent to commence a suit, but not competent to compromise it.

IX. Conclusion.

In *OTTENHEIMER v. COLLINS* the first reason given for the decision, *viz.*, that, even where no rights of creditors are involved, a consideration consisting solely and exclusively in the with-

Birdie Moayon, witnesseth: That whereas, the said Max and Birdie are now, and have been for some months past, living separate and apart from each other; and whereas, the said parties have this day agreed mutually to forego their differences, and to be reconciled, and live with each other as husband and wife, after the full execution of this agreement: Now, and in view of the fact that the parties have agreed that a settlement is to be made upon the said children by the said Max Moayon, in order to insure a sufficient estate for them and for their maintenance, education, and support, and future welfare: Now, in consideration of the love and affection which the said Max Moayon bears the said children, Beatrice and Jessamine, and in consideration of \$1 cash in hand paid, the receipt of which is hereby acknowledged, and in consideration of the acceptance of the trust by said Fidelity Trust & Safety Vault Company under this agreement, the said Max Moayon hereby agrees to convey, transfer, and deliver in fee simple to the Fidelity Trust & Safety Vault Company, as trustee, for the use and benefit of the said Beatrice and Jessamine Moayon, his children, one third ($\frac{1}{3}$) of all of his estate, real, personal, or mixed, of whatever kind or nature, belonging to him in his own right, which he acquired under the will of Hannah Moayon, his mother, as well as all the other estate otherwise acquired or now owned by him; the said personal property to be delivered according to the rules of law, and the real estate to be conveyed by deed properly acknowledged and recorded as soon as the deeds can be prepared. The absolute estate is to be con-

veyed to said trustee for the use and benefit of the said children, and, in the event of the death of either of said children, the estate of such child shall go to and belong to said Birdie Moayon, for her own sole and separate use forever. Said trustee shall have the authority to collect all income from said estate so conveyed, and pay the same over to the said Birdie Moayon for the use and benefit of the said children's care and education. She shall not be required to render any account of the moneys thus received by her, but her receipt shall be an absolute acquittance of the trustee. Said trustee shall be authorized to convey, sell, exchange, or dispose of any part of the estate so conveyed, and transfer a fee-simple title, whenever the said trustee deems it proper to do so; and conveyance by the said trustee shall convey the fee-simple title, and the said trustee shall hold the proceeds received from any such conveyance for the same use, purposes, and to the same extent and in the same manner as the original estate is held under this agreement. It is agreed between the parties that within ten days a full inventory of all the estate of the said Moayon shall be delivered to the said Birdie Moayon and said Fidelity Trust & Safety Vault Company, and the deeds executed in accordance with this agreement, and the transfers of personalty made in accordance with the terms of this agreement and to carry into full effect the same. Witness the hands of the parties this 4th day of December, 1900, at Louisville, Kentucky.

Birdie Meyers Moayon.

Max J. Moayon.

The Fidelity Trust & Safety Vault Company joins in the foregoing arrangement for

drawal by the wife of an action for divorce and a renewal of cohabitation is not sufficient to sustain an assignment of interest in property by the husband to the wife, is faulty, and is not borne out by the authority cited for it.

In *Baum v. Baum*, 109 Wis. 47, 53 L. R. A. 650, 85 N. W. 122, the judge who delivered the opinion of the court, speaking of the status or condition of the parties at the time of the making of the oral agreement between husband and wife to live separate and apart, there held to be invalid, said: "The plain inference is that the parties were then living together as man and wife;" while in *OPPENHEIMER v. COLLINS* an action for divorce was pending at the time of the making of the agreement between the husband and wife. Nobody disputes the proposition that a husband and wife, while living together as such, are incapable of making a valid and binding contract with each other to live separate; but an authority to that effect is not a very forceful one against the other proposition, stated and affirmed in the preceding cases, that, after husband and wife have actually separated, and a divorce suit has been commenced, a contract between them to compromise such suit is valid. The very fact that a wife has commenced an action for divorce against her husband (or *vice versa*) creates an inference, or a presumption, that the parties are living separate and apart from each other.

In those states where provision has been made by statute that husband and wife may contract directly with each other, there is, of course, no need of the intervention of a third party. See *France v. France*, 38 Misc. 459, 77 60 L. R. A.

N. Y. Supp. 1015, *supra*, II.; *Goldstein v. Goldstein*, 35 Misc. 251, 71 N. Y. Supp. 807, *supra*, III.

And in *Fisher v. Koonts*, 110 Iowa, 498, 80 N. W. 551, 81 N. W. 702, *supra*, III., it was stated that a provision of the statutes of Iowa (Code, § 3157) expressly authorized "a conveyance, transfer, or lien, executed by either husband or wife to or in favor of the other," and that the interest in the husband's property, claimed to have been restored by the oral agreement, might be the subject of contract between them.

As a result of the investigation, it appears that, whenever a party to a marriage,—and while in every known instance but one it seems to have been the wife, yet there is no apparent reason for saying it would never be the husband—separates from the other, and takes steps to, or actually does, commence a suit for a divorce, a subsequent contract between the husband and wife to compromise the divorce suit is valid; and further, that the agreement to do so on the part of the wife will furnish a sufficient consideration for covenants on the part of the husband for the maintenance of herself and children. That, in making such a contract under such circumstances, the wife (except as to rights and interests held by her with her husband) acts in all respects as a *feme sole*, and no third party to represent her is necessary. And that such a contract is valid, whether it provides that the parties shall thereafter live separate and apart from each other, or shall resume the marital relation.

P. H. Y.

the purpose of signifying its acceptance of the trust to be created by the deed of conveyance contemplated by its terms.

Fidelity Trust & Safety Vault Company.
by John W. Barr, Vice President.

The foregoing facts are gathered from appellant's petition filed in this case seeking a specific performance of the above contract, it being also alleged that, in pursuance thereto, appellant Birdie had forgiven the wrongs of appellee, and had returned to his home, and resumed her relations as a dutiful wife; and from the date of this contract, and in performance of her part thereof, had continued to live with appellee as his wife, and was yet doing so. It was also averred that appellee had wholly failed to comply with his part of the agreement, the one above copied, and that he refused to do so. A full description of his property, alleged to be that intended by the parties to be, and that was, embraced in the terms of the written contract, was given in the petition. It shows a number of pieces of real estate in Christian county, this state, and personal property of the value of about \$20,000. Appellee interposed a demurrer to the petition, which was sustained, and the petition dismissed.

In support of the judgment, it is argued that the contract is unenforceable for the following reasons: (1) That it is not founded upon a valuable consideration, and that it is disfavored upon principles of sound public policy; (2) that it is indefinite and uncertain and inequitable and unreasonable; (3) that it is lacking in mutuality of obligation and remedy on the part of the wife; (4) that the description of the property to be conveyed is not sufficiently certain, nor is it sufficiently identified to satisfy the statute of frauds; (5) that the wife cannot contract with her husband concerning her property rights, nor can she sue him therefor, other than in an action for divorce and alimony. As a determination for appellee of any one of the questions just outlined must result in an affirmation of the judgment, we will take them up and discuss and dispose of them in the order stated.

1. It is conceded by the demurrer that Mrs. Moayon had legal grounds for her separation and divorce; that she and her husband were then living apart because of those grounds; and that she had retained counsel to prepare, and he had prepared, a suit for her seeking a divorce from her husband. She, at her husband's solicitation, forgave his wrong, resumed a relation which he, by his conduct, had forfeited, and had no legal right to longer claim, and saved to him the costs of the threatened litigation. Also, under the facts admitted, she was certainly entitled to recover from him substantial alimony, including maintenance for herself and children pending the action, and including a sum sufficient to enable her to employ counsel and defray the costs of her suit against him. As between other persons, where one has a cause of action against the other, and is about to begin a suit on it, its

abandonment and satisfaction will constitute a consideration to support a contract based upon that fact. *Clarke v. McFarland*, 5 Dana, 48; *Brown v. Buford*, 3 B. Mon. 508, 39 Am. Dec. 477; 6 Am. & Eng. Enc. Law, 2d ed. 947, and cases. Nor is it even necessary that the party sought to be charged shall have been benefited by the abandonment of the suit. If the other party has thereby been put to an irretrievable disadvantage, that fact will equally constitute what is termed a valuable consideration. *Ford v. Crenshaw*, 1 Litt. (Ky.) 70; *Gaines v. Scott*, 3 Ky. L. Rep. 418. Becoming reconciled to the husband, with full knowledge of his actionable offense, will be a bar, as a condonement, to the suit of the wife for divorce, based upon the original facts. Independent of the question whether the fact of the reconciliation was not of as much value to the wife as to the husband, and that a mere claim or right to a divorce is of no legal value, yet her right to a settlement upon herself and children as alimony and maintenance was a right possessing money value. When she abandoned and obliterated her cause for divorce in this case, it likewise nullified her right to sue for and recover alimony.

It is argued, though, that it is the duty of the wife, no less than of the husband, to maintain in good faith the marital relation; that a promise of one to pay money to the other to continue the married relation is at best but an agreement to pay for the performance of a duty already undertaken for a sufficient consideration (to wit, the mutual undertaking to live together in the married state); and that, therefore, there is nothing upon which to rest the new promise. Were it the fact that there was no cause for the separation, this argument of appellee would be good. The other side of this proposition—that is, an agreement between husband and wife by which the former undertook to pay the latter a stipend in consideration of their living apart—has been before this court frequently. In all those cases it was shown that the marital relations had become unendurable to the parties, whether because of statutory grounds of divorce or not was not always shown. The contract of the husband to pay the wife a stipulated sum, or to convey to her certain property, was upheld on the theory that it was the legal and moral duty of the husband to support the wife, and that these contracts were but another form of, and were in lieu of, the original undertaking, and were consequently valid. *Gaines v. Poor*, 3 Met. (Ky.) 503, 79 Am. Dec. 559; *Flood v. Flood*, 5 Bush, 170; *Loud v. Loud*, 4 Bush, 455; *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605. Nor was it held in those cases to be necessary that the suit for divorce should be pending in order to support the agreement. It was sufficient if there was an actual or impending separation and suit for divorce. *Gaines v. Poor*, 3 Met. (Ky.) 503, 79 Am. Dec. 559. It is the policy of the law, because it has been found best for social happiness and progress, that the state of mar-

riage be encouraged. Certainly, if an agreement between husband and wife, settling the obligations of the husband to provide for the wife, in contemplation of their living permanently apart, will be specifically enforced, as being based upon a sufficient legal consideration and as being not contrary to the policy of the law, *a fortiori* must be a contract between them under like conditions, founded on the consideration of the restoration or preservation of the marital relation. See Bishop, Marr., Div., & Sep. § 1279. As said in *Adams v. Adams*, 91 N. Y. 381, 43 Am. Rep. 675: "While the law favors the settlement of controversies between all other persons, it would be a curious policy which would forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other." To the same effect is the case of *Phillips v. Meyers*, 82 Ill. 70, 25 Am. Rep. 295. In *Barbour v. Barbour*, 49 N. J. Eq. 429, 24 Atl. 227, the wife had abandoned her husband because of certain violations by him of the marital duties. She brought suit for divorce and alimony. He sought a reconciliation. Among other inducements offered by the husband was the agreement to convey her certain real estate owned by him if she would be reconciled to him. Relying upon his assurances and promises, she did become reconciled, and again took up her former relations with him as wife. He then refused to comply with his agreement to convey her the property as he had agreed. The court, at her suit for specific performance, granted the relief prayed for. In the course of the opinion it was said: "The agreement is an agreement respecting the conveyance of land. The consideration was a valuable one. No consideration can be named of higher importance or of more solemn significance. It is difficult to measure it. Dollars and cents afford no adequate conception of the true nature of the consideration moving upon the one side to the execution of this agreement. This agreement is thus brought within every case that recognizes the doctrine of part performance in the slightest degree. Upon the part of the wife it is not only partially, but entirely, performed. She not only agreed to become reconciled to him, but in the sincerest manner, by her conduct, manifested her determination so to continue." In addition to the foregoing, we think the principle is also sustained by the following authorities: *Smith v. Smith*, 35 Hun, 378; *Shepard v. Shepard*, 7 Johns. Ch. 57, 11 Am. Dec. 396; *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799. We are, consequently, of opinion that the contract was based upon sufficient consideration, and is not opposed to a sound public policy.

2. That the contract is definite, certain, fair, and equitable, we have no doubt. The wife agrees to abandon, and it is alleged has abandoned, her suit for divorce, and has forgiven its cause. She agrees to resume the wifely relation, and has done so in pursuance to the agreement. The husband undertook, besides his promise of a fulfillment

of the conjugal duties, to convey to a named trustee one third of all his property for the maintenance and education of their two children; it in event of their death to go to the wife. It also was provided for the management of the trust. The only serious criticism of the paper as to its indefiniteness or lack of equity, besides the matters of description and mutuality, which will be discussed further on, is the suggestion that it is unfair and inequitable to appellee to enforce a contract that may let into joint ownership with him in his property, and in his mercantile establishment, other persons probably not desirable, and whose interference would jeopardize, if not destroy, the value of his business. As to the real property, it not infrequently happens that it is owned jointly by persons of incompatible tastes. Yet we have never before heard it urged as a defense against the specific performance of one's contract to sell an undivided interest in his land that his vendee might sell the interest to some undesirable person, entailing, probably, a disastrous suit to sell the whole property because of its indivisibility. Those are questions that might properly influence one in determining whether he will sell an undivided interest in his property. But, after he has contracted to do so for an adequate consideration, we perceive no reason why equity should relieve him from a specific execution of his contract on such a ground. Upon the face of the contract, it does not appear to us to be unfair. It settles upon the wife's children, certainly, no more than the allegations of her petition show would probably have been set apart to her as alimony, had she prosecuted her suit. That she saw proper to have this sum settled on her children, instead of upon herself, is not a ground for objection by appellee.

3. It is very earnestly argued that the contract should not be enforced because of lack of mutuality in obligation and in remedy. It is asserted by appellee that, before a contract will be specifically enforced in equity, it must not only be reasonable and practicable, and supported by an adequate consideration, and be certain and definite in regard to the property to be conveyed, but it must be mutually binding upon the parties, and the remedy for its enforcement must also be mutual to the parties. It is the latter condition that we now address ourselves to. We concede the correctness of appellee's proposition. Yet it may be satisfied with less than an ideal fulfillment of its full text. For example, it is generally held that, under the statutes of frauds and perjuries, where the contract is not in writing, if one party, relying on the agreement, and induced thereby, has executed his part of the contract, the other party may be compelled to perform, or to respond in damages if specific performance is withheld. Not to do so would be to make the statute enacted to prevent frauds an instrument for effectuating a fraud. To examine minutely that part of the agreement bearing on this question, we again quote from it: "Whereas, the said Max and

Birdie Moayon are now, and have been for some months past, living separate and apart from each other; and whereas, the said parties have this day mutually agreed to forego their differences, and to be reconciled and live with each other as husband and wife after the full execution of this agreement: Now, and in view of the fact that the parties have agreed that a settlement is to be made upon the said children by the said Max Moayon, in order to insure a sufficient estate for them, and for their maintenance, education, and support and future welfare; Now, in consideration of the love and affection which the said Max Moayon bears the said children, Beatrice and Jessamine, and in consideration of one dollar cash in hand paid," etc. We have not rested this contract on the consideration of the "love and affection" of the father to his children (though it seems that might, alone, have been sufficient in this state), any more than upon the \$1 recited as having been paid. In the case of an executed contract, reciting several matters as constituting the consideration, if any one of them is sufficient, probably that would satisfy the inquiry. But in an executory contract, the execution of which is resisted by one of the parties, the inquiry should embrace all the matters recited as the consideration, because we cannot say that the complaining party would have entered into the contract in the absence of any of the matters recited as the moving consideration for his action. The consideration of this contract may be thus stated: (a) The mutual agreement to forego differences; (b) the mutual agreement to be reconciled; (c) the mutual agreement to live with each other as husband and wife; (d) love and affection of the husband for his children; (e) \$1. The last two are not questioned. Appellant Mrs. Moayon did forego the cause of their difference. That part of the contract is unquestionably executed. She did become reconciled to appellee. That is executed. The only remaining part of the contract is (c) "the mutual agreement to live with each other as husband and wife after the full execution of this agreement." The parties saw proper to anticipate the time of execution of this clause of the contract, and resumed their living together before the full execution of the agreement. This was necessarily by mutual consent, and neither party can take advantage by complaint of that act. The case is rested, however, on this point, upon the argument by appellee that the contract contemplated not merely going back to their former relation, but permanently continuing in it; that the wife's undertaking on this score cannot be fulfilled short of the death of one of the parties, for, so long as they both live, she might leave him. It is then argued that, so long as she owes him any part of this undertaking (i. e., to live with him as his wife), it is a duty that could not be enforced against her by the court; that no civil court ever has attempted to compel two people to so live together, no matter which was in fault. Therefore it is claimed

there is lacking that mutuality of remedy necessary to the enforcement in equity of this contract. Marriage contracts and marriage articles have been upheld and enforced by the courts from earliest times. They involve an agreement between a man and woman to assume the marital relation,—to live together as husband and wife,—in consideration of which each relinquishes his or her claim to the other's property, or one agrees to convey or deliver to the other certain property or money. If they, in pursuance of the agreement, did marry and live together as husband and wife, the contract has been considered always as executed, so far as that part of the undertaking was concerned. It has been held that neither misconduct of a party after marriage (*Moore v. Moore*, 1 Atk. 272; *Sidney v. Sidney*, 3 P. Wms. 269; *Seagrave v. Seagrave*, 13 Ves. Jr. 439; *Fisher v. Koontz*, 110 Iowa, 498, 80 N. W. 551, 81 N. W. 702), nor the subsequent divorce of the parties, in the absence of some term in the contract providing against such contingency, or of some statutory regulation of the subject, affects the validity of the marriage settlement (*Evans v. Carrington*, 2 De G. F. & J. 481; *Barclay v. Waring*, 58 Ga. 86; *Babcock v. Smith*, 22 Pick. 61; *Child v. Pearl*, 43 Vt. 224). Bonds for the payment of money have been enforced upon the executed consideration of marriage. *Smith v. Patterson*, Cheves Eq. 29; *Ancker v. Levy*, 3 Strobb. Eq. 197; *Logan v. Wienholt*, 1 Clark & F. 611. The promise of a woman to marry a man was held a sufficient and valuable consideration to support his deed to her, where it appeared that she had been prevented from executing the promise without her fault, but by his death. *Smith v. Allen*, 5 Allen, 454, 81 Am. Dec. 758. The marriage contract (that is, the agreement to marry), is complete and executed when the parties to it have entered into the married relation in the manner required by statute. Undoubtedly every valid marriage contemplates that the parties shall live together as husband and wife "till death them do part." In a case like the present one the agreement to live together as husband and wife could include nothing more on this point than the original vows of matrimony did. To say that marriage was not an execution of that part of a marriage settlement between a man and a woman, competent to marry, as would require the performance of the other undertakings in the settlement, would be to practically destroy that which for time out of mind has been regarded as a subject of such contracts, for it would necessarily postpone the execution of the remaining part of such contracts till the death of one of the parties; thereby substantially destroying their value, in many instances, to the party benefited and intended to be protected by them. We must hold, in reason and under the authorities, that this feature of the contract under consideration was executed by the resumption of the parties of the marital relation and duties. What relief appellee would be entitled to, as to a restoration of

the property, or some part thereof, if Mrs. Moayon should subsequently abandon him without cause, is a question we do not determine.

4. Does the contract sufficiently describe the property to be conveyed? The description in the contract is: "One third of all his [appellee's] estate, real, personal, or mixed, of whatever kind or nature, belonging to him in his own right, which he acquired under the will of Hannah Moayon, his mother, as well as all the other estate otherwise acquired or now owned by him." Can the intention of the parties, and the property to be affected by the writing, be gathered from this description? If so, the statute is complied with. It is the purpose of the description of the property concerning which a contract is made, to identify it. As said in *Warvelle on Vendors*, vol. 1, § 96: "While an unequivocal description, giving location, area, and boundaries, is a literal and perfect observance of the rule, a less particular statement will usually suffice, provided it contains within itself the proper means of identification, as by reference to extrinsic facts or other instruments by means of which the land can be ascertained with sufficient certainty." The ideal, perfect description is preferred. But we cannot compel its adoption. It is our business to treat with such contracts as the parties have made, enforcing them when lawful and practicable. It is not necessary, then, that the writing should do more than indicate clearly what property is to be affected by it, if its description or identification can be gotten from the contract, or from any extrinsic fact or writing referred to in the contract. A portion of the property may be identified by the will of Hannah Moayon, specifically referred to in the contract. It is necessarily of record to be a will, and that record will satisfy so much of the contract as treats of so much of appellee's property as derives its title from that source. The remainder of the description is: "All the other estate otherwise acquired or owned by me." In *Warvelle on Vendors*, § 135, it is said that a description as "my house and lot" imports a particular house and lot, rendered certain by the description that it is the one that belongs to "me." The following descriptions have been held sufficient: "My lot . . . on the plat in the town of South Bend, on the plat of said town, on the river bank" (*Colerick v. Hooper*, 3 Ind. 316, 56 Am. Dec. 505); the "Snow farm" (*Hollis v. Burgess*, 37 Kan. 487, 15 Pac. 534); "H.'s place at S." (*Hodges v. Kowing*, 58 Conn. 12, 7 L. R. A. 87, 18 Atl. 979); the "Knapp home property" (*Goodenow v. Curtis*, 18 Mich. 298); an agreement to convey land described as "occupied" by the vendor or a third person (*Angel v. Simpson*, 85 Ala. 53, 3 So. 758; *Towle v. Carmelo Land & Coal Co.* 99 Cal. 397, 33 Pac. 1126; *Dooter v. Hellberg*, 65 Wis. 415, 27 N. W. 176). In all such cases parol evidence was admitted not to identify, but to designate, the subject-matter, already identified in the minds of the parties, in the language of the contract 60 L. R. A.

when read in the light of the facts. In this state, in *Overstreet v. Rice*, 4 Bush, 3, 96 Am. Dec. 279, the expression, "We have swapped farms," naming the terms, but without further description of either farm, was held sufficient, after the parties had themselves identified the lands intended to be affected, by taking possession of them. In *Ellis v. Deadman*, 4 Bibb, 466, the writing was: "4th January, 1808. Received of Jesse Ellis \$—, in part pay of a lot he bought of me in the town of Versailles; it being the cash part of the purchase of said lot. Nathan Deadman." This court said: Had the receipt "specified the terms of the agreement, there would have been no doubt of the propriety of decreeing a special execution." It is as essential that the terms be specified as the description of the property. "Ten acres adjoining him on the north," in a bond for title to land of the vendor adjoining the vendee, was held sufficient in *Hanly v. Blackford*, 1 Dana, 2, 25 Am. Dec. 114. In *Henderson v. Perkins*, 94 Ky. 211, 21 S. W. 1035, the description was, "my home place and storehouse." It was held sufficient, on the authority of *Ellis v. Deadman*, 4 Bibb, 466, and *Hanly v. Blackford*, 1 Dana, 2, 25 Am. Dec. 114. In the case of *Varnum v. State*, 78 Ala. 28, the description was: "My entire crop of every description, raised by me, or caused to be raised by me, annually, till this debt is paid." While that was not concerning real estate, it was such a contract (one not to be performed within a year) as was, by the statutes of frauds, required to be in writing. Concerning that description that court said: "It is objected to the admission in evidence of this mortgage that it was void for uncertainty in the description of the crops intended to be included in it. Whatever force there may be in this objection to the instrument on its face, this alleged uncertainty was capable of being removed, when read in the light of the circumstances surrounding the contracting parties at the time of its execution, by extraneous parol identification." Parol evidence cannot be introduced to vary, enlarge, or restrict the written terms of the contract. But frequently it is the case that application of apparently vague descriptions must be by parol testimony, which puts before the court the facts and circumstances surrounding the parties when the contract was made or is to be executed, that its terms may be interpreted by the light from such surroundings. From this rule springs the maxim, "That is certain which can be made certain." In this case it has been said "all" means all. "All of my land" is a description, by necessary implication and common understanding, referring to such lands as I may own, evidenced by the public records where land titles are required to be recorded, or to my actual and continuous possession for such time as, under the law constitutes a title. This identification is complete, and admits of no possibility of mistake in this case. Applying to it the familiar usage of the courts in such matters, parol testimony may

be allowed to designate the particular properties described and identified by the writing, and in the contemplation of the parties in making the contract.

5. It is true that, by the common law, contracts between husband and wife were void. Yet equity recognized numerous instances in which the parties had peculiar property rights which they were allowed to personally control, and to make contracts concerning. It would be an anomaly and a reproach to the law to say that it recognizes a legal property right in one, to whom all the doors of every court were closed. Therefore it was early held (Story, Eq. Jur. 1372) that, although contracts between husband and wife are void at law, they are not always so in equity. This court has repeatedly affirmed the same doctrine. In *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605, it was said: Generally, "if a contract between husband and wife be just and reasonable, and would be good at law when made by the husband with a trustee for the wife, it will be upheld in equity." This case was followed in *Bohan-*

non v. Travis, 94 Ky. 59, 21 S. W. 354. In *Ward v. Crotty*, 4 Met. (Ky.) 59, it was affirmed that the husband's contract with the wife would be specifically enforced against him in equity, without the intervention of a trustee. This has been adhered to in *Maranan v. Maraman*, 4 Met. (Ky.) 89, and *Campbell v. Galbreath*, 12 Bush, 459. It is further re-enforced by legislative enactment looking to the same end, viz., § 34 of the Civil Code, as follows: "In actions between husband and wife; in actions concerning her separate property; and in actions concerning her general property (and in actions for the personal suffering of or injury to her person or character . . .) in which he refuses to unite, she may sue or be sued alone." The wife may maintain her action.

It follows that the judgment must be reversed, and the cause is remanded for further proceedings not inconsistent herewith.

Petition for rehearing overruled February 20, 1903.

NEBRASKA SUPREME COURT.

Thomas J. DOODY, *Piff. in Err.*,
v.

NATIONAL MASONIC ACCIDENT ASSO-
CIATION.

(.....Neb.....)

*A mutual accident association classified its members according to the hazard of their respective occupations. The plaintiff belonged to a class which entitled its members to \$2,500 for the loss of a hand by accident. The members of another class were entitled to but \$500 for such injury. A clause of the by-laws, which were a part of the contract of insurance, provided that no greater amount should be paid any member than the amount payable to the latter class for any injury received while hunting, or in any way using or handling firearms. The plaintiff lost his hand by the discharge of a gun which he was removing from one room of his house, where it was left by one of his boarders, to another. *Held*, that his recovery was limited to \$500.

(November 19, 1902.)

*Headnote by ALBERT, C.

NOTE.—As to right to recover full amount of policy issued to merchant though he was killed while hunting, where policy provided that in case of death while engaged temporarily in any act or occupation more hazardous than the one in which he was accepted, the amount should be equal to the rate of the occupation in which he was engaged, see, in this series, *Union Mut. Acci. Asso. v. Frohard* (Ill.) 10 L. R. A. 383.

As to right of bank cashier to recover for injury received in sawing a board for his own use, under accident policy providing that it shall be void as to all accidents occurring while engaged in any employment not rated as a preferred occupation, see *Hess v. Preferred Masonic Mut. Acci. Asso.* (Mich.) 40 L. R. A. 444, 60 L. R. A.

ERROR to the District Court for Lancaster County to review a judgment in plaintiff's favor for only part of the demand in an action brought to enforce payment of the amount alleged to be due on an accident insurance policy. *Affirmed*.

The facts are stated in the Commissioner's opinion.

Messrs. Tibbets Brothers, Morey & Anderson, for plaintiff in error:

That the by-laws use the clause "in any way" to modify the verbs "handle or use" does not change or enlarge the meaning.

Metropolitan Acci. Asso. v. Froiland, 161 Ill. 30, 43 N. E. 766, 59 Ill. App. 522.

When a policy is capable of two meanings, that which is most favorable to the insured is always to be adopted.

1 Am. & Eng. Enc. Law, 2d ed. p. 306; *Patterson v. Natural Premium Mut. L. Ins. Co.* 100 Wis. 118, 42 L. R. A. 253, 75 N. W. 980; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473, 66 N. W. 157; *Kendrick v. Mutual Ben. L. Ins. Co.* 124 N. C. 315, 32 S. E. 728; *Connecticut F. Ins. Co. v. Jeary*, 60 Neb. 338, 51 L. R. A. 698, 83 N. W. 78; *Farmers' & M. Ins. Co. v. Newman*, 58 Neb. 504, 78 N. W. 933; *Griffin v. Western Mut. Ben. Asso.* 20 Neb. 820, 57 Am. Rep. 848, 31 N. W. 122; *Springfield F. & M. Ins. Co. v. McLimans*, 28 Neb. 846, 45 N. W. 171; *Darrow v. Family Fund Soc.* 116 N. Y. 537, 6 L. R. A. 495, 22 N. E. 1093; *Utter v. Travelers' Ins. Co.* 65 Mich. 545, 32 N. W. 812; *Burkhard v. Travelers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205; *Hoffman v. Aetna F. Ins. Co.* 32 N. Y. 405, 88 Am. Dec. 337; *Lovelace v. Travelers' Protective Asso.* 126 Mo. 104, 30 L. R. A. 209, 28 S. W. 877; *Berliner v. Travelers' Ins. Co.* 121 Cal. 458, 41 L. R. A. 467, 53

Pac. 918; Travelers' Ins. Co. v. Dunlap, 160 Ill. 642, 43 N. E. 765; *Metropolitan Acci. Asso. v. Froiland*, 161 Ill. 30, 43 N. E. 766; *May, Ins. § 514 B; Bacon v. United States Mut. Acci. Asso.* 44 Hun, 599; *Northrup v. Railway Pass. Assur. Co.* 43 N. Y. 516, 3 Am. Rep. 724; *Tooley v. Railway Pass. Assur. Co.* 3 Biss. 399, Fed. Cas. No. 14,098; *Champlin v. Railway Pass. Assur. Co.* 6 Lans. 71.

"The inhaling of gas" does not cover all inhalations of gas.

Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L. R. A. 443, 20 N. E. 347; *Menneiley v. Employers' Liability Assur. Corp.* 148 N. Y. 596, 31 L. R. A. 686, 43 N. E. 54; *Pickett v. Pacific Mut. L. Ins. Co.* 144 Pa. 79, 13 L. R. A. 661, 22 Atl. 871.

A place where brooms were manufactured was nevertheless not a "manufactory" in such a sense as to forfeit the policy.

Franklin F. Ins. Co. v. Brock, 57 Pa. 74. "Being on the roadbed" does not include the fact of being on the roadbed when walking across it.

Traders' & T. Acci. Co. v. Wagley, 20 C. C. A. 588, 45 U. S. App. 39, 74 Fed. 457.

Nor is sitting on the end of a tie "being on the roadbed."

Standard Ins. Co. v. Langston, 60 Ark. 381, 30 S. W. 427; *Burkhard v. Travellers' Ins. Co.* 102 Pa. 262, 48 Am. Rep. 205.

"Self-destruction" does not include unintentional self-destruction.

Brown v. Sun Life Ins. Co. (Tenn. Ch.) 51 L. R. A. 252, 57 S. W. 415.

Nor does a prohibition against "opiates" extend to those ordered by a physician.

Knights of Pythias v. Allen, 104 Tenn. 623, 58 S. W. 241.

Nor is a person "riding on the platform of a car" who is temporarily riding on the platform of a car.

Standard Life & Acci. Ins. Co. v. Thornton, 49 L. R. A. 116, 40 C. C. A. 564, 100 Fed. 582.

Going out hunting with a loaded shot gun is not "handling firearms."

Thomas v. Masons' Fraternal Acci. Asso. 64 App. Div. 22, 71 N. Y. Supp. 692.

Plaintiff's act was within the line of his employment, and was necessary and temporary only. The clause in question in the policy therefore will not apply.

Rustin v. Standard Life & Acci. Ins. Co. 58 Neb. 792, 46 L. R. A. 253, 79 N. W. 712; *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 53 S. W. 49; *Standard Ins. Co. v. Langston*, 60 Ark. 381, 30 S. W. 427; *Daily v. Preferred Masonic Mut. Acci. Asso.* 102 Mich. 289, 26 L. R. A. 171, 57 N. W. 184, 60 N. W. 694; *Wilson v. Northwestern Mut. Acci. Asso.* 53 Minn. 470, 55 N. W. 626; *Phœnia Ins. Co. v. Flemming*, 65 Ark. 61, 39 L. R. A. 789, 44 S. W. 464.

Plaintiff's act was not only within the line of his stated occupation, but was with a direct view to removing danger from himself and others. It would be against public policy, and void, for any clause of the policy to seek to mulct him for endeavoring to save or preserve the life of another.
60 L. R. A.

Tucker v. Mutual Ben. Life Co. 50 Hun, 50, 4 N. Y. Supp. 505, Affirmed in 121 N. Y. 718, 24 N. E. 1102; *Eckert v. Long Island R. Co.* 43 N. Y. 502, 3 Am. Rep. 721; *Reynolds v. Equitable Acci. Asso.* 59 Hun, 13, 1 N. Y. Supp. 738, Affirmed in 121 N. Y. 649, 24 N. E. 1091; *Williams v. United States Mut. Acci. Asso.* 82 Hun, 268, 31 N. Y. Supp. 343, 147 N. Y. 693, 42 N. E. 726; *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 53 S. W. 49; *Keene v. New England Mut. Acci. Asso.* 161 Mass. 149, 36 N. E. 891.

Messrs. Lambertson & Hall and C. O. Marlay for defendant in error.

Albert, C., filed the following opinion:

This action was brought on an accident insurance policy issued to the plaintiff by the defendant. Defendant is a mutual concern, and the members are classified according to the hazard of their occupations. The plaintiff was classified as the proprietor of a boarding house, and belonged to class 1, whose members were entitled to an indemnity of \$2,500 for the loss of a hand, while those of class 6 were entitled to but \$500 for such injury. The by-laws of the defendant, which are part of the contract of insurance, provide, among other things, as follows: "Nor shall any greater amount be paid to any member or his beneficiary than the amount named in class 6 for or on account of any injury received by any member while hunting, or while in any way using or handling loaded firearms." At the time when the policy was in force the plaintiff undertook to carry a loaded gun in his hands from the dining room, where it had been left by one of his boarders, to a closet in an adjoining room. While doing so, the gun was discharged, destroying his hand. As proprietor of a boarding house, he was entitled, under his policy, to an indemnity of \$2,500, unless the act in which he was engaged at the time of the injury was handling firearms, within the meaning of the clause of the by-laws hereinbefore quoted, in which case he would be entitled to but \$500. The trial court held that the act of removing the loaded gun from the dining room was handling firearms, within the meaning of said clause, and directed a verdict in favor of the plaintiff for \$500, with interest. Judgment accordingly. The plaintiff brings error.

The sole question in this case is whether the plaintiff at the time he received the injury was in any way handling firearms, within the meaning of the qualifying clause of the by-laws; and this question depends upon the meaning to be given to the word "handling," as therein used. The plaintiff argues that the phrase "in any way," which precedes the word in the qualifying clause, does not enlarge the meaning of the word. The authorities cited in support of this proposition hardly support this claim. The phrase certainly does not restrict the meaning of the word. It should be given some meaning, if possible. While we may concede, for the purpose of the argument, that it does not enlarge the meaning of the word,

we think it at least shows an intention on the part of the contracting parties that the word should be taken in the comprehensive sense in which it is generally used. It is a well-known rule of construction that words are to be taken in their ordinary meaning unless it appear that the parties used or understood them in a different sense. There is nothing in the context or in the record to indicate that the parties to the contract of insurance used or understood the word in question in any other than the ordinary sense. The plaintiff contends that, as the word is commonly used, it is synonymous with the words "ply," "wield," and "manipulate." We know of no common use of the word that gives the word a different meaning than that to be found in the standard lexicons of the language. To "handle" is defined by the Standard Dictionary (1894) as "to use the hands upon; to turn, adjust, examine, or feel with the hands; to touch; to manage, contrive, or direct with the hands; to use; to ply; to wield; to manipulate; as to handle a musket or oar, etc." By the Century Dictionary (1889) it is defined as "to touch or feel with the hand; use the hand or hands upon; to manage by hand; use or wield with manual skill; ply; manipulate; act upon or control by the hand; in general, to manage, direct, control." By Webster's Dictionary (1894) it is defined as "to touch; to manage in using, as a spade or a musket; to wield; often, to manage skilfully." From the foregoing definitions it will be seen that while the word may be synonymous with such words as "ply," "wield," and "manipulate," none of such words, nor all of them, are its verbal equivalent. It is a more comprehensive term, and includes, not only the act of plying, wielding, and manipulating, but touching, using the hands upon, acting upon or controlling by the hand, and other acts. Had the parties used the equivalent of the word, as shown by the foregoing definitions, instead of the word itself, there could be no question that the act in which the plaintiff was engaged at the time of the injury was within the meaning of the qualifying clause of the by-laws. We are unable to see how the legal effect of the language is in any manner changed by the use of a word which comprehends all such acts. The plaintiff, however, invokes the rule that, when a policy admits of two meanings, that which is most favorable to the insured is always to be adopted. That rule has no application to this case. There is a difference between a comprehensive term and an ambiguous one. The question here is not which of two or more meanings shall attach to a word, but whether we shall exclude from the meaning of such word certain acts which standard authors hold to be included within it. In the absence of special circumstances to justify it, the rule does not warrant this court in arbitrarily holding that a part of the acts included within the meaning of the term were not within the contemplation of the parties at the time the contract was made. In fact, we know of no general term that so

aptly expresses what the plaintiff was doing with the gun when he received the injury as the word "handling."

It is also contended by the plaintiff that the injury was received while he was in the ordinary course of his occupation as a boarding-house keeper. We are unable to see how that affects the case. There was no unqualified promise to indemnify him against accidents occurring while he was engaged in such occupation, nor to pay him \$2,500 for the loss of a hand resulting from such accident. On the contrary, the by-laws specifically excepted certain acts, among which was that in which the plaintiff was engaged when the injury occurred. For the injury resulting to the plaintiff while engaged in such act, the promise of the defendant was to pay him \$500.

The judgment of the district court is the full measure of the defendant's liability, and we recommend that it be affirmed.

Ames and Duffie, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Petition for rehearing denied.

Lenora S. BRONSON, *Plff. in Err.*,

v.

ALBION TELEPHONE COMPANY *et al.*

(.....Neb.....)

- *1. Poles and wires which permanently and exclusively occupy portions of a public street or highway constitute an additional burden for which the abutting owner is entitled to compensation in case he is damaged thereby.
2. Where an abutting owner has planted trees along the street adjacent to his property, under the terms of a city ordinance pursuant to statutory provisions, a telephone company, which removes, destroys, or injures such trees in erecting poles and wires under its franchise, is liable for the resulting damage, even though no unnecessary injury is inflicted.
3. In case property is not taken directly by a public undertaking, but

*Headnotes by POUND, C.

NOTE.—For other cases in this series as to cutting of trees to make way for telephone or telegraph wires, see *Dailey v. State* (Ohio) 24 L. R. A. 724; *Southern Bell Teleph. & Teleg. Co. v. Francis* (Ala.) 31 L. R. A. 193; *Bradley v. Southern New England Teleph. Co.* (Conn.) 32 L. R. A. 280; *Wyant v. Central Teleph. Co.* (Mich.) 47 L. R. A. 497.

For telephone or telegraph poles or wires as additional burden on highway, see also, in this series, *People v. Eaton* (Mich.) 24 L. R. A. 721, and note; *Cater v. Northwestern Teleph. Exch. Co.* (Minn.) 28 L. R. A. 310; *Postal Telegr. Cable Co. v. Eaton* (Ill.) 39 L. R. A. 722; *Magee v. Overholser* (Ind.) 40 L. R. A. 370; *Krueger v. Wisconsin Teleph. Co.* (Wis.) 50 L. R. A. 299; and *Donovan v. Allert* (N. D.) 58 L. R. A. 775.

an owner suffers some injury in an incidental right growing out of his peculiar situation or position, so that ordinary condemnation proceedings and payment of damages in advance are not practicable, the owner will be left to his remedy at law, and is not entitled to an injunction, unless upon proof of insolvency or some other special circumstance.

4. It is sufficient for a corporation, which seeks to defend upon the ground of a franchise, to show that it is actually possessed of the franchise. Whether such franchise was acquired, or is held rightfully, is to be determined only in a direct proceeding to oust the corporation, or in a proceeding to which some one who claims a better title is a party.

(January 8, 1908.)

ERROR to the District Court for Boone County to review a judgment in favor of defendants in an action brought to restrain the injuring of trees in the highway in front of plaintiff's property. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Mr. J. A. Price, for plaintiff in error:

The corporate authorities of the cities and villages of the state may cause shade trees to be planted along the streets thereof.

Neb. Comp. Stat. 1901, § 3, chap. 2, art. 4.

The corporate authorities had caused shade trees to be planted. No effort of any kind had been made to obtain the right to mutilate these trees. Plaintiff had a right to maintain these trees, and they were hers, as owner of the adjacent lots.

White v. Godfrey, 97 Mass. 472; *Bliss v. Ball*, 99 Mass. 597.

The property of no person shall be taken or damaged for public use without just compensation therefor.

Neb. Const. § 21, art. 1; *Daily v. State*, 51 Ohio St. 348, 24 L. R. A. 724, 37 N. E. 710.

The mere existence of a remedy at law is not in itself sufficient ground for refusing relief in equity by injunction.

10 Am. & Eng. Enc. Law, 1st ed. 794, note; *Williams v. New York O. R. Co.* 16 N. Y. 97, 69 Am. Dec. 651; *Watson v. Sutherland*, 5 Wall. 74, 18 L. ed. 580; *Henderson v. New York C. R. Co.* 78 N. Y. 423; 3 Pom. Eq. Jur. 2d ed. § 1357; *Sapp v. Roberts*, 18 Neb. 299, 25 N. W. 96; *Daily v. State*, 51 Ohio St. 348, 24 L. R. A. 724, 37 N. E. 710; *Pohlman v. Evangelical Lutheran Trinity Church*, 60 Neb. 364, 83 N. W. 201; *Shaffer v. Stull*, 32 Neb. 94, 48 N. W. 882; *Tantlinger v. Sullivan*, 80 Iowa, 218, 45 N. W. 765; *Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235; *Owens v. Crossett*, 105 Ill. 354.

The erection of posts and the stringing of wires thereon in a city street in front of a residence are a permanent appropriation of a part of the street, entitling the owner of the adjacent property to compensation for the injury sustained.

Eels v. American Teleph. & Teleg. Co. 143 N. Y. 133, 25 L. R. A. 640, 38 N. E. 202; *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 30 L. R. A. 751, 74 N. W. 67; *Krueger v. Wisconsin Teleph. Co.* 106 Wis. 96, 50 L. R. A. 298, 81 N. W. 1041; *Bradley v. South-*

ern New England Teleph. Co. 66 Conn. 559, 32 L. R. A. 280, 34 Atl. 499.

It makes no difference whether the fee of the street is in the abutting owner or in the municipality.

Dill. Mun. Corp. 4th ed. §§ 704, 704a; *Mo-Quaid v. Portland & V. R. Co.* 18 Or. 237, 22 Pac. 899; *Keasbey, Electric Wires*, §§ 81-83.

Mr. M. W. McGan for defendants in error.

Pound, C., filed the following opinion:

The plaintiff applied for an injunction to restrain defendant, a telephone company, from mutilating or injuring certain trees which she had planted in the street along and adjacent to her property. The trees had been planted under the provisions of a municipal ordinance, and were rightfully in the street, by virtue of art. 4, chap. 2, §§ 3-7, and Comp. Stat. art. 1, chap. 14, § 69, ¶ 24. The company was erecting poles and wires under a franchise from the city. Upon demurrer to the petition, the district court held that no cause of action was stated, and dismissed the suit.

The right of an abutting owner to maintain shade trees upon or overhanging the sidewalk is general and well recognized. In many jurisdictions it is customary. With us it has the sanction of express legislation. But this right is subject to all proper uses of the street for the primary purposes for which it was dedicated or condemned. Hence, although a telephone or telegraph company is undoubtedly liable for unnecessary or wanton injury to such trees in erecting its poles and wires, liability for injuries, even amounting to removal or destruction of the trees, which are necessary or proper in the due carrying out of the public undertaking, must depend upon the much-mooted question whether use of a street or highway for poles and wires is an ordinary use, within the contemplation of the parties when it was dedicated or condemned, or is a new and additional burden, for which the abutting owner is entitled to compensation in case of injury. The authorities are very evenly divided upon the question whether a telephone or telegraph company is liable to the owner of the trees, where the injury does not go beyond what is necessary in the reasonable prosecution of the work. Such liability is affirmed in *Daily v. State*, 51 Ohio St. 348, 24 L. R. A. 724, 37 N. E. 710; *Board of Trade Teleg. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Bradley v. Southern New England Teleph. Co.* 66 Conn. 559, 32 L. R. A. 280, 34 Atl. 499; *Clay v. Postal Teleg. Cable Co.* 70 Miss. 406, 11 So. 658; *McCruden v. Rochester R. Co.* 77 Hun, 609, 28 N. Y. Supp. 1135. It is denied in *Wyant v. Central Teleph. Co.* 123 Mich. 51, 47 L. R. A. 497, 81 N. W. 928; *Southern Bell Teleph. Co. v. Francis*, 109 Ala. 224, 31 L. R. A. 193, 19 So. 1; *Southern Bell Teleph. & Teleg. Co. v. Constantine*, 9 C. C. A. 359, 23 U. S. App. 56, 61 Fed. 61; *Dodd v. Consolidated Traction Co.* 57 N. J. L. 482, 31 Atl. 980. All

of the cases first cited are from jurisdictions where poles and wires which permanently and exclusively occupy portions of the street or highway are held to constitute an additional burden. Of those last cited, *Wyant v. Central Teleph. Co.* is from a jurisdiction wherein it is held that there is no additional burden in such cases. On the other hand, *Dodd v. Consolidated Traction Co.* was decided in a jurisdiction where telegraph and telephone poles and wires are not regarded as ordinary uses of the highway; and in *Southern Bell Teleph. Co. v. Francis* it is held that the right to remove trees in whole or in part, in the proper prosecution of such an enterprise, does not depend upon the question whether there is an additional burden, but follows from the paramount right of the public, to which the right to maintain the trees is subject, of removing such trees when necessary for public uses.

If this proposition is maintainable, we need not consider how far the poles and wires are an ordinary use of the street. But, in our opinion, it is not sound. The right to maintain the trees confers an additional value upon the abutting property. This value cannot be cut off without due compensation. When the public conferred it, a valuable property right was created. Relying upon the statutes and municipal ordinances pursuant thereto, owners have expended time and money in improving their property. This grant cannot be resumed, and the property thereby depreciated in value without compensation. Undoubtedly the grant in the first instance was subject to all ordinary uses to which the street might be put. But to say that it was subject to all public uses, whether ordinary or not, which might be deemed convenient thereafter, is going entirely too far. It becomes necessary, therefore, to decide whether telegraph and telephone poles and wires, which permanently and exclusively occupy portions of a public street or highway, constitute an additional burden for which the abutting owner is entitled to compensation in case he is damaged thereby. The text writers are pretty well agreed that they do. *Dill. Mun. Corp. § 698a*, *Elliott, Roads & Streets*, 534; *Lewis, Em. Dom. § 131*; *Randolph, Em. Dom.* 407. But Mr. Keasbey thinks it too soon to predict which view will prevail ultimately. *Keasbey, Electric Wires*, § 101. The adjudicated cases are ranged not very unequally on both sides. The following cases, among others, support the view that there is an additional burden: *Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 133, 25 L. R. A. 640, 38 N. E. 202, and other decisions in New York; *Daily v. State*, 51 Ohio St. 348, 24 L. R. A. 724, 37 N. E. 710; *Callen v. Columbus Edison Electric Light Co.* 66 Ohio St. 166, 58 L. R. A. 782, 64 N. E. 141; *Board of Trade Teleg. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453; *Postal Teleg. Cable Co. v. Eaton*, 170 Ill. 513, 39 L. R. A. 722, 49 N. E. 305; *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380, 20 Atl. 850; *Nicoll v. New York & N. J. Teleph. Co.* 62 N. J. L. 733, 42 Atl. 583; *Western U. Teleg.* 60 L. R. A.

Co. v. Williams, 86 Va. 696, 8 L. R. A. 429, 11 S. E. 106; *Chesapeake & P. Teleph. Co. v. Mackenzie*, 74 Md. 36, 21 Atl. 690; *Stowers v. Postal Teleg. Cable Co.* 68 Miss. 559, 12 L. R. A. 864, 9 So. 356; *Krueger v. Wisconsin Teleph. Co.* 106 Wis. 96, 50 L. R. A. 298, 81 N. W. 1041; *Pacific Postal Teleg. Cable Co. v. Irvine*, 49 Fed. 113; *Spokane v. Colby*, 16 Wash. 610, 48 Pac. 248; *Kester v. Western U. Teleg. Co.* 108 Fed. 926. The opposite view is supported by *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7 (decided by a divided court); *Julia Bldg. Asso. v. Bell Teleph. Co.* 88 Mo. 258, 57 Am. Rep. 398, and other cases in Missouri; *People v. Eaton*, 100 Mich. 208, 24 L. R. A. 721, 59 N. W. 145; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 539, 28 L. R. A. 310, 63 N. W. 111; *Mages v. Overshiner*, 150 Ind. 127, 40 L. R. A. 370, 49 N. E. 951; *Hershfield v. Rocky Mountain Bell Teleph. Co.* 12 Mont. 102, 29 Pac. 883; *Irwin v. Great Southern Teleph. Co.* 37 La. Ann. 63; *Hewett v. Western U. Teleg. Co.* 4 Mackey, 424. The question has been threshed over so many times that it would subserve no useful purpose to enter into an exhaustive review of these decisions. As Mr. Keasbey puts it very aptly, the crucial point is "whether the rights and privileges of the abutting owner in the use and maintenance of the street as such are affected." *Keasbey, Electric Wires*, § 102. At one time there was a tendency to attach some weight to the ownership of the fee of the street or highway; but it is becoming well settled, for obvious and convincing reasons, that that question is immaterial. *Eels v. American Teleph. & Teleg. Co.* 143 N. Y. 133, 25 L. R. A. 640, 38 N. E. 202; *Theobald v. Louisville, N. O. & T. R. Co.* 66 Miss. 279, 4 L. R. A. 735, 6 So. 230; *Keasbey, Electric Wires*, §§ 83, 102; *Dill. Mun. Corp. § 698a*. And this court is in accord with that view. *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67. The case last cited involved an analogous question, and in passing thereon this court cited, with apparent approval, the decisions which hold telegraph and telephone poles and wires an additional burden. While the two cases are not in all respects the same, we think the position taken in *Jaynes v. Omaha Street R. Co.* would be sufficient to turn the scale in this jurisdiction, if we were in doubt. We are of opinion on independent grounds, however, that such is the sounder view. When we recall the forest of poles, with their clumsy appurtenances, and the network of wires, and even cables, with which some of our city streets are encumbered, it seems hard to say that an owner whose light is cut off, who has the safety of his buildings and their occupants in case of fire endangered, and access to his property impeded, by these permanent obstructions, is less entitled to complain than one whose easement by adjacency is impaired by a steam railway. Of course, in the greater number of cases, the poles and wires work no substantial injury, and the owner has no ground of objection; but, because the damage in most cases is trivial or nominal, we

should not be blind to the substantial and considerable damage that often exists.

It does not follow, however, that the plaintiff is entitled to an injunction. In case property is not taken or injured directly, so as to dispossess or otherwise immediately disturb the owner, but he suffers some injury in an incidental right growing out of his peculiar situation or position, so that ordinary condemnation proceedings and payment of damages in advance are not practicable, the owner should be left to his remedy at law, which in such event is entirely adequate, and is not entitled to an injunction unless upon proof of insolvency or some special circumstance. Such is the practice in cases where the construction of a railway causes damage to abutting owners. The abutting owners are not made parties to condemnation proceedings, nor can they enjoin construction of the road; but their remedy is in an action at law for damages. *Republican Valley R. Co. v. Fellers*, 16 Neb. 169, 20 N. W. 217; *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 368, 370, 42 N. W. 93; *Atchison & N. R. Co. v. Boerner*, 34 Neb. 240, 51 N. W. 842. The same remedy is employed where a city, in improving a street, impairs the easement of the abutting owner. *Omaha v. Flood*, 57 Neb. 124, 77 N. W. 379. And it was adopted in *Jaynes v. Omaha Street R. Co.* 53 Neb. 631, 39 L. R. A. 751, 74 N. W. 67. To hold otherwise would probably prevent many useful public improvements, since the legislature has never made provision for condemnation of rights incidentally affected. Where nothing is actually taken, and there is merely an injury to the rights which the abutting owner has by reason of his situation, the courts generally refuse to grant an injunction, in the absence of some special circumstances. *Lorie v. North Chicago City R. Co.* 32 Fed. 270, and cases cited; *Maxwell v. Central Dist. & Printing Teleg. Co.* 51 W. Va. 121, 41 S. E. 125. In the case at bar, we see no reason why damages will not afford an adequate remedy. We do not think public utilities of this kind ought to be suspended until every abutting owner upon the streets or highways to be used has been duly appeased. If he has been substantially or appreciably injured, an action at law will ordinarily afford him full compensation. If he has not, no opportunity for extorting an unreasonable settlement should be afforded him.

The petition alleges that the franchise under which the defendant is operating was granted by the city council to the mayor and one of the councilmen, by whom it was transferred to the company; and for this reason it is claimed that the grant is against public policy, fraudulent, and void. If the franchise was wholly void, so that injury to plaintiff's property was threatened by mutilation of her trees without any warrant of law and by mere trespassers, a case for an injunction might be presented. But the most that can be said under the allegations of the petition is that the circumstances might possibly afford ground for revocation or for ousting the company in a direct pro-

ceeding for that purpose. The company is possessed of the franchise. Whether the franchise was acquired, or is held rightfully, is to be determined only in a direct proceeding to oust the company, or in a proceeding to which some one who claims a better title is a party. 5 Thomp. Corp. § 5340.

We therefore recommend that the decree be affirmed.

Barnes and Oldham, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Petition for rehearing denied.

Martin LANGDON, Plff. in Err.,

v.

John CONLIN.

(.....Neb.....)

*A contract between an attorney at law and one who is not such an attorney, by which the latter agrees to procure the employment of the former by third persons for the prosecution of suits in courts of record, and also to assist in looking after and procuring witnesses whose testimony is to be used in the cases, in consideration of a share of the fees which the attorney shall receive for his services, is against public policy, and void.

(January 21, 1908.)

ERROR to the District Court for Cuming County to review a judgment in favor of plaintiff in an action brought to recover the contract price for services rendered. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. C. J. Smyth and M. McLaughlin for plaintiff in error.

Mr. Martin Langdon in *propria persona*.

Messrs. Anderson & Keefe, for defendant in error:

The statute of frauds does not include a verbal agreement which may possibly or probably not be performed within a year from the date thereof; nor does it apply to a parol contract, in the terms of which there is nothing inconsistent with a full and complete performance within such period.

Powder River Live Stock Co. v. Lamb, 38 Neb. 347, 56 N. W. 1019; *Kiene v. Shaefing*, 33 Neb. 21, 49 N. W. 773; *Connolly v. Gindings*, 24 Neb. 131, 37 N. W. 939; *McCormick v. Drummett*, 9 Neb. 384, 2 N. W. 729; *Carter White Lead Co. v. Kinlin*, 47 Neb. 415, 66 N. W. 536.

*Headnote by OLDHAM, C.

NOTE.—For a case in this series holding a contract similar to the one discussed above to be illegal, see *Alpers v. Hunt* (Cal.) 9 L. R. A. 483.

ChamPERTY is not a criminal offense, nor is a champertous contract illegal under our statutes; and, if this contract is champertous and voidable, it is because it is contrary to public policy to enforce it.

Omaha & R. Valley R. Co. v. Brady, 39 Neb. 48, 57 N. W. 767.

One of the essential vices of a champertous contract, making its enforcement contrary to public policy, is the agreement to relieve the litigant of the costs of litigation, thus making litigation easy, and encouraging it.

Ibid.; *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 320; *Winslow v. Central Iowa R. Co.* 71 Iowa, 197, 32 N. W. 330; *Jewell v. Neidy*, 61 Iowa, 299, 16 N. W. 141; *Bowman v. Phillips*, 41 Kan. 364, 3 L. R. A. 631, 21 Pac. 230; *Thalhimer v. Brinckerhoff*, 3 Cow. 623, 15 Am. Dec. 309; *Brooks v. Cooper*, 50 N. J. Eq. 761, 21 L. R. A. 617, 26 Atl. 978; *Blaisdell v. Ahern*, 144 Mass. 393, 59 Am. Rep. 99, 11 N. E. 681; 2 Parsons, Contr. p. 765; *Bunn v. Guy*, 4 East, 190; *Candler v. Candler*, Jac. 225.

Defendant secured employment that brought him a \$700 attorney fee, through the efforts of plaintiff; his witnesses were interviewed by plaintiff; he accepted the services of plaintiff and profited by plaintiff's work; but, when his fee was earned, and plaintiff could be of no further use to him, he concluded that the contract under which plaintiff had rendered him the services was champertous.

Oldham, C., filed the following opinion:

In this case the plaintiff in the court below brought his action against the defendant, alleging, among other things, that the defendant was a resident and practising attorney of Omaha, Nebraska; that "on or about the 1st day of November, 1893, plaintiff, at request of defendant, entered into the service of the defendant, to get parties in this and adjoining counties, or from any place, who wished the services of an attorney for litigation or for advice, to employ said defendant as their attorney, and said plaintiff was also to assist the defendant in looking after and procuring proper and legitimate witnesses, whose testimony was to be used in said cases; that for such services the defendant was to pay to plaintiff 25 per cent of the fees charged by the defendant, Martin Langdon, in said cases; that said fee of 25 per cent was to be due and payable from the defendant to the plaintiff as soon as the attorney's fees in said cases brought by virtue of the above contract were due and payable to the defendant, Martin Langdon; that the plaintiff was to enter upon his duties under said contract immediately after the same was entered into as above set forth; that the plaintiff did enter upon said services at once, and continued to work for said defendant under said contract until about the 1st day of December, 1898; that on or about the 10th day of February, 1894, Bridget McGreavy, guardian of John McGreavy, insane, through the advice and influence of plaintiff, employed said defend-

ant, Martin Langdon, as her attorney to bring an action for her, as such guardian, against W. G. Waters and others, to set the conveyance aside, for her ward, made by him to said W. G. Waters and others; the land in said conveyance being situated in Cuming county, Nebraska." The petition then sets out that after Bridget McGreavy, as guardian had employed the defendant, the plaintiff assisted defendant in procuring legitimate witnesses, testimony, and evidence to be used in behalf of said Bridget McGreavy in the district court of Cuming county, Nebraska; that the case was finally adjudicated and settled by the defendant as attorney for the said Bridget McGreavy; that the defendant received the amount of \$700 as an attorney's fee in said cause; and that, by reason of the contract between plaintiff and defendant, plaintiff was entitled to the sum of \$175 of this fee from the defendant. The defendant filed an answer to this petition, denying that he ever entered into such a contract, and alleging that the contract was against public policy, and other special defenses, which need not here be noticed. On issues thus formed, there was a trial to a jury, verdict for plaintiff, judgment on the verdict, and defendant brings error to this court.

Numerous errors in the proceedings of the cause in the court below are called to our attention in the brief of plaintiff in error, only one of which it will be necessary to discuss; and that is whether or not this contract is against public policy and good morals, and therefore void. The substance of the contract is that the plaintiff, not an attorney at law, made an agreement with an attorney and counselor at law by which he was to procure litigants to employ the attorney, and procure legitimate witnesses to testify in behalf of the clients which he had solicited and persuaded to employ the defendant, and that, as compensation for such services, he was to receive 25 per cent of the fees earned by the defendant. Courts should only declare contracts void as against public policy when expressly or impliedly forbidden by the paramount law, or by some principle of the common law, or by the provisions of a statute. What the public policy is, must be determined by the Constitution, the laws, the course of administration, and decisions of the courts of last resort of the state. *Licenses Tax Cases*, 5 Wall. 469, 18 L. ed. 500; *Luz v. Haggin*, 69 Cal. 308, 10 Pac. 674. Hence, to determine what the public policy of this state is with reference to contracts of the nature of the one at issue, it is necessary to first examine such legislative enactments of this state as are declarative of the rights and duties of attorneys and counselors at law.

Comp. Stat., chap. 7, § 1, provides that "no person shall be admitted to practise as an attorney or counselor at law, or to commence, conduct, or defend any action or proceeding in which he is not a party concerned, either by using or subscribing his own name, or the name of any other person, in any court of record in this state, unless

he has been previously admitted to the bar by order of the supreme court, or of two judges thereof," etc. Section 2 then provides for the examination of candidates for admission to the bar. Section 3 provides for the admission of practising attorneys from other states. Section 4 requires that every attorney shall take an oath to support the Constitution of the United States, the Constitution of the state, and to faithfully discharge the duties of an attorney and counselor. Section 5 provides, among other things, that it is the duty of attorneys and counselors "to maintain the respect due to the courts of justice and to judicial officers; to counsel or maintain no other actions, proceedings, or defenses, than those which appear to him legal and just, except the defense of a person charged with a public offense. . . . Not to encourage the commencement or continuance of an action or proceeding from any motive of passion or interest." Section 6 provides for the disbarment of attorneys who are guilty of deceit or collusion, and consent thereto with the intent to deceive a court or judge, or a party to an action; and § 7 defines the powers of attorneys with reference to the execution of bonds for appeal and other papers necessary and proper for the prosecution of a suit, and confers the right to bind the client by agreement in respect to any proceeding within the scope of his proper duties or powers, and the right to receive money claimed by the client during the pendency of the action, before his discharge. Section 8 provides a lien for his services, and § 13 makes it the duty of an attorney to indorse his name on any original paper filed in the proceeding.

Even a cursory examination of these excerpts from the statute is sufficient to plainly indicate that it was the policy of the legislature of this state to absolutely exclude every one who has not complied with the provisions of chapter 7, *supra*, from engaging, either directly or indirectly, in the practice of law in any court of record in this state, in any case in which such person is not a party in interest. It is also apparent that it was the policy of the legislature to fix a high standard of professional ethics to govern the conduct of attorneys in their relations with clients and courts, and to protect litigants and courts of justice from the imposition of shysters, charlatans, and mountebanks. It seems to us that the contract in issue is but a thinly veiled subterfuge by which the plaintiff, who, it is conceded, was not a member of the bar, and who had never complied with any of the provisions of chapter 7, *supra*, for the purpose of authorizing him to engage in the practice of law, undertook to break into the conduct of proceedings in a court of record, to which he was not a party, by attempting to form a limited and silent partnership with one who had complied with the provisions of the law, and was entitled to the emoluments of the profession. Under a statute with no more stringent regulations governing the practice 60 L. R. A.

of law than our own, a contract on all fours with the one in the instant case was declared void, as against public policy and good morals, in *Alpers v. Hunt*, 86 Cal. 78, 9 L. R. A. 483, 24 Pac. 846. The case is supported in principle by the holdings in *Burt v. Place*, 6 Cow. 431; *Munday v. Whisenhunt*, 90 N. C. 458. Where, as in the case at bar, a part of the consideration of the contract in issue was an agreement to furnish evidence in litigation to be commenced, the supreme court of New York, in *Lyon v. Hussey*, 82 Hun, 15, 31 N. Y. Supp. 281, said: "It is clear that such a contract is against public policy. The recognition of contracts of this character would be the introduction of all sorts of fraud and deception in proceedings before courts of justice, in order that parties might receive compensation out of the results of their successful manufacture of proofs to be presented to the court, thus holding out a premium upon subornation. The mere statement of the proposition seems to show that such a contract could never be recognized in any court of justice." See also *Lucas v. Allen*, 80 Ky. 681; *Getchell v. Welday*, 4 Ohio S. & C. P. Dec. 65.

We are therefore of the opinion that the contract on which this cause of action is founded is against public policy and good morals, and recommend that the judgment of the district court be reversed, and that plaintiff's petition be dismissed.

Barnes and Pound, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the petition dismissed.

Isabella A. OAKLEY, *Plff. in Err.*,
v.

John CARR.

(.....Neb.....)

*1. Notice of dishonor of a promissory note is sufficient, if sent to the last indorser by the first mail of the day following dishonor, even though such indorser is an agent for collection, merely, and he is entitled to one additional day to notify the indorser immediately preceding him.

2. Where such last indorser receives the notice of dishonor on Saturday,

*Headnotes by LOBINGER, C.

NOTE.—As to necessity and sufficiency of demand and notice of nonpayment to bind indorser on commercial paper, see also, in this series, notes to *Turner v. Iron Chief Min. Co.* (Wis.) 5 L. R. A. 533, and *Rosson v. Carroll* (Tenn.) 12 L. R. A. 727. Also *Beer v. Clifton* (Cal.) 20 L. R. A. 580; *American Nat. Bank v. Junk Bros. Lumber & Mfg. Co.* (Tenn.) 28 L. R. A. 492; *Pattillo v. Alexander* (Ga.) 29 L. R. A. 616; *Leonard v. Olson* (Iowa) 35 L. R. A. 381; *Auten v. Manistee Nat. Bank* (Ark.) 47 L. R. A. 329; and *Williams v. Parks* (Neb.) 50 L. R. A. 759.

his notice to the next prior indorser is timely if served on the following Monday.

3. The notice served by the last indorser need not be actually prepared by him, but he may adopt and utilize for that purpose a notice sent him by the protesting officer, addressed to the next prior indorser.
4. In an action on a promissory note, an averment by the holder that he caused due notice of dishonor to be served on the last indorser but one is sufficient, in the absence of a motion to make more specific, to admit evidence that the notice was given to the last indorser, and by him transmitted to the one next prior.

(December 17, 1902.)

ERROR to the District Court for Lancaster County to review a judgment in favor of defendant in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the Commissioner's opinion.

Mr. Samuel J. Tuttle, for plaintiff in error:

The actual delivery of the notice, the second day after the third day of grace (Sunday, the 10th, being excluded), where the maker and indorser reside in different places not reached by the same postoffice delivery, was sufficient.

Phelps v. Stocking, 21 Neb. 443, 32 N. W. 217.

When notice is sent by mail to a drawer or indorser residing in another town, it is sufficient if the holder deposits it in the postoffice in due time; and the fact that it is received at a late day, or not at all, by the party notified, is immaterial.

Randolph, Com. Paper, § 1300.

The time for giving notice is in all cases prolonged during reasonable and diligent inquiry made by the holder for the residence of the party to be notified.

Randolph, Com. Paper, § 1252.

One who indorses a bill for collection only should have notice of dishonor as a distinct indorser.

Randolph, Com. Paper, § 1241; *Wood River Bank v. First Nat. Bank*, 36 Neb. 744, 55 N. W. 239.

The indorser is not bound to forward notice to a previous party on the same day on which he receives it, but may wait until the next.

Linn v. Horton, 17 Wis. 151; *Eagle Bank v. Hathaway*, 5 Met. 212.

Mr. T. J. Doyle, for defendant in error:

A reasonable time in which to give notice has never been construed to mean but one thing. That is, where the residence of the indorser is known to the holder, and notice is to be given by mail, that he will mail the notice, properly directed to the indorser, in time to get out on the first mail which leaves within business hours after the day of dishonor.

Sending the notice to the First National Bank instead of to Mr. Carr was the sole cause of the delay. If the notice had been mailed on the evening of the day after dishonor L. R. A.

honored, Carr would have received it just as early as he did. Under all of the authorities, that would have been too late.

Barker v. Webster, 10 Iowa, 593; *Farmers' & M. Bank v. Builer*, 3 Litt. (Ky.) 498; *Bank of Orleans v. Whittemore*, 12 Gray, 469, 74 Am. Dec. 605; *Howland v. Adrian*, 30 N. J. L. 41; *Hirt v. Vincent*, 9 Misc. 87, 29 N. Y. Supp. 61; *Burgess v. Vreeland*, 24 N. J. L. 71, 59 Am. Dec. 408.

The indorsement of a note for collection and account does not pass title to indorsee, nor confer upon him authority to transfer the note, so as to charge the former indorsers under the law merchant.

Boyer v. Richardson, 52 Neb. 156, 71 N. W. 981.

Lebingier, C., filed the following opinion:

This is an action on a promissory note executed and delivered by one U. O. Anderson, of Seward, Nebraska, to defendant in error, who is a resident of Lincoln, and who, before maturity of the note, indorsed it in blank and sold it to plaintiff in error. By its terms, the note became due December 5, 1890; the three days of grace expiring December 8th. Some time before the first-named date it was deposited for collection with the First National Bank of Lincoln, which forwarded it to a correspondent bank at Seward, having first indorsed as follows: "Pay any bank or banker or order. First Nat. Bank, Lincoln, Nebr. H. S. Freeman, Cashier." On the last day of grace, a notary employed by the Seward bank presented the note for payment at the maker's office and residence, and, not finding him at either place, the note was duly protested. On the same day the notary mailed a notice of protest to the maker at Seward, another to the First National Bank of Lincoln, and a third directed as follows: "John Carr, Lincoln, Nebr. First National Bank;"—all of these notices being deposited in the Seward postoffice not later than the evening of December 8th. The first mail from Seward to Lincoln, if on time, was delivered at the Lincoln postoffice about 11, and there was a regular delivery by carriers about 12. The mail of the First National Bank, however, was delivered by its own special messenger; and the letter addressed to Carr was by this messenger carried with the bank's other mail, and appears to have reached the bank some time after noon of the 9th, which was Saturday. The cashier of the bank testifies that before 2 o'clock on that day a notice of dishonor from the Lincoln bank was mailed to defendant in error, but the latter testifies that he never received it. The notice from the notary at Seward, however, was given to the messenger of the Lincoln bank, and by him delivered to defendant in error on Monday forenoon at 10:40; one of the clerks having previously noted in pencil on the envelope defendant in error's address, "52 Brownell Block." This action is brought against the indorser alone, and the sole defense is that the notice of dishonor was not served in time. There was a trial to the

court, a jury being waived, and a judgment for defendant, of which plaintiff now seeks a reversal by error proceedings.

At common law, by the weight of authority, the indorser of a dishonored note or bill was entitled to notice thereof on the day following the dishonor, if he resided in the same town with the maker; and, if he resided elsewhere, the notice was required to be posted by the first seasonable mail sent on the day following dishonor. The rule was not universal. In *Bank of North America v. M'Knight*, 1 Yeates, 145, an indorser living in the same city with the maker was held, though not notified until the second day after dishonor. Moreover, we have in this state a statute governing such cases, which provides that "notice of nonpayment or nonacceptance thereof to the indorser within a reasonable time shall be adjudged due diligence." Comp. Stat. chap. 41, § 3. Whether this statute enlarges the common-law liability of the indorser, and restricts his rights as to notice, or whether it is intended merely to re-enact the rule of the *lex mercatoria*, is a question which we need not here determine, because, as we view it, the case at bar is governed by a different principle, presently to be discussed. Suffice it to say that the cases relied upon in the able and ingenious argument for defendant in error were decided in jurisdictions which are without such a statute as ours. But the same law merchant which required the notice of dishonor to be given or sent on the day following nonpayment also limited the duty of the holder or protesting officer in this regard to a notification of the last indorser, who in turn was allowed an additional day to send notice to the indorser immediately preceding him, and so on until all had been notified. 3 Randolph, Com. Paper, § 1261. Thus in the case before us the notary was not legally bound to notify Carr at all. It would have been sufficient had he simply sent the one notice to the First National Bank, which was the last indorser, and the latter would have had until the following business day to notify Carr. As the bank received its notice on Saturday, it would, under this rule, have until the following Monday to send its notice to defendant in error, for in such cases the intervening Sunday is not to be counted. *Eagle Bank v. Chapin*, 3 Pick. 180; *Agnew v. Bank of Gettysburg*, 2 Harr. & G. 478; and many cases cited in 7 Century Dig. § 1169.

It is claimed, however, that this doctrine should not be applied to a case like this, where the last indorser had received and indorsed the note simply for collection. It will be remembered that the indorsements themselves were not such as to disclose that the Lincoln bank was an indorsee for collection only. Carr had indorsed the note in blank, and the Lincoln bank had indorsed it merely so that its correspondent might collect, and there was nothing to indicate to the notary but that the Lincoln bank was the holder as well as the last indorser. But aside from this, no authority is cited for the

exception contended for by plaintiff in error in the case of indorsers who hold for collection only. On the other hand, there is ample support for the proposition that it is sufficient to notify such indorsers in the same way as other last indorsers are notified, and that prior indorsers may be held by virtue of the usual notice from them. *Carmena v. Bank of Louisiana*, 1 La. Ann. 369; *Eagle Bank v. Hathaway*, 5 Met. 212; *Brown v. Ferguson*, 4 Leigh, 39, 24 Am. Dec. 707; *Linn v. Horton*, 17 Wis. 151; 3 Randolph, Com. Paper, §§ 1241, 1262. *Boyer v. Richardson*, 52 Neb. 156, 71 N. W. 981, cited by defendant in error, in no way conflict with the foregoing. The court there was simply considering the effect of an indorsement for collection on the title to a note, and held that such an indorsee acquired no right of action against a prior indorser.

But it is contended that the "First National Bank has never so notified Carr. . . . They simply attended to the courtesy of seeing that Carr finally got a letter that was sent to them in their care, without even knowing its contents." If it had developed that the letter which the bank delivered to Carr by its messenger was not in fact a notice of dishonor, and none other had been sent, he, of course, would have been released from liability. In taking the course it did, the bank might have been assuming some risk, though it must be remembered that its agent claimed to have mailed a separate letter to Carr, and testified that it was their custom, out of ample caution, to adopt in such cases both methods of notification. But since the letter delivered to Carr was complete and sufficient notice of dishonor, we are unable to see how it can profit defendant in error that it was not actually prepared by the clerks or officers of the Lincoln bank. The latter had a right to employ such agencies as it saw fit, both in the preparation, and delivery of the notice. Among others, it had a right to adopt and utilize the work of the notary employed by its correspondent bank at Seward. The form of the notice and the time of its delivery are the important elements. Who may have prepared it, provided it was done by authority, we deem unimportant. It seems to us, therefore, that this letter from the notary, received by the Lincoln bank in the due course of mail, and sent by it with a notation of his office address to defendant in error on the next business day, was a sufficient compliance with the rules of the law merchant, as well as with the requirements of our statute.

But it is urged that plaintiff in error did not, in the trial court, rely upon this so-called doctrine of the "sequence of notices," but claimed to have notified Carr directly. What plaintiff in error's counsel may have urged in his argument below, we have no means of knowing, nor do we deem it material. In the petition, which is our only guide in determining what was the cause of action, it is alleged, after setting forth the

nonpayment of the note, that plaintiff "caused due notice of such demand and nonpayment to be forthwith served upon said defendant, said John Carr, and he duly received such notice." It will be seen that this is not an averment that plaintiff notified Carr directly, but merely that she "caused due notice . . . to be served;" and it would seem to constitute a sufficient compliance with § 129 of the Code, requiring the facts "which fix liability" to be stated. Whether the allegation might not have been open to a motion to make it more specific by stating the manner and means of service, we need not now inquire, for no motion of the kind was made; and, in its absence, the averment was certainly sufficient to permit the introduction of evidence that the notice was served by an agent for collection employed by the plaintiff. At any rate, no objection was made to the admission of such evidence, and we are unable to see how the alleged variance on the theory of recovery, even if it existed, could now avail defendant in error.

The conclusions at which we have arrived might, we think, be reached in another way, and still satisfy the strict requirements of the law merchant. Under that law, where a note or bill is sent by the holder to an agent in another town for presentment to the maker, the agent is allowed one day to post the notice of dishonor to his principal, and the latter is entitled to an additional day to send notice to the last indorser, and the agent is not required to notify the indorser directly, though this would afford them earlier notice. *Ellis v. Commercial Bank*, 7 How. (Miss.) 294, 40 Am. Dec. 63; *Lawson v. Farmers' Bank*, 1 Ohio St. 206; *Church v. Barlow*, 9 Pick. 547; *Bank of United States v. Goddard*, 5 Mason, 366, Fed. Cas. No. 917; *State Bank v. Ayers*, 7 N. J. L. 130, 11 Am. Dec. 535; *Randolph*, Com. Paper, § 1262. If, therefore, in the case at bar, the notary had sent the notice of dishonor directly to plaintiff in error, and she had received it in the due course of mail, and had presented her notice to defendant in error by the time the bank's messenger reached him, she would have been within the letter of the *lex mercatoria*. Can it make any legal difference that her place in the transaction was taken by her agent, the First National Bank? The Seward notary might well have thought that he was complying with this rule in sending the notice to the Lincoln bank, for the indorsements were such as to indicate that it was the holder. And as was well stated by Ross, J., in *First Nat. Bank v. Wood*, 51 Vt. 471, 31 Am. Rep. 692, where a notice of dishonor, sent to the wrong address, and thence forwarded, was held sufficient: "All the rules requiring the holder to use diligence to ascertain the residence of the indorser, and to leave notice at his place of business or residence, when they reside in the same town, or to mail notice as soon as the day following the day of the maturity of the note, addressed to him at his place of residence,"

when they reside in different towns, are made and enforced, that the indorser may be informed that his liability on the note has not been discharged by the party whose duty it was to pay the note at maturity. When, therefore, the indorser in fact receives notice in due season that the note has been duly presented for payment and protested, the purpose of the law has been accomplished, although the holder of the note has not complied with one of the established rules in regard to the use of diligence in giving notice."

It seems to us that in this case both the purpose and the letter of the law have been complied with, and we are forced to the conclusion that the learned trial judge erred in finding for the defendant. We recommend that the judgment be reversed, and remanded for further proceedings according to law.

Hastings and Kirkpatrick, CC., concur.

Per Curiam:

"For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and remanded for further proceedings according to law.

Rehearing denied.

Josephine HASLACK, *Plff. in Err.*,

v.

Theodore WOLF *et al.*

(.....Neb.....)

*A promissory note is not rendered nonnegotiable by an agreement to pay the sum named "with exchange" on a place other than that at which it is payable.

(December 3, 1902.)

ERROR to the District Court for Platte County to review a judgment in favor of defendants in an action brought to enforce payment of a promissory note. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. McAllister & Cornelius, for plaintiff in error:

A stipulation in an instrument for the payment of a certain sum of money, payable with current exchange on a place other than the place of payment, is not destructive of negotiability.

Clark v. Skeen, 61 Kan. 526, 49 L. R. A. 190, 60 Pac. 327; *Smith v. Kendall*, 9 Mich. 246, 80 Am. Dec. 83; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356; *Hoyt v. Jaf-*

*Headnote by POUND, C.

NOTE.—As to provision for exchange as affecting negotiability, see also, in this series, *Culbertson v. Nelson* (Iowa) 27 L. R. A. 222, and note, and *Clark v. Skeen* (Kan.) 49 L. R. A. 190.

fray, 29 Ill. 104; *Hastings v. Thompson*, 54 Minn. 184, 21 L. R. A. 178, 55 N. W. 968; *Whittle v. Fond du Lac Nat. Bank* (Tex. Civ. App.) 26 S. W. 1106; *Orr v. Hopkins*, 3 N. M. 25, 1 Pac. 181; *Bradley v. Lill*, 4 Biss. 473, Fed. Cas. No. 1,783; *Grutacop v. Woulweise*, 2 McLean, 581, Fed. Cas. No. 5,854; *Price v. Teal*, 4 McLean, 201, Fed. Cas. No. 11,417; *Dan. Neg. Inst.* § 54; *Tiedeman, Com. Paper*, § 28a; *Randolph, Com. Paper*, § 200; *Johnson v. Frisbie*, 15 Mich. 286; *Bullock v. Taylor*, 39 Mich. 137, 33 Am. Rep. 356.

Our supreme court has passed on other questions in a more liberal manner than some of the courts that have held that "with New York exchange" did not destroy the negotiability of a note.

Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811; *Kemp v. Klaus*, 8 Neb. 24; *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37; *Dobbins v. Oberman*, 17 Neb. 163, 22 N. W. 356; *Kirkwood v. First Nat. Bank*, 40 Neb. 484, 24 L. R. A. 444, 58 N. W. 1016.

Messrs. Reeder & Hobart, for defendants in error:

The note is nonnegotiable.

Culbertson v. Nelson, 93 Iowa, 187, 27 L. R. A. 222, 61 N. W. 854.

Found, C., filed the following opinion:

In *Garnett v. Myers* (Neb.) 91 N. W. 400, this court expressly left open the much-vexed question whether a note or bill for the payment of a certain sum "with exchange" is rendered nonnegotiable by the agreement to pay exchange. The subject has been discussed exhaustively in a number of recent cases, and now that the question is squarely presented, we have only to range ourselves upon the one side or the other, and indicate our reasons briefly. Most of the text-writers have held that such a stipulation has no effect upon the negotiability of the instrument. 1 *Dan. Neg. Inst.* § 54; 1 *Randolph, Com. Paper*, § 200; *Tiedeman, Com. Paper*, § 280; *Norton, Bills & Notes*, § 26. But it may be observed that these authors wrote, for the most part, before certain recent decisions, in which the opposite view has been asserted with much force and ability. The adjudicated cases are in conflict, and almost evenly balanced. The view that such a provision is without effect upon the negotiability of the instrument is supported by *Clark v. Skeen*, 61 Kan. 526, 49 L. R. A. 190, 60 Pac. 327; *Hastings v. Thompson*, 54 Minn. 184, 21 L. R. A. 178, 55 N. W. 968; *Smith v. Kendall*, 9 Mich. 241, 80 Am. Dec. 83, and subsequent decisions in Michigan; *Whittle v. Fond du Lac Nat. Bank* (Tex. Civ. App.) 26 S. W. 1106; *Morgan v. Edwards*, 53 Wis. 599, 40 Am. Rep. 781, 11 N. W. 21; *Bradley v. Lill*, 4 Biss. 473, Fed. Cas. No. 1,783. The contrary position is maintained in *Culbertson v. Nelson*, 93 Iowa, 187, 27 L. R. A. 222, 61 N. W. 854; *Flagg v. School Dist. No. 70*, 4 N. D. 30, 25 L. R. A. 363, 58 N. W. 499; *Nicely v. Commercial Bank*, 15 Ind. App. 563, 44 N. E. 572, and subsequent cases in 60 L. R. A.

Indiana; Fitzharris v. Leggatt, 10 Mo. App. 527; *First Nat. Bank v. Bynum*, 84 N. C. 24, 37 Am. Rep. 604; *Read v. McNulty*, 12 Rich. L. 445, 78 Am. Dec. 467, and subsequent cases in South Carolina; *Hughitt v. Johnson*, 28 Fed. 865, and several subsequent decisions in the Federal courts. Some of the cases on each side are open to obvious criticism. *Morgan v. Edwards* is a dictum as to this point, and *Bradley v. Lill* goes so far as to hold that an instrument payable "in exchange" on a certain point is negotiable. See *Chandler v. Calvert*, 87 Mo. App. 368. On the other hand, some of the decisions taking the opposite view are based on special provisions of statutes. The whole matter turns upon the question whether such a stipulation renders the amount uncertain, so as to destroy one of the essential elements of negotiability. While it is true that in a sense an uncertain element is imported into the instrument by the agreement to pay exchange, the difficulty is more specious than real. Business is carried on more or less in subordination to certain financial centers, to which and from which money is constantly flowing. When a note is made payable in Lincoln with Chicago exchange, the practical business effect is the same as if it had been payable in Chicago, but, for convenience, the parties had agreed that it might be paid at Lincoln, with the cost of transmission. *Clark v. Skeen*, 61 Kan. 526, 49 L. R. A. 190, 60 Pac. 327; *Morgan v. Edwards*, 53 Wis. 599, 40 Am. Rep. 781, 11 N. W. 21. Looked at in this way, the exchange becomes a mere incident, not affecting the amount of the debt itself, and analogous to such matters as attorneys' fees and costs of collection, which do not affect negotiability. As Mr. Daniel puts it: "The spirit of the rule requiring precision in the amount of negotiable instruments applies rather to principal amount than to the ancillary and incidental additions of interest or exchange." 1 *Dan. Neg. Inst.* § 54. These questions are primarily questions of business and business usage, and, so far as not foreclosed by any established course of decision, ought to be resolved in a liberal spirit, to promote the interests of business, rather than by a strict adherence to the letter of the rules. The policy of the rule as to negotiability is in no way infringed by the provision as to exchange. The custom and convenience of business men have introduced it in such instruments, and would, perhaps, afford sound reason, in view of the general approval of standard text-writers, for a modification of, or exception to, the general rule, if necessary. But there is sufficient ground to hold that the reason of the rule is unaffected, and the infringement of its letter, if any, is of trivial consequence.

It is argued that the provisions of the note in suit for payment of "attorneys' fees" generally, without specifying for what purpose, destroy negotiability. But we must give the instrument a reasonable construction. It is self-evident that fees for

collecting the note, if not paid at maturity, were referred to. As our law now stands, this clause was mere surplusage, and may be wholly disregarded.

Objection is made also to the petition. The allegations of that pleading are not as precise as they might be. But the defendant pleaded that the note was taken after maturity, and without consideration, and plaintiff denied these allegations generally. The parties went to trial upon the theory that those questions were in issue, and decisive of plaintiff's rights, and the trial court expressly based its decision upon the question whether the instrument was negotiable. The theory which the parties held below ought to bind them here, and the cause will be treated as all parties as well as the trial court there treated it.

We recommend that the judgment of the district court be reversed, and the cause remanded.

Barnes, C., concurs.

Oldham, C.:

I concur in the conclusion reached by my learned associate in this case, because I believe the opinion is in harmony with the former holdings of this court on the question of negotiability of the instrument, but on sound principle I believe the decision is wrong.

Per Curiam:

For the reasons given in the foregoing opinion, *the judgment of the District Court is reversed, and the cause remanded.*

ROCKFORD FIRE INSURANCE COMPANY, *Plff. in Err.*, v.

Frank R. HON et al.

(.....Neb.....)

1. An agreement between parties to a contract that neither shall maintain a suit thereon after breach—all differences to be settled by arbitration—is without binding force, as tending to oust the courts of their jurisdiction.

2. An agreement by which parties thereto stipulate in advance not to enforce, by a resort to a court of justice, a substantial right which may subsequently be involved in dispute between them, but to submit such right to the decision of a private tribunal, although other questions involved may be reserved for adjudication by the courts, cannot be enforced.

3. An insurance policy provided that the insurer should not be liable beyond the actual cash value of the prop-

*Headnotes by KIRKPATRICK, C.

NOTE.—As to effect of agreement to arbitrate on right to bring action, see also, in this series, *Kinney v. Baltimore & O. Employees' Asso.* (W. Va.) 15 L. R. A. 142, and *note*, and *Chapman v. Rockford Ins. Co.* (Wis.) 28 L. R. A. 405, 60 L. R. A.

erty at the time of loss; the loss or damage to be ascertained by the insured and the insurer, and, in case of disagreement, then by arbitrators selected in the manner indicated in the contract. *Held*, that when, in the first instance, the insured and insurer could not agree as to the extent of the loss, there was a valid and subsisting cause of action, subject to adjudication by a court of law, and that the stipulation to arbitrate the amount of loss could not be enforced, as tending to oust the jurisdiction of the courts.

(December 8, 1902.)

ERROR to the District Court for Lancaster County to review a judgment in favor of plaintiffs in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. F. M. Hall, C. C. Marlay, and Barger & Hicks for plaintiff in error.

Messrs. Halleck F. Rose and Willmer B. Oomstock for defendants in error.

Messrs. C. C. McNish and Greene, Breckenridge, & Kinsler, amici curiae:

The refusal of the insured to comply with the appraisal clause of the policies must abate this suit.

Langan v. Aitna Ins. Co. 96 Fed. 705; *Connecticut F. Ins. Co. v. Hamilton*, 8 C. C. A. 114, 10 U. S. App. 366, 59 Fed. 258; *Hamilton v. Phoenix Ins. Co.* 9 C. C. A. 530, 22 U. S. App. 164, 61 Fed. 379.

An agreement between parties to submit a single question, which may be the subject of dispute between them, to the judgment of arbitrators or appraisers will be gladly enforced; such an agreement not being one which ousts the jurisdiction of the court to determine the question of liability between the parties, and the enforcement of which would greatly simplify and minimize the labor of the court in determining the rights of the parties.

Bedell v. Kennedy, 109 N. Y. 153, 16 N. E. 326; *Knuche v. Chicago, M. & St. P. R. Co.* 34 Fed. 471; *Herrick v. Belknap*, 27 Vt. 673; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.* 50 N. Y. 250; *Scott v. Avery*, 5 H. L. Cas. 811; *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Faunce v. Burke*, 16 Pa. 469, 55 Am. Dec. 519; *O'Reilly v. Kerns*, 52 Pa. 214; *Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1086; *National Masonic Asso. v. Burr*, 44 Neb. 258, 62 N. W. 466.

The following courts enforce the appraisal clause of insurance policies in terms like those in this suit, as a condition precedent to the maintenance of an action:

Hamilton v. Liverpool & L. & G. Ins. Co. 136 U. S. 242, 34 L. ed. 419, 10 Sup. Ct. Rep. 945; *Gauche v. London & L. Ins. Co.* 4 Woods, 102, 10 Fed. 347; *Zalesky v. Home Ins. Co.* 102 Iowa, 613, 71 N. W. 566; *George Dee & Sons Co. v. Key City F. Ins. Co.* 104 Iowa, 167, 73 N. W. 594; *Westenhaver Bros. v. German American Ins. Co.* 113 Iowa, 726, 84 N. W. 718; *Gasser v. Sun Fire Office*, 42 Minn. 315, 44 N. W. 252; *Moeness v. German-American Ins. Co.* 50 Minn. 341, 52 N.

W. 932; *Levine v. Lancashire Ins. Co.* 66 Minn. 133, 68 N. W. 855; *Chapman v. Rockford Ins. Co.* 89 Wis. 572, 28 L. R. A. 405, 62 N. W. 422; *Chippewa Lumber Co. v. Phenix Ins. Co.* 80 Mich. 116, 44 N. W. 1055; *Brook v. Dwelling House Ins. Co.* 102 Mich. 583, 26 L. R. A. 623, 61 N. W. 67; *Niagara F. Ins. Co. v. Bishop*, 154 Ill. 9, 39 N. E. 1102; *Phœnix Ins. Co. v. Carnahan*, 63 Ohio St. 258, 58 N. E. 805; *Palatine Ins. Co. v. Morton-Scott-Robertson Co.* 106 Tenn. 558, 61 S. W. 787; *Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co.* 66 Cal. 253, 5 Pac. 232; *Carroll v. Girard F. Ins. Co.* 72 Cal. 297, 13 Pac. 863; *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Reed v. Washington F. & M. Ins. Co.* 138 Mass. 572; *Hutchinson v. Liverpool & L. & G. Ins. Co.* 153 Mass. 143, 10 L. R. A. 558, 26 N. E. 439; *Hall v. Norwalk F. Ins. Co.* 57 Conn. 105, 17 Atl. 356; *Wolff v. Liverpool & L. & G. Ins. Co.* 50 N. J. L. 453, 14 Atl. 562; *Pioneer Mfg. Co. v. Phœnix Assur. Co.* 106 N. C. 28, 10 S. E. 1057; *Herdon v. Lancashire Ins. Co.* 107 N. C. 191, 10 L. R. A. 53, 12 S. E. 241; *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209, 10 So. 297; *Scottish Union & Nat. Ins. Co. v. Olancy*, 71 Tex. 5, 8 S. W. 630.

Mirkpatrick, C., filed the following opinion:

This is an action brought to recover for a loss claimed to have accrued under a policy of insurance. The insured had judgment below, and the case is brought to this court upon error by the insurance company. The single question presented and requiring consideration is the validity of a provision in the policy making a submission of the question of the amount of loss to arbitrators, and an award thereon, a condition precedent to the right to maintain an action. The agreement providing for arbitration is as follows: "In the event of disagreement as to the amount of the loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." It has been ably and earnestly contended in briefs of counsel and in the argument at the bar that there is nothing in the provision quoted contrary to sound public policy, or contrary to the prior decisions of this court, and that it ought, therefore, to be given full force, rendering a refusal on the part of the insured to arbitrate a good plea in bar to the action.

It is an incident of every contract that a 60 L. R. A.

breach on the part of one of the parties thereto gives to the other a cause of action enforceable in a court of law or equity; and an agreement between parties to a contract that neither shall maintain a suit thereon after breach, any differences to be settled by arbitration, is without binding force, as tending to oust the jurisdiction of the courts. The doctrine is stated by Mr. Justice Hunt in *Home Ins. Co. v. Morse*, 20 Wall. 445-451, 22 L. ed. 365-368, as follows: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life, or his freedom, or his substantial rights. . . . In a civil case he may submit his particular suit, by his own consent, to an arbitration, or to the decision of a single judge. So, he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may, no doubt, waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." The case quoted from involved the validity of a contract between the state of Wisconsin and the Home Fire Insurance Company of New York, by which the latter agreed, in compliance with a statute of Wisconsin, not to remove any suit brought against it in the state courts for trial into the Federal courts, and the agreement was held to be nonenforceable. That decision announced the proposition that a party might, in any particular case, waive his right to remove his suit to the Federal courts, but that he could not in advance, by agreement, bind himself that, in case a future suit should arise, he would not avail himself of the right to remove it to such courts, because every man is entitled to resort to all the courts and invoke their protection, and cannot be held to an agreement, to enforce which would result in depriving him of a substantial right guaranteed by the law. The provision found in the Constitution of the state (Bill of Rights, § 13) embodies the same general proposition: "All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Thus it will be seen that a stipulation that no suit shall be maintainable upon a contract after breach is void. This proposition, we understand, is conceded in the case at bar; and, if the stipulation above quoted results in ousting the courts of jurisdiction, it must be held unenforceable.

But it is contended that the provision does not contemplate ousting the jurisdiction of the courts; that the contract merely provides for an adjustment by arbitration of the amount of the loss, leaving the question of liability to be adjudicated in the usual

channel of the courts. Between this kind of a stipulation, it is said, and one providing for the submission of all matters in dispute, including the question of liability, there is a definite distinction,—the former valid and enforceable, and the other admittedly opposed to the policy of the law. The theory of plaintiff in error is that under such a stipulation in the contract the award becomes a condition precedent to the right of action; that no cause of action accrues until the arbitrators have made an award. Such an agreement, it is contended, does not oust the courts of jurisdiction, for the reason that parties are at liberty to contract that, in the event of unliquidated damages arising from contract, such damages shall be liquidated and ascertained by a given mode; both parties binding themselves to refer that question to a private tribunal of their own selection, clothing that tribunal with power finally and conclusively to adjudicate that question. Stated in other terms, the contention of plaintiff in error amounts to a concession that the parties cannot bind themselves to settle the question whether the company is liable at all in this manner, because the policy of the law forbids such an agreement, but that they are free to stipulate that the amount of the loss shall be ultimately decided by a mode agreed upon, other than a resort to the courts. If this distinction is sound, the arbitration and award must be held, in accordance with the plain reading of the agreement, a condition precedent to a right of action. If, on the contrary, there is no real or substantial distinction in principle between an agreement to refer the whole controversy and an agreement to refer only a particular part of it, the agreement under consideration must, of course, be held to come within the doctrine prohibiting agreements which oust the courts of jurisdiction. An agreement, as we have already seen, that neither party should maintain an action on a contract, either at law or in equity,—any controversy to arise to be referred to arbitration,—cannot be enforced, upon the theory that the powers of all the courts may always be invoked by every citizen for the protection of his rights; that the enforcement of a valid and subsisting cause of action is a substantial right; and that he cannot be held to have bartered that away by any agreement made before it arose. Upon principle, therefore, we assume it to be true that an agreement by which the parties thereto bind themselves to refrain from resorting to the courts for the adjudication of a cause of action to arise between them in the future is void, and the real question in this case is whether this principle has been violated by the arbitration agreement pleaded.

In the contract upon which this action is brought, plaintiff in error agrees to be liable not beyond the actual cash value of the property at the time any loss or damage occurs. To the extent of such loss or damage, it does not question its liability. Further than this there is nothing in the contract by which the liability of the company is indi-

cated. All the residue of the clause relates to the mode of ascertaining or estimating the "actual cash value of the property at the time any loss or damage occurs." The contract further provides: "In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained" by appraisers; indicating the manner of their selection, and the rules to govern their deliberations. The award of the appraisers, of course, not being subject to review by a court of law or equity, and being unimpeachable except for fraud, becomes conclusive of the question of the amount of the loss. It is therefore apparent that, so far as the question of the amount of the loss is concerned, the party has, by the agreement into which he has entered, closed up all access to the courts. The agreement to arbitrate contemplates a reservation by the company and the insured of the question of liability in any event. Inasmuch as it is not to be assumed that the company would go to the trouble of an expensive arbitration of the amount of the loss, bearing its share of the cost, unless it was ready to concede its liability for some loss, the presumption would naturally be that, when arbitration of the loss is once undertaken, the extent of the loss is the question of chief importance to all concerned. But even if the question of the company's liability is not in every instance tacitly conceded by entering into arbitration of the amount of the loss, it is certain that in some instances this would be the case; and in every such instance, at least, all of the rights at stake between the parties would be wholly and exclusively in the hands of a private tribunal, to be finally adjudicated by them, in compliance with a contract entered into long before any dispute had arisen, and before the parties knew that any dispute would arise. Now, in a case such as that supposed, the company tacitly or expressly admitting its liability, what would be the question for settlement? Namely, the extent of the company's liability, measured "by the actual cash value of the property at the time any loss or damage occurs." Is it not a matter of very substantial interest to the parties that this question should be settled rightly? A settlement of the matter upon a basis which would give to the insured an amount either too small or too large would be for one of the parties to suffer, just to that extent, a deprivation of his property rights. But it is said the parties have agreed upon that mode of settlement, and, if one or the other should suffer such a deprivation, it must be held to come within the reasonable and necessary intendments of the contract. The answer is that the courts of law, established and maintained by society, with all the safeguards surrounding their administration of justice, are constituted and maintained for the specific purpose of settling just such differences. A jury may or may not be as competent and skilful in arriving at the exact amount of the loss as would be a board selected by the parties themselves; but the law gives to

either party the right to have a jury, safeguarded by all the machinery of a duly constituted court of justice, pass upon that question; and to this effect the Constitution (§ 6, Bill of Rights) has provided: "The right of trial by jury shall remain inviolate." It may be readily admitted that in such a case, after it has arisen, the party may submit this particular question, by his own consent, to arbitration, or to the decision of a single judge. But we cannot see upon what principle his agreement, made in advance, and binding himself before this right accrues, to forfeit it after it does accrue, can be specifically enforced against him. To so enforce it would be tantamount to saying that, while parties cannot by contract barter away all of their substantial rights which may later be involved in controversy between them, they can make a severance, and barter away the one which is likely to be of chief significance when the controversy does finally arise.

If the position contended for be correct, the principle would apply to all contracts. Should a person or corporation, employing a large number of servants, in each contract of employment stipulate that, in case of personal injury to the servant during employment, the amount of damage should be submitted for arbitration to a board of physicians, their determination of that question to be final and conclusive, the question of liability to remain for the determination of the courts, it will be hardly contended that such an agreement would be enforced; yet the principle involved would be identical with that in the case at bar. To recognize the existence of such a distinction would, it seems to us, be a plain evasion of a salutary doctrine firmly imbedded in the law,—that courts will not lend their aid in the enforcement of contracts the effect of which would be to close their doors to suitors who would otherwise be entitled to their protection.

In *Home Ins. Co. v. Morse*, 20 Wall. 445-460, 22 L. ed. 365-368, is found this language: "Should a citizen of New York enter into an agreement with the state of Wisconsin, upon whatever consideration, that he would in no case, when called into the courts of that state, or the Federal tribunals within it, demand a jury to determine any rights of property that might be called in question, but that such rights should in all such cases be submitted to arbitration or to the decision of a single judge, the authorities are clear that he would not thereby be debarred from resorting to the ordinary legal tribunals of the state." And if a citizen of New York could not be held, upon principle or authority, to such a contract as that supposed, with the state of Wisconsin, it seems to us equally clear that he could not be held to a contract with a citizen of that state, binding himself, in any suit thereafter to arise between them, not to demand a jury trial to determine any rights of property that might be called into question, but that such rights should, in any case to arise, be submitted to arbitration, or to the decision of a sin-

gle judge. Yet the latter is, according to our view, in effect, the contract under consideration in the case at bar; and we are of opinion that it cannot be enforced, but that it is revocable by either party at any time before arbitration is had.

We are not unmindful of the fact that there are many cases in both Federal and state courts recognizing the distinction sought to be maintained here. These decisions are for the most part based upon *Scott v. Avery*, 5 H. L. Cas. 811, decided in 1856. That was a case involving marine insurance, where the contract provided that the loss, as to amount, must first be settled by what was styled a "committee," which seems to have been a board of officers of the insurance company, but, if a difference should arise between the insured and the committee, such difference should be referred to arbitration,—the award of the arbitrators to be final,—with the further provision that, if the insured refused to accept the settlement made by the committee, the obtaining of the decision of the arbitrators was a condition precedent to the maintaining of an action. In that case it was conceded by all the lords that it had become the settled law that a contract which required all questions in controversy to be submitted to arbitrators, whose award should be final, was void, as a contract tending to oust the courts of their jurisdiction, and for that reason contrary to public policy; but it was held by a majority of the lords that the provision in the policy was valid because it only required that the question of amount be submitted to arbitration. We have made a very careful examination of the arguments advanced in the several opinions given by the lords in support of the conclusion reached by the majority, and, with all due respect, are forced to the conclusion that the position taken is unsound. The distinction urged does not seem to have any solid foundation upon which to rest. The real question is, Will parties bound by a contract to settle differences by arbitration which shall be final, and by stipulation entered into when the contract is formed, deprive themselves of the right to the protection of the courts? Suppose, in a controversy arising upon a loss sustained under an insurance policy, three distinct questions are presented for determination. It is conceded by all parties that an agreement to submit all of the questions to arbitration is against public policy and void. Upon what sound reason can it be said that an agreement to submit one or two of the questions in controversy can be sustained? As we have seen, the one or two questions may be the questions of vital importance, and the third may sink into insignificance, or may be entirely eliminated by the arbitration of the two questions. Or suppose ten questions are in controversy: Will the courts say that a contract to submit nine is valid, and will be enforced, so long as the party has one question left, concerning which he has a right to be heard in the courts. Of course, the one remaining question may be

of minor importance, and the party may not desire to go into the courts upon that. Yet, so long as the contract does not deprive him of the right to go into the courts upon all the questions involved, it is valid and will be enforced. It seems clear to us that an agreement which deprives a party of a right to the protection of the courts upon a single question, which may be the question of greatest importance in the controversy, violates the principle involved to the same extent as would an agreement requiring all matters to be submitted. If we say that an agreement to submit one question to arbitrators is valid, then there is no middle ground upon which to stand. If one question can be submitted, and the determination of the arbitrators be final, then all questions involved can, upon the same principle, be submitted. The distinction made by the learned lords in *Scott v. Avery* does not rest upon sound principles. It is a difference in degree, rather than in kind. The question was passed upon by the court in *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N. W. 406. The policy in that case, among other things, contained the following provision: "It is expressly stipulated by the parties hereto that no suit or action against this company shall be sustained in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claims in the manner above provided." Reece, Ch. J., in considering this clause in the policy, said: "As to the first of the above-quoted clauses, we apprehend that there is practically no dispute but that the whole provision is void." In the syllabus in that case it is said: "A provision in a policy that no suit or action against the insurer 'shall be sustained in any court of law or chancery until after an award shall have been obtained' by arbitration 'fixing the amount' due, after loss, is void; the effect of such provision being to oust the courts of their legitimate jurisdiction." It is said by counsel for plaintiff in error that the loss in that case arose from the destruction of a dwelling house and contents, and that the clause quoted in the policy was void as being contrary to the valued policy law, and that, while the decision in that case was correct, the learned judge writing the opinion gave a wrong reason. In this counsel is in error. The valued policy law took effect July 1, 1889, while the policy considered in that case was written December 21, 1886. The question under consideration has been more or less directly involved in the following cases: *Union Ins. Co. v. Barwick*, 36 Neb. 223, 54 N. W. 519; *Home F. Ins. Co. v. Bean*, 42 Neb. 537, 60 N. W. 907; *Ins. Co. of N. A. v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Home F. Ins. Co. v. Kennedy*, 47 Neb. 138, 66 N. W. 278; *Schrandt v. Young*, 62 Neb. 254, 86 N. W. 1085. And the doctrine has been assumed to be firmly established in the body of our law; but because of the very earnest and able manner in which the doctrine has been challenged by counsel for plaintiff in error, and the authorities cited from various courts 60 L. R. A.

entitled to fair consideration, we have seen fit to re-examine the question; but we cannot, on principle, see any valid reason why a doctrine which has stood for many years, and which has become a rule of property, should now be abandoned. On the contrary, we can see many reasons why it should be adhered to.

From what has been said, it follows that the judgment of the district court should be affirmed, and it is therefore recommended that the same be done.

Hastings, C., concurs.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

Catherine McENTEE et al., Appts.,
v.

Thomas BONACUM et al.

(.....Neb.....)

- *1. Ordinarily the right to the custody and to decide upon the final place of burial of the body of a deceased unmarried person resides in his next of kin, and this right the courts will not lightly disregard, or treat as having been waived or relinquished, except upon clear and satisfactory evidence of conduct indicative of a free and voluntary intent and purpose to that end.
2. Evidence examined, and held not sufficient to bring this case within the above-mentioned exception.
3. Territorial areas, described in the nomenclature of Roman Catholic Church as "parishes," are not recognized by the law as corporate or political entities, and, if they were such, the church could not legislate concerning them.

(December 8, 1902.)

APPEAL by plaintiffs from a judgment of the District Court for Lancaster County in defendants' favor in an action brought to restrain defendants from interfering with their removal of the remains of Edward P. Cagney, deceased. *Reversed*.

The facts are stated in the Commissioner's opinion.

Mr. Charles O. Whedon, for appellants: The judgment dismissing the action and enjoining the appellants from removing the remains of Edward P. Cagney in the manner and for the purposes intended by appellants cannot be justified by the facts as

*Headnotes by AMES, C.

NOTE.—As to right to control disposition of dead body, see also in this series, *note to Larson v. Chase* (Minn.) 14 L. R. A. 85; *Hackett v. Hackett* (R. I.) 19 L. R. A. 558; *Choppin v. Dauphin* (La.) 33 L. R. A. 138; *Thompson v. Deeds* (Iowa) 35 L. R. A. 56; *O'Donnell v. Slack* (Cal.) 43 L. R. A. 388; *Wright v. Hollywood Cemetery Corp.* (Ga.) 52 L. R. A. 621; and *Enos v. Snyder* (Cal.) 53 L. R. A. 221.

disclosed by the testimony, or by the law applicable to those facts.

Weld v. Walker, 130 Mass. 422, 39 Am. Rep. 465; *Re Beekman Street*, 4 Bradf. 503, Appx.; *Bogert v. Indianapolis*, 13 Ind. 134; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Snyder v. Snyder*, 60 How. Pr. 371; *Smiley v. Bartlett*, 6 Ohio C. C. 234; *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85, 50 N. W. 238; *Reinhart v. Wright*, 125 Ind. 536, 9 L. R. A. 514, 25 N. E. 822; *Garvey v. McCue*, 3 Redf. 313; *Fox v. Gordon*, 16 Phila. 185; *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 53 Pac. 906.

It may well be doubted if a person can make a testamentary disposition of his remains.

Williams v. Williams, L. R. 20 Ch. Div. 659; *Enos v. Snyder*, 131 Cal. 68, 53 L. R. A. 221, 63 Pac. 170.

Messrs. Sawyer & Snell, for appellees:

It is a felony to remove the body of a dead human being from any cemetery where the same may have been buried without first having obtained the consent for such removal from the lawfully constituted authority thereof.

Neb. Stat. §§ 244, 245a.

The executor, in directing the form of the burial, should obey the express reasonable wishes of the testator as to the disposition of his remains, even though they are not in accord with the wishes of the next of kin.

Bemison's Estate, 9 Phila. 355; *Larson v. Chase*, 47 Minn. 307, 14 L. R. A. 85, 50 N. W. 238.

There is no property in a corpse; the relations have, in regard to it, the right of interment, and this right having been once exercised by the father, though against the husband's consent, or by the husband, though against the consent of the father, no right to the corpse remains except to protect it from insult.

Guthrie v. Weaver, 1 Mo. App. 136.

The wishes of the deceased as to where his remains shall repose will be observed by the court.

Johnston v. Marinus, 18 Abb. N. C. 75; *Secor Case*, 10 Alb. L. J. 70; *Peters v. Peters*, 43 N. J. Eq. 140, 10 Atl. 742; *Pierce v. Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667; *Lourie v. Plitt*, 11 Phila. 303; *Re Donn*, 14 N. Y. Supp. 189.

Disturbance of the remains of the dead is not encouraged.

Choppin v. Dauphin, 48 La. Ann. 1220, 33 L. R. A. 133, 20 So. 681; *Secor Case*, 10 Alb. L. J. 70; *Lourie v. Plitt*, 11 Phila. 303; *People ex rel. Coppers v. St. Patrick's Cathedral*, 21 Hun, 184, Reversing 7 Abb. N. C. 121.

When a body has once been buried no one has the right to remove it without the consent of the owner of the grave, or leave of the proper ecclesiastical, municipal, or judicial authority.

Weld v. Walker, 130 Mass. 423, 39 Am. Rep. 465; *Reg. v. Sharpe*, Dears. & B. C. C. 160, 7 Cox C. C. 214.
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On motion for rehearing.

Where the body has been buried, the matter of consent is a controlling element.

Hackett v. Hackett, 18 R. I. 155, 19 L. R. A. 558, 26 Atl. 42.

Ames, C., filed the following opinion:

At the times hereinafter mentioned, Mt. Calvary Cemetery was a tract of land in the vicinity of the city of Lincoln, in this state, set apart as a burial place for the communicants of the Roman Catholic Church and their relatives, the legal title to the tract being in the defendant the Reverend Thomas Bonacum, as bishop of the diocese, and previously in his predecessor in office. Edward P. Cagney, now deceased, was the son of the plaintiff Catherine McEntee by a former husband, and the brother of the plaintiff Marista Cagney, and a half-brother to David C. McEntee, son of Catherine. So far as appears from the record, the plaintiffs are the only relatives by blood of the deceased who were living at the time of the beginning of this action. Edward's father died when he was a child, and at about the age of nine or ten years he was taken into the family of his mother's brother, John Fitzgerald, by whom he was nurtured and educated, and by whom he was provided with employment after he had attained to sufficient maturity. From the beginning he made his home continuously and exclusively with his uncle, who, and whose family, appear to have regarded him with a warm affection, which was fully reciprocated; but there was never any estrangement between him and the plaintiffs, or any of them. He died at the home of his uncle in Lincoln in the month of April, 1891, and was buried in the above-mentioned cemetery in a plot of ground, which, by some means or procedure, not described in the record, had been assigned or allotted for the use as a burial place of the uncle and his relatives. A few years later the uncle also died, and was buried in the same plot; his widow, the defendant Mary Fitzgerald, being appointed as the sole administratrix of his estate. She was not related to the deceased otherwise than by her marriage to his uncle, and as to what right or authority, if any, over this parcel of land or over the subject of this litigation, her appointment conferred upon her, the record and briefs of counsel are silent. The defendant Walton G. Roberts is an undertaker, and is described as a trustee of the cemetery, but what were his powers or duties as such, or what were his official relations, if any, to the church or to the land, the legal title to which was, as we have said, in the bishop, we are not informed. The property is described in one of the so-called "statutes" of the diocese as belonging to the parish in which it is situated, though it certainly does not so belong in a legal sense—First, because its title is vested elsewhere; and, second, because the law does not recognize any such territorial subdivision or legal entity as a parish, and concerning such political corporations as the state does contain the church does not possess any power of

legislation. Until further advised, we shall feel obliged to say that the defendant Roberts appeared to have no title or interest, personal or otherwise, in the controversy. During all these times the plaintiff Catherine McEntee and her children Marieta and David C. were living, and they now live at the city of Plattsmouth, in this state, where they have burial rights in a Catholic cemetery, in which one of her sons is now buried, and where she, being very old, anticipates that before very long she will herself be also interred. Animated by a desire that ultimately her family should, as far as possible, be brought together at this final resting place, she applied in May, 1901, to the defendants Roberts, Fitzgerald, and Bonacum for permission to remove the body of her son from the cemetery at Lincoln to that at Plattsmouth. The request was denied by each of the defendants, and, upon repairing to the Lincoln burial ground with vehicles and apparatus requisite to carry out the object she had in view, she was met at the entrance by a person in charge of the premises, who threatened her with prosecution if she should not desist. Thereupon she and her two children began this action to perpetually enjoin the defendants, and each of them, from preventing her carrying out her aforesaid desires, or from obstructing her in so doing. On the trial the bishop testified, in substance, that he had no interest or inclination in the matter, except in so far as he deemed it to be his official duty to protect the rights and maintain the status of persons to whom burial privileges in the cemetery had been allotted. The pleadings are not divergent in any essential degree as to any of the above-recited facts, which, except as below stated, are all that we think material in the present inquiry. The defensive matter stated in the answer is that Edward P. Cagney, "long prior to his death, had expressed a wish that his remains be interred in the family burying ground of said John Fitzgerald, and had selected for that purpose, by and with the consent of the said John Fitzgerald and Mary Fitzgerald," the plot where he was in fact buried, "and it was his dying wish that his former request in that behalf should be carried out." It is further alleged that after his decease the said John and Mary, "in pursuance of said wish, and without any opposition or remonstrances whatever on the behalf of the plaintiffs, or any of them, or anyone else," caused his body to be buried at the spot designated. That a dying request by a decedent as to the disposition of his remains is obligatory upon his next of kin, we very much doubt. Probably, if, in this case, such a request had consigned the body to a dissecting table, all the parties to this action would have unanimously repudiated it as an obligation upon the living. But we need not decide the question at this time, because the answer does not allege such request. It alleges a wish as consequent upon a request made "long prior," but it is not alleged that the wish was expressed by word or gesture, and, so far as appears from the pleading, it

may have been a mere inference from the precedent request. It appears from the evidence that the request referred to was made some eleven years before the death of Edward, who died unmarried, at about the age of twenty-one years, so that at the time he made it he was a child of nine or ten years of age, who had been living with his uncle something more than a year. This request was made of the Fitzgeralds alone, and, if it was repeated,—about which there is some doubt,—it was repeated to them alone. It did not come to the knowledge of the plaintiffs, or of any of them, until after Edward had died. This falls far short of being a dying request, or of proving a dying wish. The allegation that the burial was "without the opposition or remonstrance" of the plaintiffs is, we think, immaterial. The great weight, if not the unanimous voice, of the authorities is that the right of disposition of the body of a deceased person resides in his or her surviving consort or next of kin, and we think this court would be unwarranted in holding that such right can be relinquished, if at all, without some affirmative act evidencing a deliberate purpose so to do. That the plaintiffs, or any of them, ever committed such an act, is not only not alleged, but it is not proved. What the evidence does establish quite clearly, and all that it tends to establish, is that when the body was lying in wait for the grave a discussion arose about the place of sepulture, the plaintiffs then expressing a desire that it should be at Plattsmouth, and that, after having been repeatedly besieged by the Fitzgeralds and by a priest of the church, they reluctantly ceased, for the time being, their active opposition to the burial which took place. But that they ever freely and voluntarily consented to it there is not a syllable of evidence to prove. We do not think that this is a case to which the doctrine of estoppel applies, but, if it was so, the evidence would be insufficient to maintain the issue on behalf of the defense. The right of a surviving husband or wife, or, if there be none, of the next of kin, to have the custody of the body of a deceased person, and decide upon the place of its final burial, is supported by the better reason, and by the almost unanimous voice of the authorities. There are, of course, exceptions, as there are to nearly all general rules; but they arise for the most part out of some such circumstances as would deprive a natural guardian of the custody of a living child. The sentiments, sympathies, and affectionate wishes of parents and near relatives concerning their deceased children and next of kin are not to be lightly set aside at the instance of strangers to the blood or of distant relatives. *Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Wynkoop v. Wynkoop*, 42 Pa. 293, 82 Am. Dec. 506; *Snyder v. Snyder*, 60 How. Pr. 371; *Re Beckman Street*, 4 Bradf. 507, Appx.; *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906; *Smiley v. Bartlett*, 6 Ohio C. C. 234.

We do not think that the record in this

case offers any occasion for an exception. The district court dismissed the plaintiffs' petition, and granted a perpetual injunction in behalf of the defendants. The plaintiffs appeal. We recommend that the judgment of the district court be reversed, and that a judgment be rendered in this court according with the prayer of the petition.

Albert and Duffie, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, it is ordered that *the judgment of the District Court be reversed*, and that a judgment be rendered in this court according with the prayer of the petition.

Petition for rehearing denied.

**Michael O'NEILL, Plff. in Err.,
v.**

**CHICAGO, ROCK ISLAND, & PACIFIC
RAILROAD COMPANY.**

(.....Neb.....)

*An employer is not liable in damages for the consequences of mere error in judgment in furnishing structures, machinery, and appliances for the use of his servants in the prosecution of his business, unless it is shown that such error is itself the result of negligent or wilful ignorance or inattention.

(June 19, 1901.)

ERROR to the District Court for Sarpy County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinions.

Messrs. M. F. Harrington and James Hassett for plaintiff in error.

Mr. M. A. Low, with **Messrs. W. F. Evans and Woolworth & McHugh**, for defendant in error:

On motion for rehearing.

Mere opinion evidence that the use of the block guard rail as an appliance would lessen the dangers simply to the switchmen and brakemen is insufficient to warrant an inference of negligence.

McGinnis v. Canada Southern Bridge Co. 49 Mich. 466, 13 N. W. 819; *Chicago & A. R. Co. v. Few*, 15 Ill. App. 125.

As there is a difference of opinion among railroad men, and a difference of practice among railroad companies, with respect to these guard rails, some favoring and using

the appliance of an unblocked guard rail, and others favoring and using the appliance of a blocked guard rail, the question as to which appliance shall be used is a matter of judgment to be determined by the railroad managers for themselves, and the selection of neither one can be held to be negligence.

Titus v. Bradford, B. & K. R. Co. 136 Pa. 618, 20 Atl. 517; *Kehler v. Schwenk*, 144 Pa. 348, 13 L. R. A. 374, 22 Atl. 910; *Reese v. Hershey*, 163 Pa. 253, 29 Atl. 907; *Dooner v. Delaware & H. Canal Co.* 171 Pa. 581, 33 Atl. 415; *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 31, 36 N. E. 813; *Louisville & N. R. Co. v. Hall*, 91 Ala. 112, 8 So. 371; *McGinnis v. Canada Southern Bridge Co.* 49 Mich. 466, 13 N. W. 819; *Missouri P. R. Co. v. Baater*, 42 Neb. 793, 60 N. W. 1044; *Southern P. Co. v. Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530.

Messrs. L. W. Billingsley, R. J. Greene, and William V. Allen also for defendant in error.

Albert, C., filed the following opinion:

This is an action brought by the plaintiff to recover for personal injuries sustained by him by reason of the alleged negligence of the defendant. At the close of the testimony the court directed a verdict for the defendant, and from a judgment rendered thereon the plaintiff prosecutes error to this court.

At the threshold of this case we are met by an objection to the bill of exceptions. The defendant insists that a part of the evidence is omitted therefrom, and for that reason the bill of exceptions should be disregarded. The evidence which it is claimed is omitted consists of ponderous articles, which do not admit of physical attachment to the record proper. These articles are all referred to in the written portion of the bill of exceptions, and articles answering to such reference were filed with the record in the case, and produced at the hearing in this court, bearing the marks of identification of the official reporter of the trial court. Their identity is unchallenged, save in the course of the argument. Under such circumstances, the articles produced will be regarded as a part of the bill of exceptions. The bill of exceptions, therefore, is complete, and will be considered as a part of the record in the case.

Coming down to the merits of the case, it is undisputed that at the time of the injuries complained of the plaintiff was in the service of the defendant in the capacity of brakemen on one of its freight trains. In the course of his employment he stepped between two cars to uncouple them. While between the cars his foot caught between the guard rail and one of the main rails, and, before he could extricate himself, he was struck by one of the cars, thrown down, and part of the train passed over both his legs, whereby they were crushed and mangled so that amputation was necessary. The negligence imputed to the defendant by the plaintiff is its omission to fill or block the space between the guard and the main rail of the

***Headnotes by Ames, C.**

NOTE.—As to the liability of an employer for injuries received by servants owing to the want of blocking at switches, see also *Narramore v. Cleveland, C. C. & St. L. R. Co.* (C. C. App. 6th C.) 48 L. R. A. 63.
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road. That the guard rail is a source of danger to those employed in operating trains is sufficiently clear from the evidence. It is an ordinary iron rail, varying in length according to the requirements of the particular place. It is placed on the inner side of the main rail, and parallel with it, at points on the road where there is danger of derailment. The space between the guard and main rail is usually about 4 inches, except at the ends of the former, which are somewhat curved. What renders this contrivance dangerous is that the rails in cross sections are in the form of the letter "T," and the guard rail being curved, at its ends, from the main rail, the foot of one walking on the track is liable to be forced into the space between the two rails, and, when it is, it is difficult to withdraw it. It sufficiently appears from the evidence that, long prior to the injury complained of most railway systems had adopted the precaution of blocking the space between the two rails with wood, thereby lessening the danger to the employees. As to the relative advantages and disadvantages of this precaution, the evidence is conflicting; but, the court having directed a verdict, it will suffice for present purposes to say that there was sufficient evidence to sustain a finding that ordinary care and prudence, and a due regard for the safety of its employees, required the defendant to keep such places blocked, and that the injury to the plaintiff would not have occurred but for the omission of the defendant in this regard. In other words, there was sufficient evidence to establish negligence on the part of the defendant. The defendant invokes the rule that a servant, by his contract of service, assumes the risks and dangers incident to his employment, and insists that such rule relieves it of liability for the injury sustained by the plaintiff. That the servant, by his contract of service, assumes certain risks, is true. Just what such risks are, we are not required to determine in this case, because it is sufficient to say that the negligence of his employer is not one of the risks assumed. On the contrary, a servant has a right to assume that his employer has used ordinary care and prudence to insure his safety in the course of his employment. *Seley v. Southern P. Co.* 6 Utah, 319, 23 Pac. 751; *Miller v. Southern P. Co.* 20 Or. 285, 26 Pac. 70; *Nord Deutscher Lloyd S. S. Co. v. Ingebreghsten*, 57 N. J. L. 400, 31 Atl. 619; *Carter v. Oliver Oil Co.* 34 S. C. 211, 13 S. E. 419; *Chicago & E. I. R. Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021; *Southern P. Co. v. Yeargin*, 48 C. C. A. 497, 109 Fed. 436. We have not overlooked the case of *Missouri P. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044. We do not deem it necessary to discuss the rule laid down in that case, because, in our opinion it is not applicable to the state of facts shown by this record. In that case it was neither alleged nor shown in evidence that the plaintiff was ignorant of the defects causing injury. In the reasoning employed in the deduction of the rule in that case, great stress is laid on that omission. In the

present case it is alleged in the petition and shown by the evidence that the plaintiff had been in the employ of the defendant but a short time when the injury occurred, and was ignorant of the defect causing the injury. Hence the rule stated in the case referred to does not apply to the one at bar.

This brings us to what we regard as the most difficult question presented by the record, and that is whether the plaintiff himself was guilty of such negligence in the premises as to preclude a recovery. It is conclusively established that the train by which the plaintiff was injured at the time of such injury was under his control and direction; that, at the time he stepped between the cars to uncouple them, they were moving at the rate of about 4 or 5 miles an hour; that he might, by a mere signal, have had them stopped, and thus effected the uncoupling without danger to himself. There is evidence sufficient to sustain a finding that the plaintiff, though an experienced man, had been in the employ of the defendant but a short time when the injury occurred, and was ignorant of the guard rail at the point where the injury occurred. The defendant insists that the plaintiff's acts, under the circumstances, amount to contributory negligence, and bar a recovery. It would serve no useful purpose to cite authorities in support of the general rule that there can be no recovery if the negligence of the injured party proximately contributed to the injury. The soundness of the rule is not questioned. The only question is whether it was correctly applied in this case. In other words, the question is whether the trial court was warranted in holding, as a matter of law, that the acts of the plaintiff, in the light of all the circumstances, constitute such negligence as would defeat a recovery. Negligence is rarely an unmixed question of law. It has been defined by this court as doing that which an ordinarily careful and prudent man would not do under the existing circumstances. *Dailey v. Burlington & M. River R. Co.* 58 Neb. 400, 78 N. W. 722. The risk involved is the deterring cause. If the risk is so great that an ordinarily careful and prudent man would not, under the circumstances, assume it, then to assume it is negligence. The magnitude of the risk is to be determined by many considerations. Among them are the experience and skill of the individual in the performance of such acts, the time and place and the instrumentalities involved. These and other elements affecting the risk, which readily suggest themselves, the plaintiff was bound to take into account in deciding whether to assume the risk of going between the moving cars to uncouple them. But he was not required to weigh the chances of negligence on the part of the defendant. On the contrary, he had a right to assume that it had used ordinary care, and taken due precautions to protect its employees from danger. He was not required to anticipate the negligence of his employer, but had a right to assume that it had performed its duty. The case just cited amply

sustains this proposition. Such an assumption is not only warranted, but is essential to the successful operation of a railroad, which will not admit of the employee's stopping to weigh the probabilities of negligence or a mistake on the part of his superiors, but requires prompt and unquestioning obedience. This leaves, then, the bare question whether, as a matter of law, one who goes between cars, moving at the rate of 4 or 5 miles an hour, on a road where ordinary precautions have been taken for the safety of the employees, is guilty of negligence. As before stated, negligence is seldom an unmixed question of law. Whether an ordinarily careful and prudent man would do a particular act depends upon the attendant risk. As we have seen, the risk depends in part on the individual doing the act. A young man with long experience as a brakeman might go between moving cars and uncouple them without incurring any serious risk, while the same act by an old and inexperienced man would be perilous in the extreme. Again, the risk would vary according to the condition of the road; being greater if it should be rough and uneven, or covered with ice and snow, than if smooth and level, and free from such covering. These and an almost infinite number of other elements must be taken into account in estimating the risk incurred by the individual doing the act. In view of the manifold factors entering the problem of estimating the risk, it is impossible to say, as a matter of law, what an ordinarily careful and prudent man, under the circumstances, would do. From the evidence, reasonable minds might reach different conclusions; hence, the question was one of fact for the determination of the jury. *Omaha Street R. Co. v. Martin*, 48 Neb. 65, 66 N. W. 1007; *Omaha & K. Valley R. Co. v. Morgan*, 40 Neb. 604, 59 N. W. 81; *Trott v. Chicago, R. I. & P. R. Co.* 115 Iowa, 80, 86 N. W. 33; *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645, 58 N. W. 1120. It follows, therefore, that the trial court erred in directing a verdict for the defendant, and the judgment should be reversed, and the cause remanded for a new trial; and such is our recommendation.

A petition for rehearing having been filed, Ames, C., on December 3, 1902, filed the following response thereto:

This was submitted and decided at a former term of the court, and an opinion filed on the 19th day of June, 1901. See 62 Neb. 358, 86 N. W. 1098. Afterwards a motion for a rehearing was granted, and the cause has been exhaustively reargued by the counsel for both parties, and resubmitted for our consideration. The vital question in the case is one of extreme importance, not only to the parties thereto and to railroad companies, but to all persons making use of mechanical devices in the conduct of their business, and to their servants and employees, and to the public generally. We do not conceive that, in the absence of legislation, any different rule of liability or responsibility is applicable to railroad companies than

to other persons under substantially similar circumstances. The plaintiff in error was injured in the service of the company by reason of having one of his feet caught under an unblocked guard rail while he was attempting to uncouple some cars belonging to one of the trains of the defendant. Other circumstances of the accident are set out in the former opinion, but are not required to be repeated here. The jury returned a verdict for the defendant in obedience to a peremptory instruction by the court. The charge of negligence by the company consists in its omission to block the rail. We are convinced that we fell into error of fact in the statement in the former opinion that "it sufficiently appears from the evidence that, long prior to the injury complained of, most railway systems had adopted the precaution of blocking the space between the two rails with wood, thereby lessening the danger to the employees." A more thorough examination of the record, aided by a more complete analysis thereof by counsel than we were favored with on the former hearing, has disclosed that there were wide differences of opinion between railway companies and their skilled managers with respect to the relative safety to their servants and to the public of the blocked and unblocked guard rails; that a very large number—perhaps a majority—of the principal railway systems of the country continue the use of unblocked rails; and that in some instances the managers of the companies have used the blocked and unblocked, alternately, because of an inability to satisfy their own minds which, upon the whole, is the safer and more prudent course to pursue. There is also some evidence that in the opinion of some managers the relative safety of the use of the device of blocking, and the contrary, is dependent upon the situation of the road to which it may be applied, and to the character of the soil over which the road extends, and the liability of the spaces between the rails becoming filled up with drifting sand and dirt. But the plaintiff offered no evidence to prove what is the effect, if any, of the use of blocks upon the safety of the transportation of persons and property over the railways, or the facility of moving trains. Upon this state of the record, can it be properly said that a railroad company is negligent because of using, or of failing to use, the block? We think not. It is a case not analogous to the use of defective machinery, or of omitting the use of a device generally approved, and obviously adapted to prevent or lessen a known and specific danger. The rule of law is that in such cases the employer must exercise such care and skill as, under the circumstances, reasonable and ordinary prudence requires to be used. The phraseology by which the rule is variously stated is somewhat indeterminate, because the idea sought to be expressed is in like degree vague, and its application in any case depends in a great measure upon the attendant facts; but it may be said generally that a man cannot be held responsible in damages for the consequences of an error in judg-

ment, carefully formed after an intelligent survey of all the elements entering into the problem which he is called upon to solve. Such a responsibility would transcend any which any accepted theory of ethics has ever demanded, and would exceed the ability of civil tribunals to enforce or even to expound. Mechanical devices, like medicinal remedies, are innumerable, and the only sure test of either is that of experience; and, until the latter has pronounced a definite judgment, one who, in the exercise of ordinary skill and care, makes use of that which, in his opinion, is most conducive to the accomplishment of a desired result, cannot be held responsible for the consequences. Extremes meet. Under the contrary rule, responsibility of each to all, and of all to each, being theoretically universal, would practically cease to exist. Scientific progress would be arrested, and society would dissolve into its primary elements. Whatever may be the theological consequences of an "honest doubt," it cannot be sufficient ground for recovery in a civil action for damages. Civil tribunals have not the attribute of omniscience, without which an issue pertaining thereto cannot be tried, or an adequate judgment thereon pronounced. Servitude, in this age and country, is voluntary. The servant assumes the risks incident to the nature of his employment. Among these is the danger of error of judgment by his employer in the choice of tools and mechanisms with which his tasks are to be performed, and he cannot be held civilly liable in choosing one of two or more mechanisms regarded by those called on to use such devices, and competent to judge of their safety from long use and experience in their operations, as among the best in use, even though an accident may happen to an employee in the use of the one selected, that could not have occurred in the same manner, had another kind been chosen. When experts skilled and experienced in their profession differ with respect to the choice of the means, remedies, or mechanisms best adapted or adaptable to the accomplishment of a given end, especially if that end be not simple and single, but is itself compounded of many elements, courts and juries are incompetent to decide between them. A world-old problem is expressed by the inquiry, "When doctors disagree, who shall decide?" In whatever field of inquiry, proof of the best is a requirement which it is impossible to meet. That of the comparative is often beyond reach. The highest scientific attainments vary in their conclusions, while varying degrees of practical skill often differ where the former agree. Judicial tribunals cannot supervise or correct the mistakes of either. They cannot so do, if for no other reason, because their decision in a particular instance decides nothing but the matter then being especially litigated. The decision furnishes no rule for the future guidance of the parties. The very act or omission which in one case has served as the occasion of punishment or exculpation may in the very next case, tried upon the same or following day, have an ex-

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actly opposite consequence. Such results would travesty the administration of justice, and so we think that the courts have nearly universally held that errors of judgment, not occasioned by wilful ignorance or a reckless inattention to duty, are not evidence of negligence, or a ground of civil liability.

As having a direct application to cases like the one at bar, we quote the following authorities: Thus, in *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 618, 626, 20 Atl. 518, the court says: "All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement, or nature of the mode of performance of any work 'reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and, however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way, for which liability shall be imposed. Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community." And in *Reese v. Hershey*, 163 Pa. 253, 257, 29 Atl. 908: "The average untrained mind is apt to take the fact of injury as sufficient evidence of negligence. Moreover, the use of a dangerous machine is very commonly considered ground for holding the employer responsible, whereas the test of liability is not danger, but negligence, and negligence can never be imputed from the employment of methods or machinery in general use in the business." And in *Harley v. Buffalo Car Mfg. Co.* 142 N. Y. 31, 34, 36 N. E. 813: "The master does not guarantee the safety of his servants. He is not bound to furnish them an absolutely safe place to work in, but is bound simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known appliances, but only such as are reasonably fit and safe. He satisfies the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the master liable, not a mere error of judgment. Here the belt was fastened at one of its splices with what

was called the Buffalo Belt Fastener, and while the machinery was running the fastener gave way, and the belt parted and caused the injury to the plaintiff. It was shown upon the trial that there were several kinds of belt fasteners in use. . . . Under such circumstances, how can it be said that the defendant violated any duty it owed to the plaintiff? It was impossible, from the evidence, to determine whether these fasteners were or were not the best in use for such a belt and such machinery as the defendant had at the time and place of the accident. Suppose a master, needing fasteners in his shop, makes inquiry among men of skill and experience as to the best kind of fasteners to use, and he is informed by some that one kind is the best, and by others that another kind is the best, and so on, and he finally makes a selection, using his best judgment, and suppose it should turn out that it was not the best; could he, under such circumstances, be held liable for an injury received by a person in his service from the parting of a belt on account of the insufficiency of the fastener under any particular strain to which the belt had been subjected? But we may go one step further. Suppose, under such circumstances, he purchased fasteners for use in his shop, which, according to the judgment of his skilled workmen, were found to be useful, convenient, and safe, and the very best in use; can he then be charged with negligence for continuing to use them, and be made liable to one who is accidentally injured by the parting of a belt? Suppose, under the circumstances which exist here, the defendant had adopted one of the other fasteners for this particular belt, and an accident had happened from its parting; there would have been substantially the same evidence for the jury, and the same claim could have been made which is now made, — that there was a question of fact for the jury as to its negligence in making the selection. This judgment cannot be affirmed without subjecting the master in such a case as this to the risk of liability for injuries from the parting of a belt moving machinery in his shop, whatever fastener he may use, because, if he uses one kind, according to the evidence in this case, it is easy to find persons who will testify that, from their experience and observation, some other kind was better. It must always be true that where several appliances are in use, each of which is regarded by men of skill and experience as safe and proper, the master cannot be made liable for an injury to one of his servants, if, in selecting the particular appliance, he takes what, according to his judgment, is the best or most suitable, guided by his experience and observation, and those of the skilled men in his employment. Upon the evidence in this case, it cannot even be determined that the managers of the defendant erred in their judgment in the selection of this kind of fastener. But if there was an error in judgment, it was not such as to constitute that degree of negligence and want of prudence which, under the rules of 60 L. R. A.

law above cited, can impose liability for such an accident as this." And in *Louisville & N. R. Co. v. Hall*, 91 Ala. 112, 8 So. 371, it is said: "We have said many times that railroads are not required to adopt every appliance which some roads, even a majority of the well-regulated, have incorporated into their system of management. Something must be accorded to diversity of judgment. If many well-regulated railroads abstain from adopting a particular appliance, which other roads, even a majority, consider wise precautions, and adopt such abstention cannot be pronounced, *per se*, recklessness or negligence." And in *McGinnis v. Canada Southern Bridge Co.* 49 Mich. 466, 472, 13 N. W. 819, 821: "Railroading is at least a business with many dangers, and scarcely any machine, implement, or expedient made use of in it but is liable at some times and under some circumstances to imperil human lives. Suppose the block had been made use of, and an accident had occurred, which was thought to be attributable to it; how, on the plaintiff's theory, would the defendant have excused itself for adopting it? A jury verdict in favor of its use in a previous case could be no protection, for a verdict makes no precedent, and settles nothing but the immediate controversy to which it relates. The next jury, on precisely similar facts, is at liberty to find directly the contrary. The defendant would therefore be compelled to defend its adoption of the block by showing that it tended to make the management of trains more safe. But if the plaintiff in the suit were to proceed to show — what fully appears in this case — that, though the device had been known for several years, the experts in charge of railroads the country over, naturally solicitous, as they must be, on grounds of personal interest, if not of humanity, to diminish the risks to life, had failed to be convinced of the expediency of making use of the block, this showing would have made out a case against the defendant which could not well have been answered. The *prima facie* showing that the device had been hastily, if not heedlessly, adopted, would certainly have been very strong; and if the two cases, charging respectively negligence in rejecting, and then in adopting, the same device, could go to successive juries, we might witness the instructive result of a verdict against the defendant in both. But such a result is inconsistent with a proper administration of definite rules of law and justice." And to the same effect is *Southern P. Co. v. Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530, Reversing 6 Utah, 819, 23 Pac. 751, cited in our former opinion, and, to a like effect, *Luke Shore & M. S. R. Co. v. McCormick*, 74 Ind. 440.

We think that the foregoing decisions establish beyond controversy, both upon reason and authority, that an employer is not liable in damages for the consequences of mere error in judgment in furnishing structures, machinery, and appliances for the use of his servants in the prosecution of his business, unless it is shown that such error is itself

the result of negligent or wilful ignorance or inattention. Of this latter there is no evidence in this case, and the instruction complained of was therefore rightfully given.

We recommend that the former judgment of this court be vacated and set aside, and the judgment of the district court be affirmed.

Duffie, C.:

I fully agree with all that is said in the foregoing opinion, and think that the case should be affirmed for the reasons above given. I wish to add, however, that I think the evidence shows that the plaintiff in error was guilty of contributory negligence, and that on that account alone the law can afford him no relief.

Sedgwick, J.:

On account of the importance of the question involved, and the difference of opinion of the commissioners, argument was had before the court. There can be no doubt that if the company acted in good faith, and with an honest desire to adopt the methods best calculated to promote the safety of its employees generally, as well as of the traveling public, it cannot be charged with negligence, even though we should believe from the evidence before us that the purposes the company had in view would have been better served by blocking the rails, as plaintiff contends. There is still less reason to impute negligence to the company if the evidence shows that, in the present condition of experience, it is impossible to say which method, upon the whole, affords the best guaranty of immunity from danger. It was contended upon the argument that the claim that the unblocked guard rail is less dangerous than the blocked rail was an afterthought, and not urged in good faith by the company, and that for this reason the case should have been submitted to the jury. Of course, the question of good faith on the part of the company in determining the advisability of blocking the guard rails is a question of fact, and as such, when in dispute, is to be determined by the jury. If there was no reasonable ground for doubt as to the better course to pursue, the company cannot defend against a charge of negligence by urging that it was in doubt, and acted on its best judgment. But if the best course to pursue, in the interest of the safety of the employees and of the traveling public alike, was an open question, and difficult to determine, the company cannot be charged with negligence in having adopted the one course rather than the other. Upon examination of the evidence, it appears that there is no dispute that the safety of the employees of the company and the safety of the traveling public are both involved in the determination of the question of the advisability of blocking the guard rails. So far as safety to the employees is concerned, there is a large mass of testimony, from which it cannot be determined with any degree of certainty which is the better practice; and when we further consider that there is much apparently reli-

able evidence tending to show that danger to the traveling public is increased by the practice of blocking the rails, and no evidence is offered to show that any system of blocking can be adopted without increasing that danger, we think there is an entire failure of proof that the company acted in bad faith in adopting the unblocked system.

We have therefore adopted the majority opinion of the commission, as prepared by Mr. Commissioner Ames, and the judgment of the district court is affirmed.

Per Curiam:

For reasons stated in the foregoing opinion, it is ordered that the former judgment of this court be vacated and set aside, and the judgment of the District Court be affirmed.

Petition for second rehearing denied.

STATE of Nebraska *ex rel.* Frank N. PROUT, Attorney General,
v.
NEBRASKA HOME COMPANY.

(.....Neb.....)

- *1. To constitute a lottery, it is necessary that a prize be offered, and something of value be given for a chance to obtain the prize.
2. The prize may be anything of value. A preference or privilege in the distribution of a common fund among those entitled thereto may constitute a prize.
3. A scheme whereby a common fund is to be produced by the contributions of various parties, and afterwards distributed among the parties contributing thereto, and a valuable preference or privilege in the distribution thereof is made to depend upon chance, is a lottery, within the meaning of our statute prohibiting lotteries.
4. Contracts in which a corporation, in consideration of stated payments made to it, makes promises, which are the main inducement to such contract, and are impossible to perform, are unlawful, being against public policy.
5. A corporation, organized under the laws of this state, which is engaged in a business forbidden by statute, or unlawful as against public policy, may be deprived of its charter and dissolved by proceedings in quo warranto.

(November 19, 1902.)

*Headnotes by SEDGWICK, J.

NOTE.—For other cases in this series as to what constitutes lottery, see also, *People v. Elliott* (Mich.) 3 L. R. A. 403, and note; *Yellowstone Klt v. State* (Ala.) 7 L. R. A. 599, and note; *Bailock v. State* (Md.) 8 L. R. A. 671, and note; *State v. Bonell* (La.) 10 L. R. A. 60; *State ex rel. Kellogg v. Kansas Mercantile Assn.* (Kan.) 11 L. R. A. 430; *Long v. State* (Md.) 12 L. R. A. 89, and note, 12 L. R. A. 425; *Thornhill v. O'Rear* (Ala.) 31 L. R. A. 792; *Lynch v. Rosenthal* (Ind.) 31 L. R. A. 835; *People ex rel. Lawrence v. Fallon* (N. Y.) 37 L. R. A. 227; *Meyer v. State* (Ga.) 51 L. R. A. 496; and *State ex rel. Sheets v. Interstate Sav. Invest. Co.* (Ohio) 52 L. R. A. 530.

APPPLICATION for a writ of quo warranto to annul defendant's charter. *Judgment of ouster.*

The facts are stated in the opinion.

Messrs. Frank N. Prout, Attorney General, Norris Brown, and William B. Rose, for the State:

The scheme of defendant is impracticable, and it cannot keep its promises. The enterprise will collapse, and many contract holders will lose their investments.

McLaughlin v. National Mut. Bond & Invest. Co. 64 Fed. 908; *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 60 N. E. 220; *Re National Indemnity & Endowment Co.* 142 Pa. 460, 21 Atl. 879.

The Nebraska Home Company's contracts are unlawful for the reason that they require the corporation to discriminate between investors, giving some an unreasonable profit at the expense of others.

The Nebraska Home Company collects from investors unconscionable compensation for services.

Unconscionable terms imposed by investment companies upon investors are unlawful, and cannot be enforced.

United States v. McDonald, 59 Fed. 563; *MacDonald v. United States*, 12 C. C. A. 344, 24 U. S. App. 25, 63 Fed. 426; *Randall v. National Bldg. Loan & Protective Union*, 43 Neb. 876, 62 N. W. 252.

It is the policy of the law to make savings and investment institutions safe and economical, and to protect investors from fraud and plunder. An investment company employing no capital in its business, and operating under a plan which requires it to keep its treasury empty, should not be permitted to use its charter to solicit contracts of investment without security.

Re National Indemnity & Endowment Co. 142 Pa. 454, 21 Atl. 879.

A provision in a contract of investment for forfeiture to the investment company of all investments, upon default in payment of instalments, is unconscionable and unlawful.

Randall v. National Bldg. Loan & Protective Union, 43 Neb. 876, 62 N. W. 252.

The Nebraska Home Company is conducting a lottery, or scheme of chance, and its contracts for the promotion and operation of that enterprise are unlawful.

MacDonald v. United States, 12 C. C. A. 344, 24 U. S. App. 25, 63 Fed. 426; 19 Am. & Eng. Enc. Law, p. 588, note 1; *United States v. Fulkerson*, 74 Fed. 628; *Seidenbender v. Charles*, 4 Serg. & R. 151, 8 Am. Dec. 682; *Horner v. United States*, 147 U. S. 463, 37 L. ed. 242, 13 Sup. Ct. Rep. 409; *Ballock v. State*, 73 Md. 1, 8 L. R. A. 671, 20 Atl. 184; *State v. Mumford*, 73 Mo. 647, 39 Am. Rep. 532; *United States v. Wallis*, 58 Fed. 942; *Randle v. State*, 42 Tex. 580; *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 60 N. E. 220; *Dunn v. People*, 40 Ill. 467.

The relation existing between the Nebraska Home Company and each contract holder is one of trust and confidence. The contracts 60 L. R. A.

provide for an abuse of the fiducial relation, and are, therefore, contrary to public policy and unlawful.

Wright v. Smith, 23 N. J. Eq. 111; *Darlington's Appeal*, 86 Pa. 512, 27 Am. Rep. 726.

Contracts may violate public policy, though they do not conflict with any statutory or constitutional provision.

Teal v. Walker, 111 U. S. 252, 28 L. ed. 419, 4 Sup. Ct. Rep. 420; *Wilde v. Wilde*, 37 Neb. 891, 56 N. W. 724; *Fitzgerald v. Fitzgerald & M. Constr. Co.* 41 Neb. 376, 59 N. W. 838.

Contracts against public policy are uniformly condemned by the courts as unlawful.

Atcheson v. Mallon, 43 N. Y. 147, 3 Am. Rep. 678; *Richardson v. Crandall*, 48 N. Y. 348; *State ex rel. Atty. Gen. v. Interstate Sav. Invest. Co.* 64 Ohio St. 283, 52 L. R. A. 530, 60 N. E. 220; *Drealer v. Tyrrell*, 15 Nev. 134; *Firemen's Charitable Asso. v. Berghaus*, 13 La. Ann. 209; *Elkhart County Lodge v. Crary*, 98 Ind. 242, 49 Am. Rep. 746; *Shipley v. Reasoner*, 80 Iowa, 548, 45 N. W. 1077; *Edwards v. Randle*, 63 Ark. 318, 36 L. R. A. 174, 38 S. W. 343; *Fearnley v. De Mainville*, 5 Colo. App. 441, 39 Pac. 73.

A corporation has no authority to enter into an unlawful contract, and the power of the courts to dissolve a corporation for abusing its franchise is complete.

State ex rel. Dilworth v. Council Bluffs & N. Ferry Co. 11 Neb. 354, 9 N. W. 563; *State v. Nebraska Distilling Co.* 29 Neb. 700, 46 N. W. 155.

The use of \$1,000 without interest until it can be returned in monthly payments of \$5 each, or a present of \$1,000 if the person receiving it will pay interest thereon for sixteen and two thirds years at 6 per cent per annum, is sufficient to constitute the prize essential to a lottery.

Re National Indemnity & Endowment Co. 142 Pa. 458, 21 Atl. 879; *United States v. Fulkerson*, 74 Fed. 628.

A scheme for numbering alleged investment contracts in regular numerical order as applications are received at the home office of the promoters contains the element of chance, where the contracts are identical in form, but of unequal value owing to difference in numbers.

O'Connor v. Bradshaw, 5 Exch. 887; *Dunn v. People*, 40 Ill. 468; *Randle v. State*, 42 Tex. 580.

The Criminal Code makes no distinction between common culprits and offenders who attempt to legalize a lottery by contract; and the courts make no such distinction, but in every case look to the substance of the scheme to determine its character as a lottery.

Dunn v. People, 40 Ill. 467; *Ex parte Blanchard*, 9 Nev. 104; *State ex rel. Murphy v. Overton*, 16 Nev. 136; *State v. Clarke*, 33 N. H. 335, 66 Am. Dec. 723; *Randle v. State*, 42 Tex. 585.

Messrs. George A. Neal and Coffin & Clements, for defendant:

The business conducted by the defendant has none of the elements of, and is in no sense, a lottery.

The rule of the early common law did not permit the taking of interest as compensation for the use of money.

Lowe v. Waller, 2 Dougl. 736; *Nassau & L. R. Corp. v. Boston & L. R. Corp.* 61 Fed. 237; *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 438, 24 L. ed. 178; *Perkins v. Fourniquet*, 14 How. 328, 14 L. ed. 441; 2 Bl. Com. 454.

Under the arrangements of this contract and the relation of parties, not only is it the purpose for every man to receive benefits equal to the value of the money he pays, but each man must pay the value of the thing, namely, the property which he obtains.

United States v. Zeisler, 30 Fed. 499; *Horne v. United States*, 147 U. S. 449, 37 L. ed. 237, 13 Sup. Ct. Rep. 409.

The contractual relation between the only parties who have an interest in the matter has not reached that stage of guardianship of a sumptuary kind which would deny them the right to make contracts.

York Park Bldg. Assn. v. Barnes, 39 Neb. 834, 58 N. W. 440; *Neosho Valley Invest. Co. v. Hannum*, 10 Kan. App. 499, 63 Pac. 92.

The contracts entered into between defendant and its members do not in any manner contravene public policy.

A corporation is a person within the meaning of the 14th Amendment of the Federal Constitution.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 154, 41 L. ed. 667, 17 Sup. Ct. Rep. 255; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207.

It matters not whether the privileges or immunities be denied by the legislature, by the executive, by the court, or by the officers of the state.

Brannon, 14th Amend. 97; *Virginia v. Rives*, 100 U. S. 313, sub nom. *Ex parte Virginia*, 25 L. ed. 667; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Conner v. Elliott*, 18 How. 591, 15 L. ed. 497; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *People v. Mayr*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Bertholf v. O'Reilly*, 74 N. Y. 515, 30 Am. Rep. 323; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 756, 28 L. ed. 590, 4 Sup. Ct. Rep. 652; *Live Stock Dealers' & Butchers' Assn. v. Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388, Fed. Cas. No. 8,408; *Austin v. Murray*, 16 Pick. 121; *Slaughter-House Cases*, 16 Wall. 36, 87, 21 L. ed. 394, 412; *Frorer v. People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359, 10 S. E. 288; *State v. Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. 60 L. R. A.

E. 285; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *Printing & Numerical Registering Co. v. Sampson*, L. R. 19 Eq. 462; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *Ex parte Kubaek*, 85 Cal. 274, 9 L. R. A. 482, 24 Pac. 737; *Com. v. Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343; *Kuhn v. Detroit*, 70 Mich. 534, 38 N. W. 470; *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302; *Lauston v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Willett v. People*, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631.

A municipal ordinance making it unlawful for any person to carry on the business of laundry within any portion of the city of Stockton other than a certain described portion is unconstitutional and in violation of the 14th Amendment of the Constitution of the United States.

Stockton Laundry Case, 26 Fed. 611 *Yick Wo. v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Braceville Coal Co. v. People*, 147 Ill. 66, 22 L. R. A. 340, 35 N. E. 62; *Ramsey v. People*, 142 Ill. 380, 17 L. R. A. 863, 32 N. E. 364; *Palmer v. Tingle*, 55 Ohio St. 423, 45 N. E. 313; *Harding v. People*, 160 Ill. 459, 32 L. R. A. 445, 43 N. E. 624; *Ruhstrat v. People*, 185 Ill. 133, 49 L. R. A. 181, 57 N. E. 41.

The term "liberty," as used in the Bill of Rights in the Constitution, includes the right of every citizen to choose and follow a particular business, and to take and advertise in any legitimate manner, subject to the restraints necessary to secure the common welfare.

People ex rel. Tyroler v. Warden of City Prison, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362.

The contract is not contrary to public policy on the ground that it cannot be carried out without practising deception, or is incapable of performance.

Matson v. Blossom, 18 N. Y. S. R. 726, 2 N. Y. Supp. 551; *Barrett v. Carden*, 65 Vt. 431, 26 Atl. 530; *Walsh v. Fussell*, 6 Bing. 163; *Greenhood*, Pub. Pol. 27.

The contract in this case is clear and explicit in its terms. The holder knows, before he enters into the contract, the number of the same and its position in the series. The conditions and promises are fully and fairly set out in the contract. There are no latent interpretations or meanings therein to defraud the parties. There are no subtle conditions to mislead a man of common intelligence and understanding. The purpose of the contract is not only lawful, but such as the government and every other good influence in the country should encourage.

Pratt v. Hutchinson, 15 East, 511; *King v. Webb*, 14 East, 406.

Messrs. Bartlett, Dundey, & Martin, also for defendant:

A corporation which has for its object the purchase of land and the construction of houses thereon, the funds being realized from the capital stock paid in by subscribers in instalments, and finally the allotment of the lots and houses among the stockholders in satisfaction of their stock, is one organized for the purpose of carrying on a lawful business, and authorized by the general incorporation law.

York Park Bldg. Asso. v. Barnes, 39 Neb. 834, 58 N. W. 440.

On motion for rehearing.

The law will not presume a contract to be illegal or against public policy, and so void, when it is capable of a construction which will make it lawful and valid.

Ormes v. Dauchy, 82 N. Y. 443, 37 Am. Rep. 583.

Courts will not declare contracts void on the ground of public policy, except where the case is free from doubt, and when an injury to the public interests clearly appears.

Barrett v. Carden, 65 Vt. 431, 26 Atl. 530.

All business depends upon continued patronage for success, and the business and legal world has always observed a presumption that business would continue. If the iron rule should be applied that no business should be permitted unless it would succeed by a limited and stationary patronage, then every industry in the land would be palsied. If the presumption is indulged that the business would continue,—and there is no reason why this rule should not obtain,—then these contracts would not only be practicable, but a great benefit would be given to those who made them; and it is a well-established rule of law that, where a contract is open to two constructions, the one lawful and the other unlawful, the former must be applied.

Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940, 6 Sup. Ct. Rep. 870; *United States v. Central P. R. Co.* 118 U. S. 235, 30 L. ed. 173, 6 Sup. Ct. Rep. 1038.

The burden is on the party claiming that the contract is contrary to public policy to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people.

Swann v. Swann, 21 Fed. 299; *Richardson v. Mellish*, 2 Bing. 229.

If the contract is within the range of possibility, however absurd or improbable the idea of execution will be, it will be upheld.

3 Comyns, Dig. 93; *Beebe v. Johnson*, 19 Wend. 500, 32 Am. Dec. 518; *Public Schools v. Bennett*, 27 N. J. L. 513, 72 Am. Dec. 373.

Mr. A. G. Wolfenbarger, amicus curiæ:

Five laborers are enabled to save \$4 a month each, after paying the family expenses, including \$16 a month house rent in each case. Each is striving to get a \$1,000 home; each one has saved up \$200 to that end. By working alone it will be one hundred

thirty-eight months before anyone can accomplish his purpose, including interest on his money. They put their money together and buy a home for number 1, who then puts into the common fund the \$16 a month he has been paying as rent, in addition to his savings; then their combined savings are \$30 a month, and in 27 $\frac{1}{3}$ months they have saved enough to buy a home for number 2; then their combined savings are \$52 a month, so in 19 $\frac{1}{3}$ months more they buy a home for number three; then their combined savings are \$68 per month, so in 14 $\frac{1}{3}$ months they buy a home for number 4; then their combined savings are \$84 per month, and in 11 $\frac{1}{3}$ months they buy a home for number 5. Number 5, by this co-operation, would get his home in seventy-five months, and have it all paid for in one hundred months, making a net saving to the last man of thirty-eight months over what would have been possible without co-operation. When the one hundred and thirty-eight months have expired that it would have taken them to secure homes without co-operation, by this co-operation they have paid for their homes, and have combined savings to the amount of \$6,300 in addition thereto.

This is the scheme set forth in defendant's contract.

The attempt to restrain and interfere with the private right of contract in the absence of complaint from any party to the contract, and in the absence of any violation of law, should not be tolerated.

Sedgwick, J., delivered the opinion of the court:

This is an information in the nature of quo warranto to annul the corporate existence of defendant, and oust it of its corporate powers, franchises, and privileges. To the answer of the defendant the attorney general filed a general demurrer. The answer alleges that defendant has been and is entering into contracts with various parties in pursuance of its franchise. The terms of these contracts are set out in full in the answer. The principal questions presented and discussed by counsel are: First. Do these contracts contain the elements of a lottery? Second. Are they unlawful as against public policy? By the terms of the contract the company "agrees and undertakes to assist the said holder of this contract in purchasing and paying for a home." The holder agrees to pay \$3 for the "company's services in registering and issuing each application and contract," and "to pay to the company at the home office of the company in Omaha, Nebraska, \$1.35 each month, on or before the last day thereof, from the date hereof, until this contract shall mature as hereinafter described." After the contract matures, the amount of the monthly payments is increased to \$5.35, and they continue "until the holder shall have paid into the home fund, as herein provided, the total sum of one thousand (\$1,000) dollars, or such fractional part of such sum as shall be furnished for him by the

company. Five dollars of said sum of \$5.35 so paid shall be placed by the company in the home fund as hereinbefore described, and 35 cents thereof is in payment for the services of the company." The contract also provides: "First. Said company shall number and date all contracts issued in regular numerical order as applications are received at the home office, and shall keep a record thereof, showing the date and serial number of each contract. Sixth. This contract shall be deemed to be matured, within the meaning hereof, when there shall be, over and above what is required to be paid out on contracts of lower serial number than this contract, either (1) an income of fifty (\$50.00) dollars per month, due said home fund from contract holders; or (2) an amount of money in said home fund, which, when added to the income so due from contract holders for a period of twenty months, will equal one thousand (\$1,000) dollars. Seventh. When this contract matures, the company agrees on each and every month thereafter, for twenty months, to pay out of the said home fund the sum of fifty (\$50.00) dollars in assisting the holder to purchase a home, to pay off a mortgage on a home owned by the holder, or to erect a dwelling house on a lot belonging to a holder, as said holder may prefer. It is understood and agreed that the holder shall select property of the value of one thousand (\$1,000) dollars on the basis of said payments thereon of fifty (\$50.00) dollars per month, and thereupon the company shall immediately proceed to investigate title and value of the property, and, as soon as possible, notify the holder of its approval or disapproval of the holder's selection. If the company approves the selection, it shall immediately cause the property selected to be purchased, and put the holder in possession thereof, on the terms and conditions hereinafter contained."

1. Does this scheme involve the elements of a lottery? To constitute a lottery, there must be a prize offered, and the payment of something for a chance to obtain it. The attorney general has furnished the court with an "expert's table," which is derived from a computation based upon the issuing of contracts upon 1,000 applications received at the same time, and each holder paying his instalments according to his agreement. We do not understand that defendant's attorneys deny the accuracy of the result obtained upon the basis assumed, and it appears that the twenty-two holders of the lowest numbered contracts would get their first instalments, respectively, within the first twenty-month period after the contracts were made, and would receive the full sum of \$1,000 within the next twenty-month period thereafter; whereas the holder of contract numbered 1,000, although making his payments monthly, would not have any return from his investment until more than seventy years from the time he took his contract and began payment. The advantage of the fortunate holder of the early number is manifest. To obtain such a pref-

erence is to obtain something of value. "It is idle to say that a sum or an obligation for a sum due and payable to-day or at an early day is of no more value than an obligation for an equal amount, without interest, payable at a remote and indefinite time." *MacDonald v. United States*, 12 C. C. A. 339, 24 U. S. App. 25, 63 Fed. 426. The question, then, is whether the element of chance enters into the scheme by which one contract holder obtains this advantage over another. The contracts are to be "numbered and dated in regular numerical order as applications are received at the home office." The applicant must take his chances as to how many applications may be received at the same time that his is received, and, if there are several at the same time, he must take the chance of preference over other applications received with his. In *MacDonald v. United States*, 12 C. C. A. 339, 24 U. S. App. 25, 63 Fed. 426, Judge Woods said: "Whether or not a purchaser will obtain a bond of one number or another depends . . . upon the order in which his application shall reach the hand of the secretary, and that is largely a matter of chance. The secretary receives applications by mail and otherwise; sometimes singly, and sometimes a number together; and in the order of receipt, and as he chances to take up one or another first, passes them through a registering device, and, in accordance with the notations thereby made upon the applications, the bonds are numbered and issued. But for the purchaser's hope, or, as it may well be said, for his chance, of getting a multiple number, the business would soon cease." He held that "the element of chance incident to the numbering of the bonds before they were issued" made the scheme a lottery. The reasoning of the court in the *MacDonald Case* was adopted by Judge McComas in a similar case recently decided in the supreme court of the District of Columbia. *United States v. Sherwood* (D. C.) 31 Wash. L. Rep. —. Judge McComas fortifies his conclusions by quotations from other authorities, and holds that under such a plan "the number of the certificate and their consequent value depends upon chance." A certified copy of his very clear and satisfactory opinion is on file in this case. He says: "In different states applicants on the same day may mail subscriptions for certificates in this company. Whether or not an applicant will receive a certificate of one number or another depends upon the order in which the application may reach the officer of this company who issues the certificates, and that is a matter of chance. This officer receives these applications by mail or otherwise, it may be one at a time, it may be many at the same time, and according to the order he chances to receive them, or as he chances to take up one or another, and determines the number of each applicant's certificate, the certificates are numbered and issued. He who, by these chances, luckily receives an earlier number, will be paid sooner, and will pay in less money, than another, who, subscribing on the same

day, receives a later number, and will, by these chances, be required to pay longer, and pay more money, and wait longer for payment of his shares. It is this element of chance in the numbering of the certificates which I believe to be in violation of this anti-lottery law. It is evident that the inducement to subscribe consists mainly in the chance of securing an early or lucky number." This reasoning is satisfactory to our minds, and we have been referred to no authority conflicting with the views so announced. The suggestion that the applicant will know the number of his contract before he accepts it, and, if not satisfied, may reject the contract, is without merit. By his application he agrees to accept the contract, and he is presumed to know the terms of the contract before he makes the application. The suggestion is predicated upon the idea that he will not perform the agreement that he has made in his application, but will forfeit the fee "for registering and issuing each application and contract," and so risk only the \$3. If that is the proper construction of the contract, the result is the same. It involves the payment of \$3 for the chance of obtaining an early number.

2. This defendant cannot be allowed the protection of its charter to do business in this state for another reason. Its plan involves taking money from its patrons upon contracts which, on its part, it is impossible to perform. It professes to be "a home company," and it "agrees and undertakes to assist" the holders of its contracts "in purchasing and paying for a home." It issues contracts which, through the misfortune of the holders in the numbering of the applications, will bring no assistance before the expiration of the ordinary allotment of three score years and ten. It cannot result in assistance to such holders in procuring a home in this world, and it does not profess to ren-

der assistance in any other. If it is intended that there will be new patrons, whose monthly payments shall be used to make good the company's promise to holders of earlier contracts not otherwise provided for, the situation is still worse. The company cannot furnish the funds to assist these new patrons to obtain homes before the time will come when, in the ordinary course of nature, they cannot avail themselves of such assistance. Their own payments cannot do so, nor help to do so. These are pledged to make up a deficiency existing before they obtained their contracts. They can hope to obtain the fruits of their contracts during their natural lives only from the payments to be made by others who obtain contracts after them, and there must be a sufficient number of these others in order to bring about the hoped-for result. It appears from the table referred to that about one third of the holders of the first 1,000 contracts supposed to be issued at one time would be able to procure homes within twenty-five years. To enable 1,000 to do so, there must be 3,000 contracts taken, or 2,000 new patrons, who must take their contracts soon after the first 1,000 are taken. To enable these additional 2,000 to obtain the promised assistance, there must be a still larger number of other contracts taken within a short time after the 2,000 take theirs, and so on in progressional numbers, which must in a few years run into infinity. The contracts, so contemplated, cannot, of course, all be fulfilled, and public policy will not permit the state to become a party to such a scheme. The defendant's business is, for these reasons, unlawful.

The demurrer is sustained, and judgment of ouster will be entered as prayed.

Petition for new trial denied.

PENNSYLVANIA SUPREME COURT.

Wesley BUCK

v.

NEW JERSEY ZINC COMPANY of Pennsylvania, *Appt.*

(204 Pa. 132.)

1. One whose duty is to do the blacksmith work necessary upon the implements used in the construction of a manufacturing plant is, in making a link for the chain used to hold in position the box of a dump car, a fellow servant of one engaged in operating the car, so that the common employer is not liable for injury to the latter through insufficiency of the link made by the former.

2. An employee operating a dump car, who is charged by the master with the duty of seeing that the links in the dumping mechanism of the cars are sound, is, in procuring and placing a link on a car, a fellow servant of one subsequently employed to operate it, so that the master is not liable for an injury to the latter because of the insufficiency of the link.

(*McIntosh, J., dissents.*)

(November 11, 1902.)

APPPEAL by defendant from a judgment of the Court of Common Pleas for Carbon County in favor of plaintiff in an action

NOTE.—For a case in this series holding that a machinist in roundhouse, whose duty it is to inspect and repair engines, is not a fellow servant of a fireman on an engine, see *Kansas City, Ft. S. & M. R. Co. v. Becker* (Ark.) 46 L. R. A. 814.

As to whether car repairers or inspectors are 60 L. R. A.

fellow servants of employees running trains, see *Byrnes v. New York, L. E. & W. R. Co.* (N. Y.) 4 L. R. A. 151; *International & G. N. R. Co. v. Keenan* (Tex.) 9 L. R. A. 703; *St. Louis, A. & T. R. Co. v. Triplett* (Ark.) 11 L. R. A. 773; *Dewey v. Detroit, G. H. & M. R. Co.* (Mich.) 16 L. R. A. 342.

brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Edward Harvey and Frederick Bertolette, for appellant:

Absolute safety is unattainable, and employers are not insurers.

Purdy v. Westinghouse Electric & Mfg. Co. 197 Pa. 257, 51 L. R. A. 881, 47 Atl. 237; *Titus v. Bradford, B. & K. R. Co.* 136 Pa. 626, 20 Atl. 517; *Leonard v. Herrmann*, 195 Pa. 222, 45 Atl. 723; *Dickerson v. Central R. Co.* 189 Pa. 567, 42 Atl. 299; *Bradbury v. Kingston Coal Co.* 157 Pa. 231, 27 Atl. 400.

Negligence is the gist of the action, and must be shown before the case can be submitted to the jury.

Higgins v. Fanning, 195 Pa. 599, 46 Atl. 102.

The plaintiff, Beitle, and the workmen in the blacksmith shop were fellow servants.

New York, L. E. & W. R. Co. v. Bell, 112 Pa. 400, 4 Atl. 50; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432; *Mullan v. Philadelphia & S. Mail S. S. Co.* 78 Pa. 25, 21 Am. Rep. 2; *Ross v. Walker*, 139 Pa. 42, 21 Atl. 157, 159.

The plaintiff assumed all the risks incident to his employment.

Boyd v. Harris, 176 Pa. 485, 35 Atl. 222; *Broseman v. Lehigh Valley R. Co.* 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; *Fletcher v. Philadelphia Traction Co.* 190 Pa. 117, 42 Atl. 527; *Frazier v. Pennsylvania R. Co.* 38 Pa. 104, 80 Am. Dec. 467; *Caldwell v. Brown*, 53 Pa. 453; *Mullan v. Philadelphia & S. Mail S. S. Co.* 78 Pa. 25, 21 Am. Rep. 2; *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432; *Hoffman v. Clough*, 124 Pa. 505, 17 Atl. 19; *Duffy v. Oliver Bros.* 131 Pa. 203, 18 Atl. 872; *Bentley v. Cranmer*, 137 Pa. 246, 20 Atl. 709; *Ryan v. Cumberland Valley R. Co.* 23 Pa. 384; *Barlow v. Standard Steel Casting Co.* 154 Pa. 130, 26 Atl. 12; *Johnston v. Pittsburgh & W. R. Co.* 114 Pa. 443, 7 Atl. 184; *Ross v. Walker*, 139 Pa. 49, 21 Atl. 157, 159.

The duty which a master owes to his servant is to provide him with safe tools, machinery, and appliances with which to do what is required of him. The mere fact that a car which was the cause of the employee's injury was in an unsafe and dangerous condition is not prima facie evidence of negligence on the part of the employer.

It is the duty of the servant to observe, and report to his employer any defect which may become apparent in tools or machinery; and the employer is not liable to an employee for the negligence of a fellow servant in the same employment.

Mensch v. Pennsylvania R. Co. 150 Pa. 598, 17 L. R. A. 450, 25 Atl. 31; *Mixer v. Imperial Coal Co.* 152 Pa. 395, 25 Atl. 587; *Wojciechowski v. Spreckels' Sugar Ref. Co.* 177 Pa. 57, 35 Atl. 596; *Baker v. Allegheny Valley R. Co.* 95 Pa. 211, 40 Am. Rep. 634; *Augerstein v. Jones*, 139 Pa. 183, 21 Atl. 24; *Allison Mfg. Co. v. McCormick*, 118 Pa. 60 L. R. A.

519, 12 Atl. 273; *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. 301, 13 Atl. 286.

If the machinery is of an ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that can be required from the employer.

Payne v. Reese, 100 Pa. 301; *Pittsburgh & C. R. Co. v. Sentmeyer*, 92 Pa. 276, 37 Am. Rep. 684.

A servant assumes the patent risks naturally and reasonably incident to his employment.

Philadelphia, W. & B. R. Co. v. Keenan, 103 Pa. 124; *Pittsburgh & O. R. Co. v. Sentmeyer*, 92 Pa. 276, 37 Am. Rep. 684; *Rummell v. Dilworth*, 111 Pa. 343, 2 Atl. 355; *Patterson v. Pittsburg & C. R. Co.* 76 Pa. 390, 18 Am. Rep. 412; *Toledo, W. & W. R. Co. v. Eddy*, 72 Ill. 138; *Chicago & A. R. Co. v. Bragonier*, 119 Ill. 51, 7 N. E. 688; *Chicago & N. W. R. Co. v. Jackson*, 55 Ill. 492, 8 Am. Rep. 661; *Illinois C. R. Co. v. Jewell*, 46 Ill. 99, 92 Am. Dec. 240.

Negligence cannot be imputed from the employment of machinery in general use.

Higgins v. Fanning, 195 Pa. 599, 46 Atl. 102; *Mensch v. Pennsylvania R. Co.* 150 Pa. 598, 17 L. R. A. 450, 25 Atl. 31; *Pittston Coal Co. v. McNulty*, 120 Pa. 414, 14 Atl. 387; *Wojciechowski v. Spreckels' Sugar Ref. Co.* 177 Pa. 57, 35 Atl. 596.

The link having been made by a fellow servant at the request of another fellow servant, the employer is not answerable for the competency of the blacksmith who made the link, or for his error of judgment in selecting the materials out of which it was made.

Cunningham v. Ft. Pitt Bridge Works, 197 Pa. 625, 47 Atl. 846; *Prescott v. Ball Engine Co.* 176 Pa. 459, 35 Atl. 224; *Ross v. Walker*, 139 Pa. 42, 21 Atl. 157, 159; *Hughes v. Leonard*, 199 Pa. 123, 48 Atl. 862; *Hart v. Frick Coke Co.* 131 Pa. 125, 18 Atl. 1011; *Philadelphia & R. R. Co. v. Hughes*, 119 Pa. 302, 13 Atl. 286; *Roading Iron Works v. Devine*, 109 Pa. 246; *Miller v. New York, N. H. & H. R. Co.* 175 Mass. 363, 56 N. E. 282; *Guggenheim Smelting Co. v. Flanigan*, 62 N. J. L. 354, 41 Atl. 844, 42 Atl. 145; *Campbell v. New Jersey Dry Dock & Transp. Co.* 61 N. J. L. 382, 39 Atl. 658; *Harnois v. Cutting*, 174 Mass. 398, 54 N. E. 842; *Green v. Sansom*, 41 Fla. 94, 25 So. 332; *Adasken v. Gilbert*, 165 Mass. 443, 43 N. E. 199; *Oelschlegel v. Chicago G. W. R. Co.* 73 Minn. 327, 76 N. W. 56, 409; *Bolton v. Georgia P. R. Co.* 83 Ga. 659, 10 S. E. 352; *Kennedy v. Spring*, 160 Mass. 203, 35 N. E. 779; *O'Connor v. Rich*, 164 Mass. 560, 42 N. E. 111; *Hoar v. Merrill*, 62 Mich. 386, 29 N. W. 15; *Benn v. Null*, 65 Iowa, 407, 21 N. W. 700; *McKinnon v. Norcross*, 148 Mass. 533, 3 L. R. A. 320, 20 N. E. 183; *Rogers Locomotive & Mach. Works v. Hand*, 50 N. J. L. 464, 14 Atl. 766; *Ling v. St. Paul, M. & M. R. Co.* 50 Minn. 160, 52 N. W. 378.

Messrs. William G. Freyman and Eugene O. Nothstein, for appellee:

It was the duty of the defendant company to furnish reasonably safe appliances, tools, and machinery to its servants in the construction of its plant; yet it wholly neglected its duty in this respect.

An employer who has had ample opportunity to discover a defective appliance, and does not repair it within a reasonable time, is liable in damages to an employee who is injured by reason of the defective appliance while in the performance of his duties.

Bennett v. Standard Plate Glass Co. 158 Pa. 120, 27 Atl. 874.

There was not only a duty resting on the defendant to keep the cars in reasonable repair, but to make such inspections as the nature of the business required; and whether the cars belonged to a private owner or not is immaterial.

Elkins v. Pennsylvania R. Co. 171 Pa. 121, 33 Atl. 74; **Pennsylvania & N. Y. Canal & R. Co. v. Mason**, 109 Pa. 300, 58 Am. Rep. 722; **Prescott v. Ball Engine Co.** 176 Pa. 459, 35 Atl. 224; **Rummell v. Dilworth**, 111 Pa. 343, 2 Atl. 355; **Ross v. Walker**, 139 Pa. 42, 21 Atl. 157, 159; **Newton v. Vulcan Iron Works**, 199 Pa. 646, 49 Atl. 339; **Kennedy v. Alden Coal Co.** 200 Pa. 1, 49 Atl. 841; **Lewis v. Seifert**, 116 Pa. 647, 11 Atl. 514.

A master must provide and maintain reasonably suitable instruments and means to carry on his business so that his servant may perform his duties with relative safety and without exposure to danger not reasonably incident to his employment.

Rummell v. Dilworth, 111 Pa. 343, 2 Atl. 355; **McGuigan v. Beatty**, 186 Pa. 332, 40 Atl. 490; **Weger v. Pennsylvania R. Co.** 55 Pa. 465; **Tissue v. Baltimore & O. R. Co.** 112 Pa. 91, 56 Am. Rep. 310, 3 Atl. 687; **Bennett v. Standard Plate Glass Co.** 158 Pa. 120, 27 Atl. 874; **Huntsinger v. Trezler**, 181 Pa. 497, 37 Atl. 574; **McCray v. Sterling Varnish Co.** 7 Pa. Super. Ct. 610; **Philadelphia & R. R. Co. v. Huber**, 128 Pa. 63, 5 L. R. A. 439, 18 Atl. 334; **Dooner v. Delaware & H. Canal Co.** 164 Pa. 17, 30 Atl. 269; **Elkins v. Pennsylvania R. Co.** 171 Pa. 121, 33 Atl. 74.

This was a proper case for the jury under the law and the evidence.

Honifius v. Chambersburg Engineering Co. 196 Pa. 50, 46 Atl. 259; **Philadelphia, W. & B. R. Co. v. Keenan**, 103 Pa. 124; **Bier v. Standard Mfg. Co.** 130 Pa. 446, 18 Atl. 637; **Giberson v. Patterson Mills Co.** 187 Pa. 513, 41 Atl. 525; **Wilson v. Pennsylvania R. Co.** 177 Pa. 503, 35 Atl. 677; **McGroarty v. Wanamaker**, 187 Pa. 132, 40 Atl. 820; **McGuigan v. Beatty**, 186 Pa. 329, 40 Atl. 490; **Wilson v. Pennsylvania R. Co.** 177 Pa. 503, 35 Atl. 677; **McKee v. Bidwell**, 74 Pa. 218; **Kingan v. Pittsburg Traction Co.** 5 Pa. Super. Ct. 436; **Dormer v. Alcatraz Paving Co.** 16 Pa. Super. Ct. 407; **Kane v. Philadelphia**, 196 Pa. 502, 46 Atl. 893; **West Chester & P. R. Co. v. McElwee**, 67 Pa. 311; **Walbert v. Trezler**, 156 Pa. 112, 27 60 L. R. A.

Atl. 65; **Cougle v. McKee**, 151 Pa. 602, 25 Atl. 115.

Potter, J., delivered the opinion of the court:

The appellant in this case, the zinc company, was engaged in the construction of a large manufacturing plant. For the purpose of grading the ground and carrying cinders and building materials wherever they might be needed during the progress of the operation, temporary railroad tracks were laid. The cars used for this purpose were dump cars, which turned upon an axis running lengthwise of the car, so as to discharge the contents upon either side. In maintaining the normal equilibrium, the body of the car was held in place by short chains fastened upon each side. These chains were composed of 4 or 5 links, and each link was some 4½ inches in length. Usually the chains were not tightly drawn, but had considerable play, permitting the body of the car to rock somewhat upon its central axis. During the progress of the work the links of the chains were liable to become worn, or to break, and whenever this occurred it was customary to substitute, for the time being, an open link. Usually two men were assigned to each of the dump cars to see to the loading and unloading, and they were expected to ride back and forth upon the cars. At the time of the accident the plaintiff was so engaged. It appears from the testimony that another workman, named Beitle, who was working with the plaintiff, had received orders from the foreman of the yard to watch the cars, and, whenever he found a worn link, to cut it out, and put an open link in. He testifies that five days before the happening of the accident he did replace a worn link in the chain on the car upon which the plaintiff was employed with an open link, and that it was then all right; that he took a hammer, and welded the open points as close together as possible; that he saw this link just before the accident, and it was then in position, and well secured. While the car was in motion, and the plaintiff was sitting upon it, either from a sudden lurch, or from some other cause, this open link suddenly broke, permitting the car body to turn sideways, and the plaintiff was thrown to the ground. The immediate cause of the accident was, therefore, the breaking of the link. These links were not purchased ready-made by the defendant, nor were they prepared in advance of the need for their use. They were made by the blacksmiths upon the premises, when ordered by the men. The defendant company had furnished large supplies of iron suitable for the various needs which might arise during the course of construction. This iron was kept in racks in the supply house, assorted according to size, so that the workmen could make a suitable selection as the occasion arose. The testimony shows that from 30 to 40 tons of iron of different sizes were thus kept in store, and three blacksmiths were provided to work it up into the various shapes as

required by the workmen. As a witness stated, the blacksmiths did all kinds of work,—making the iron up into bolts, hangers, clasps, links, and anything else which was required. They made open links, welded links, and all kinds of links. Whatever the men needed and asked for was made by the blacksmiths. When anything of the kind was ordered, the blacksmiths went to the supply house, and selected from the stock of iron there on hand such as appeared to be suitable for the purpose required, and made it up into links, stirrups, bolts, clasps, and all the things necessary for use in the construction and erection of the plant. It must be borne in mind that the particular work which was being carried on at that time and place by the defendant company was the construction of the new works, and to this end everything was made to bend, and all of the workmen were engaged in carrying out this general purpose. While the plaintiff himself did not procure from the blacksmith the link which broke, yet it was procured by his fellow workman, Beitle, who was engaged in precisely the same duties, and was working side by side with him upon the cars. The particular inquiry in this case is whether the blacksmith who made the link in question was a fellow servant with the plaintiff and his immediate fellow workman who placed the link in the chain upon the car, and were using it at the time of the accident.

In *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432, the rule is laid down that, to constitute fellow servants in contemplation of the law, "they need not at the time be engaged in the same particular work. It is sufficient if they are in the employment of the same master, engaged in the same common work, and performing duties and services for the same general purposes." In applying this principle in the case of *New York, L. E. & W. R. Co. v. Bell*, 112 Pa. 400, 4 Atl. 50, it was held that trainmen working on cars carrying supplies were fellow servants with the men in the shops who had put up a gas pipe for their own convenience, but which resulted in injury to a trainman. In the present case, if there was any negligence disclosed by the evidence, it was that of the blacksmith, either in making choice of the material out of which he formed the link, or in the exercise of his judgment as to the particular form and shape which he gave to it. The link was made at the request of Beitle, and was accepted by him from the hands of the blacksmith, without any objection or criticism as to its form or shape. He took it to the train upon which both he and the plaintiff were working, and placed it in position in the chain. They were working either upon the same or adjoining cars, and the duties performed by each were practically the same, as they consisted merely in attending to the loading and unloading of the cars. As it happened, Beitle was the one to whom the foreman had spoken, requesting him to look out particularly for the condition of

the chains, and directing him to have any worn links replaced by sound ones. But the plaintiff was employed side by side with Beitle, and all the conditions were equally obvious to him. The blacksmith shop was open, and the blacksmiths were there for the purpose of making up into the shape desired whatever the men wanted in the way of links or other ironwork. Provision was made for direct and immediate communication between the men engaged in the work and the blacksmiths. The iron was furnished in quantities, and in various sizes for varied use as needed, and the blacksmiths were in attendance, not for the purpose of carrying on any separate or distinct department of the defendant's work, but to aid and assist in every way in which their service could be of use to the other workmen, who were, with themselves, all engaged in carrying out one common end,—the construction of the new works. Under the circumstances of the common employment at that time and place the blacksmiths were as truly the helpers and assistants of the other workmen as would be a blacksmith engaged at a stone quarry or a coal mine to sharpen or repair the picks and working tools of the quarrymen or miners. We cannot avoid the conclusion, therefore, that the blacksmith and the plaintiff were coemployees. Both were employed by the same master; were engaged in the same circle of employment; each was helping to carry forward in his own way a definite portion of the work directed to a common end. There is no proof in the case that the blacksmith was incompetent, or not sufficiently skilled for the purpose of his employment. Nor is there any proof that the iron furnished by the defendant in large quantities was either insufficient or unsuitable. This case is clearly ruled by the principles laid down in *Ross v. Walker*, 139 Pa. 40, 21 Atl. 158, 159. As was there said: "The master does not insure his employees against each other, nor is he bound to supervise and direct every detail of their labor. They must exercise their own senses in the selection of material out of the mass provided for them; they must use their own judgment as to the manner of handling it." And again (p. 51, 139 Pa., and p. 159, 21 Atl.): "For an error in judgment, or for a neglect of duty on the part of any one of his employees, from the foreman down to the humblest unskilled laborer, he [the employer] was not liable." We are of opinion that the defendant was entitled to an affirmance of its tenth point for charge, which is as follows: "The blacksmith that made the link, the laborer who ordered it made and put it on the car, and the plaintiff who worked as a laborer on the car, were fellow servants. They assumed all the risks incident to this work, and the master or employer cannot be held liable for the negligence of either or any of them which resulted in an injury to either." The fourth assignment of error, which is to the refusal of this point, is therefore sustained; as is also the first assignment of error, which was to

the refusal of binding instructions in favor of the defendant.

The judgment is reversed.

Mestresat, J., dissenting:

I dissent from the judgment entered in this case. A brief statement of the material facts which are not controverted is necessary for a consideration of the question involved. Wesley Buck, the plaintiff, was employed by the defendant company as a laborer at the time he received the injuries for which the action was brought. The company built a large zinc manufacturing plant at Hazard, in Carbon county. During its construction a temporary railroad track of possibly 1 mile in length was laid for the purpose of carrying cinder, gravel, and other material to be used in grading the ground and in the construction of the buildings. Dump cars drawn by an engine were used on the road. The body of the car was held in place by a chain of 5 links, each about 4½ inches in length, on either side attached to the truck. When the contents of the car were to be discharged, the chain on the opposite side of the dump would be unloosed. The work in the construction of the plant was being done by the defendant company. The labor, as well as the cars, appliances, etc., were furnished by it. The cars belonged to the Central Railroad of New Jersey, and were leased to the defendant company. On the premises where the plant was being constructed the defendant had a blacksmith shop, at which all kinds of work was done. Near the shop was the company supply house, in which were kept large quantities of iron and other material, which were subject to the requisition of the employees in the different departments of the work. Five days prior to the accident, Robert Beitle, then a laborer on the gravel train, and subsequently plaintiff's fellow workman, went to the blacksmith shop, and procured 2 open links to be made by the defendant's blacksmith, to take the place of links which were worn or broken in the chains on the cars. Mr. Courtright, the chief constructing engineer in charge of the work, was at the shop, and Beitle told him that the cars were in a bad condition, and that he came there to get a few open links to be used on the gravel train. On his return to the cars Beitle put the open links in the chains, one in a chain of the car on which the plaintiff subsequently was riding at the time of the accident, and which broke, and caused his injuries. The plaintiff was one of a gang of men operating a train of 8 cars on this road in December, 1899. They loaded and unloaded the cars, and in passing between the points where they performed this service they were required to ride on the cars, and were not permitted to ride on the engine. On the afternoon of December 30th, the cars having been loaded with cinder, the men took their places upon them, and the train started for its destination. After it had gone about 30 yards, one of the chains on the car on which the plaintiff was riding broke, the car was dumped, and he was thrown to the ground, and seriously injured.

On examination it was discovered that the link which broke was an open one. Such links are used only in the case of an emergency, and until the car is taken to the shop, where the chain is repaired with a welded link. The plaintiff had been at work less than three days when he was injured, and did not know there was an open link in the chain until after the accident.

The learned trial judge, in his charge, limited the jury to a consideration of the condition and sufficiency of the link which broke as the only ground of negligence on which there could be a recovery. He held that the broken link was the proximate cause of the accident, and submitted to the jury to determine whether the defendant was negligent in supplying a link defective in its construction or in the material of which it was composed. He charged that "the defendant was bound to furnish a reasonably safe link, not only in matter of construction, but as to the constituent elements of it; and, while he is not liable for any latent defects in it, yet he is liable for negligence in not furnishing the proper material—safe material—for that kind of device. If the link was defectively constructed, or was of defective material, then the plaintiff may recover on both or either of these grounds, if the preponderance of the evidence satisfies you of the correctness of the plaintiff's contention as to those particulars." It was the personal, absolute duty of the defendant to provide the plaintiff with a reasonably safe place in which to work, and with proper and suitable tools and appliances with which to perform his work. This is familiar law. The fact that the cars did not belong to the defendant company did not, as contended by appellant, relieve it from the duty of seeing that they were reasonably safe. They were furnished by the defendant to the plaintiff and his collaborators of the train gang with which to carry or haul the cinder, and that imposed the duty upon the defendant, regardless of the ownership of the cars. Aside from this, however, it was not the cars nor the chain which the defendant hired from the Central Railroad of New Jersey that caused the accident, but the open link, made by the defendant company, and by it inserted in the broken chain on one of those cars prior to the time when the plaintiff entered the defendant company's service. In procuring the link Beitle was not performing work which made him a fellow servant of the plaintiff, even if the latter had then been engaged on the work; nor was the blacksmith in the construction of the link. The duty in either case was that of the defendant company, without regard to the fact that it was performed by an employee of the same grade as the plaintiff. It is the character of the act which causes the injury to an employee, and not the rank of the coemployee to whom its performance is intrusted, that determines the liability of the employer. *Ricks v. Flynn*, 196 Pa. 263, 46 Atl. 380. When the master delegates to his servant or other agent the performance of a duty obligatory upon him, the agent becomes a vice

principal, for whose acts the master is responsible. *Lewis v. Seifert*, 116 Pa. 628, 11 Atl. 514. "But there are some duties," says Paxson, J., delivering the opinion of the court in the case last cited, "which the master owes to the servant, and from which he cannot relieve himself except by performance. Thus, the master owes to every employee the duty of providing a reasonably safe place in which to work, and reasonably safe instruments, tools, and machinery with which to work. This is a direct, personal, and absolute obligation; and, while the master may delegate these duties to an agent, such agent stands in the place of his principal, and the latter is responsible for the acts of such agent."

There were no open links in the chain when the cars were received by the defendant from the Central Railroad of New Jersey. The proximate cause of the accident was the breaking of an open link inserted in the chain by the defendant company before the plaintiff was in its service, and not a defect in any other part of the car or in the chain. The case at bar very much resembles *Philadelphia & R. R. Co. v. Agnew*, 11 W. N. C. 394, though the facts of that case are very much stronger in favor of the defendant. The plaintiff was a brakeman, and was injured by the snapping of a brake chain on a coal train. A chain on one car had snapped, and a broken link was found. The evidence tended to show that the broken link was not in the chain when purchased, but had been placed there in the repair shop of the defendant. The plaintiff recovered a verdict, and judgment was entered in his favor. In the opinion of this court it is said: "A chain is no stronger than the weakest link in it. There was evidence that the link which broke was not in the coil of the chain welded in the factory, but was put in afterwards at the repair shop of the company. It matters not, therefore, how strong or perfect the other parts of the chain were. This link was weak and imperfect, and the breaking thereof caused the injury. . . . The company was bound to exercise reasonable care in procuring good and strong chains, and in maintaining and repairing them. The verdict establishes they did not do the latter." In *Pennsylvania & N. Y. Canal & R. Co. v. Leslie*, 42 Phila. Leg. Int. 267, it was held, as stated in the syllabus, that a boiler maker in the machine shop of a railroad company is not such a coemployee or fellow servant with the engineer and fireman of a locomotive as would relieve the company from his negligent manner of repairing the locomotive boiler, whereby the accident was alleged to have occurred. Gordon, J., speaking for the court, says: "How a boiler maker employed in a machine shop can be regarded as a coemployee with a fireman and an engineer engaged in running a locomotive on the railroad, in the sense of making the latter responsible for the negligence of the former, is something that is difficult to understand." So may it be said here: How a blacksmith in a repair shop can be regarded as a coemployee with a la-

borer on a gravel train in the sense of making the latter responsible for the negligence of the former is something that is difficult to understand. There is no connection between the two employees. The blacksmith has no business about the cars, and the laborer has no business about the shop. In *McKinney, Fellow Servants*, § 25, it is said: "The agents [of the master] who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow servants of those who are engaged in operating it. They are charged with the master's duty to his servants." In *Wood, Mast. & S.* § 409, the author says: "The question is whether any fault is imputable to him [the master] either in the selection of mechanics, material, or in the inspection of the machinery when completed. . . . If so, he is liable, whether the machinery was made by his own mechanics or purchased from others." In an extended note to *Mast v. Kern* (Or.) 75 Am. St. Rep. 580, the learned editor, Judge Freeman, states the following as deducible from the numerous cases he cites on the subject (p. 623, 75 Am. St. Rep.): "Agents charged with the duty of procuring safe machinery, or agents charged with the duty of inspecting and keeping machinery and appliances in suitable repair, are not to be regarded as fellow servants with those employed to labor in the business wherein such machinery and appliances are used, or, in some cases, even with those engaged to operate the same. Such agents are, in legal effect, vice principals, and the master is liable for injuries resulting, without contributory negligence, to other servants, through the ordinary negligence of his employee or agent thus charged with the duty of procuring or repairing, whether such negligence be in originally failing to purchase safe machinery or appliances or in failing to keep the same in proper condition for use." In *Lehigh Valley Coal Co. v. Jones*, 86 Pa. 432, a "mining boss" and a "driver boss" engaged in the mining and removal of coal were held to be fellow servants. But it must be observed that both employees were engaged in the same general business of getting out coal under the orders of a general superintendent. They were performing parts of one common service. Neither was furnishing tools or appliances to the other, nor in any other way performing towards the other the duty of an employer. This observation applies to the case of *New York, L. E. & W. R. Co. v. Bell*, 112 Pa. 400, 4 Atl. 50. In *Ross v. Walker*, 139 Pa. 42, 21 Atl. 157, 159, relied upon by the majority of the court, the plaintiff, a laborer employed in building a bridge, was injured by the breaking of a defective timber supporting the scaffolding on which he worked. "The scaffold was built by the workmen as it was needed to support the ironwork while it was being put in place in the erection of the bridge." This court held—and it was the principal question decided—that it was not the duty of the employer, after having provided materials ample in quantity and quality, to supervise the se-

lection of every stick of timber out of the mass for every purpose. With that conclusion I heartily agree. In the case at bar, if the plaintiff had been a blacksmith, and had been furnished with proper material by the defendant, and had made the link which, breaking, caused his injury, the case would have been similar to the one cited. But the difference in the facts of the two cases is clearly apparent. The reasoning in the opinion in *Ross v. Walker* sustains the position assumed here. Justice Williams, in delivering the opinion of the court, holds that it is the duty of the master to provide suitable appliances for his employees, and that for any negligence in the performance of this duty imposed upon the master he is responsible, regardless of the grade or character of the person who performs it. He says: "The person who is thus put in place of the principal to perform the duties which the law imposes is a vice principal, and *quoad hoc* represents the principal, so that his act is the act of the principal." In my judgment, the case at bar carries the fellow-servant rule far beyond any other case in the books. It makes an employee who acts for and performs the duty of his principal a collaborator of another employee who is injured by the failure of his employer to furnish him suitable appliances with which to work. It was the duty of the defendant

company, under all the decisions, to furnish reasonably safe cars, including the chains, and to maintain them in that condition. It did furnish cars, but they were unsafe before and at the time the plaintiff entered its service. It is a truism, having, as we have seen, the judicial sanction of this court, that a chain is no stronger than its weakest link. Supplying a link, found by the jury to be defective, was the furnishing of a defective chain, which was a necessary and constituent part of the car, which the law required to be reasonably safe when delivered to the plaintiff. An important and controlling fact in the case, it seems to me, is that when Beitle procured the link and inserted it in the chain the plaintiff was not in the service of the company. He entered it two days subsequent. Even if Beitle were a fellow servant of the plaintiff at the time the latter was injured, he was clearly not such when he procured the defective link and put it in the chain. With due deference to the majority of the court, the defendant company is clearly and unquestionably responsible for the condition of the car when it put the plaintiff in charge of it. The case was, therefore, for the jury, and, having been submitted with proper instructions by the learned trial judge, I would affirm the judgment of the court below.

TENNESSEE SUPREME COURT.

CHATTANOOGA LIGHT & POWER COMPANY, *Plff. in Err.*,
v.

George J. HODGES, Admr., etc., of Milton Palmer, Deceased.

(.....Tenn.....)

1. The proximate cause of the death of an employee mortally burned in the employer's burning building, which he had entered to telephone an alarm of fire after he had failed to give the alarm elsewhere as he had left the building to do, is not the employer's negligence in constructing and maintaining the building so as to be likely to burn, but the employee's act in re-entering the building after he had reached a place of safety.

2. The question of proximate or intervening cause is for the court, where the facts are fairly incontrovertible.

(November 28, 1902.)

ERROR to the Circuit Court for Hamilton County to review a judgment in favor of

plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. Brown & Spurlock for plaintiff in error.

Messrs. Richmond, Chambers, & Cooper for defendant in error.

Beard, Ch. J., delivered the opinion of the court:

This suit was brought by the defendant in error to recover damages for the death of his intestate, Milton Palmer, resulting, as is alleged, from the negligence of the plaintiff in error. There were a verdict and judgment in favor of the administrator for \$10,000, and the case has been brought to this court by the light and power company.

The deceased was one of the engineers of the company, and at night had charge of its power-house engines and other machinery. While he was on duty, and about 9:30 P. M., fire was discovered in a framework cover of the electric wires which led up through the hallway to the room above,

NOTE.—For a case in this series as to what constitutes proximate cause of an injury to a servant who leaves a place of safety in order to protect his master's property, see *Pullman's Palace Car Co. v. Laack* (Ill.) 18 L. R. A. 215. As to negligence in incurring danger to save life of another person, see *Corbin v. Philadel-*

phia (Pa.) 49 L. R. A. 715, and *note*; *West Chicago Street R. Co. v. Lilderman* (Ill.) 52 L. R. A. 855, and *Becker v. Louisville & N. R. Co.* (Ky.) 53 L. R. A. 267.

As to doctrine of "last clear chance" in negligence cases, see *note* to *Bogan v. Carolina C. R. Co.* (N. C.) 55 L. R. A. 418.

where they made their exit from the building. The fire rapidly spread, and occasioned the terrible injuries from which Palmer died. The theory of the plaintiff below was that negligence on the part of the defendant company in the use of combustible lumber in making this framework, and also in the location and condition of these wires, occasioned the fire which fatally burned the deceased while he was discharging his duty in seeking to save the property of his employer. The record shows that on discovering the fire young Palmer, instead of sounding the alarm through a telephone in the building, ran to a house across the street, and sought to do so with a telephone located there. After an ineffectual effort to make connection, he abandoned it, and returned to the power house. By that time the fire had spread until it was a serious conflagration. The flames and smoke were pouring out of the main entrance and the windows in that part of the building. There were other openings or doors into the power house, but, seeing Palmer in the act of passing in through this main entrance, a policeman on the ground expostulated with him on what he characterized as "foolhardiness." Disregarding the expostulation, however, Palmer entered there, and went down the burning hallway into the telephone booth or box when it was on fire. Remaining there but a short time, he came out with his clothing aflame, and so horribly burned that in catching at himself the flesh parted or slipped from his hands. From these injuries he died. This is a meager outline of the fire and its results, so far as they affect the present case. While the evidence attributing the origin of the fire to negligence of the company was attenuated, it may be assumed that, with its inferences, it was sufficient to preclude us, under the rule, from saying that there was not material evidence to support the verdict on this point. Assuming, therefore, that the jury were warranted in finding that the defendant company was guilty of such negligence, were they also warranted in finding that this negligence was the proximate cause of Palmer's fatal injuries? For there must be a concurrence of these essentials in order to maintain the present action.

It seems to be well settled that, where one person is exposed to peril of life or limb by the negligence of another, the latter will be liable in damages for injuries received by a third party in a reasonable effort to rescue the one so imperiled. *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692; *Eckert v. Long Island R. Co.* 43 N. Y. 503, 3 Am. Rep. 721; *Gibney v. State*, 137 N. Y. 6, 19 L. R. A. 365, 33 N. E. 142. But even in such a case the rescuer must not rashly and unnecessarily expose himself to danger. *Pennsylvania Co. v. Langendorf*, 48 Ohio St. 316, 13 L. R. A. 190, 28 N. E. 172. But whether the benefit of this rule is to be extended to one injured

in an effort to save his own or another's property, exposed to danger by the wrongdoing or negligence of a third party, is a question that has provoked much difference of judicial opinion. Opposed to this extension are found the cases of *Eckert v. Long Island R. Co.* 43 N. Y. 502, 3 Am. Rep. 721; *Morris v. Lake Shore & M. S. R. Co.* 148 N. Y. 186, 42 N. E. 579; *Condiff v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 260, 25 Pac. 502; *Cook v. Johnston*, 58 Mich. 437, 55 Am. Rep. 703, 25 N. W. 388, and *Seale v. Gulf, O. & S. F. R. Co.* 65 Tex. 274, 57 Am. Rep. 602. On the other hand, in *Berg v. Great Northern R. Co.* 70 Minn. 272, 73 N. W. 648; *Liming v. Illinois O. R. Co.* 81 Iowa, 248, 47 N. W. 66; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 295; *Reater v. Starin*, 73 N. Y. 601, and *Wamer v. Delaware, L. & W. R. Co.* 80 N. Y. 212, 36 Am. Rep. 608,—the rule has been extended so as to give the party injured redress where his effort to save property has been such as a reasonably prudent man would have made under similar circumstances.

In his charge to the jury the trial judge gave the administrator of the deceased the benefit of the rule as announced in *Berg v. Great Northern R. Co.* 70 Minn. 272, 73 N. W. 648, and the other like cases. We do not, however, feel called on to choose determinately between the divergent decisions on this point, and certainly we are not prepared to say the trial judge was in error. But granting that he laid down the law correctly, the question recurs, Was the injury received by Palmer, which resulted in his death, the proximate result of the negligence of the plaintiff in error? An examination of the cases will confirm the statement of Mr. Archibald Watson, of the New York bar, in his recent and very valuable work, entitled "Damages for Personal Injuries," that "no branch of the subject of personal injuries presents greater difficulty than the determination of liability for a specific loss, with reference to its naturalness and proximity as a consequence of the wrongful act complained of." So great has this uncertainty been felt, that many courts have reached the conclusion that, at last, "to a sound judgment must be left each particular case." *Harrison v. Berkley*, 1 Strobb. L. 547, 47 Am. Dec. 578. The same view was expressed by the Supreme Court of the United States in *Louisiana Mut. Ins. Co. v. Troesdel*, 7 Wall. 49, 19 L. ed. 65, in the following language: "We have had cited to us a general review of the doctrine of proximate and remote causes, as it has arisen and been decided in the courts in a great variety of cases. It would be an unprofitable labor to enter into an examination of these cases. If we could deduce from them the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon the very nicest discrimination." While there is much of practical truth in these

statements, and the most careful study of the best text-books and opinions of courts will fail to discover an infallible guide, yet it will be found that all agree on certain general formulas or rules, which, though difficult of application in some, are of value in all, cases involving this question of proximate or remote cause. In *Deming v. Merchants' Cotton-Press & Storage Co.* 90 Tenn. 353, 13 L. R. A. 518, 17 S. W. 89, this court said: "The proximate cause of an injury may, in general, be stated to be that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, which, had it not happened, the injury would not have been inflicted." This definition was approved in that case, and in the later cases of *Postal Teleg. Cable Co. v. Zopf*, 93 Tenn. 369, 24 S. W. 633; *East Tennessee R. Co. v. Kelly*, 91 Tenn. 699, 17 L. R. A. 691, 20 S. W. 312; and *Anderson v. Miller*, 96 Tenn. 35, 31 L. R. A. 604, 33 S. W. 615. In each of these cases, while the injury complained of was not the necessary effect of the particular act of negligence held to be the proximate cause, yet it was the natural result, and one which, in the face of human experience, might well have been anticipated as possible, if not probable. In all of them the principle recognized was that a wrongdoer is liable, not only for the injury which immediately results from his act, but for such consequential injuries as, according to the common experience of man, were likely to result. But the consequential injury, according to the authorities, must be natural, "following upon the original wrongful act, in the usual, ordinary, and experienced course of events." *Wiley v. West Jersey R. Co.* 44 N. J. L. 248; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256. But it is to be observed that the result will not be unnatural, so as to relieve the original wrongdoer of responsibility, because he did not foresee or contemplate the precise consequence of his misconduct. It will be sufficient to fix liability on him if the particular result is one naturally connected, either immediately or through a series of events, with the original wrongful act. *Watson, Damages & Personal Injuries*, § 145. On the other hand, where the result is such that no reasonable man would expect it to occur, and no knowledge is shown in the person doing the negligent or wrongful act that such a state of things exists as to make the damage probable, we think the rule is that the injury will not be regarded as actionable as against the wrongdoer. *Sharp v. Powell*, L. R. 7 C. P. 253. And especially should this be true where the injury results from an act committed by the injured party so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence. In such a case it would seem impossible to find any ground upon which to maintain that the person guilty of the first act of negligence should be held

liable to the party so injured, and the law, upon uncontroverted evidence showing such facts, without more, should relieve the original wrongdoer from liability. In such a case the intervening act of the party injured should be treated as the proximate cause of the injury. *Seale v. Gulf, C. & S. F. R. Co.* 85 Tex. 274, 57 Am. Rep. 602; *Pike v. Grand Trunk R. Co.* 39 Fed. 255. On this phase of the subject, Mr. Watson, in § 82 of the work already referred to, says: "It is not, it is believed, necessary to show that the plaintiff's intervening act, which may render the defendant's act the remote cause of the former's injuries, amounted to contributory negligence in law. Whether, in its character, the plaintiff's act is negligence or otherwise, it will, just as an intervening cause of any other nature, if unexpected, and of a character which could not have been contemplated or foreseen, and without which no injuries would have been occasioned, relieve of liability the author of the earlier act or omission complained of."

Now, in view of these general rules, which it would seem, are based on common fairness and right reason, where, upon the undisputed facts as disclosed in the record, rests the responsibility for the loss of young Palmer's life? Granting every inference indicating negligence on the part of the plaintiff in error which had to do with the origin of this fire, was the fatal injury sustained by him the natural or probable result therefrom? Could any reasonable man, though guilty of this negligence, have contemplated that one, from a place of safety, would go through flame and smoke to his mortal injury? Was such an act within the bounds of human experience? Or was there an unbroken connection between the negligent act and the injury? On the contrary, was not this intervening act of the deceased, however heroic it may have been,—one of extreme rashness, called for by no requirement of duty to his employer,—the proximate cause of his death? Was it not an intermediate, efficient cause, operating to disconnect the fatal consequence from the original act of negligence? While ordinarily the answers to those questions would naturally fall within the province of the jury, and, when made in their verdict, would be regarded as binding, yet, where the facts are fairly incontrovertible, the question of proximate or intervening cause is for the court. *Holman v. Boston Land & Security Co.* 8 Colo. App. 282, 45 Pac. 519; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L. R. A. 794, 51 N. E. 1; *Bradley v. Ft. Wayne & B. R. Co.* 94 Mich. 35, 53 N. W. 915; *Butcher v. Hyde*, 152 N. Y. 142, 46 N. E. 305.

Whatever may hereafter be developed, at least on the record as it now is, we think these questions must be answered, as a matter of law, against the contention of the plaintiff below, and that the judgment must be reversed because of a lack of evidence to support the verdict on this material point. The case is remanded for a new trial.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

TEXAS & PACIFIC RAILWAY COMPANY,
Plff. in Err.,
v.

Michael CARLIN.

(49 C. C. A. 605, 111 Fed. 777.)

1. An action for negligent injuries should not be withdrawn from the jury, unless the conclusion follows, as matter of law, that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish.
2. Under statutes requiring employees to be in the same grade of employment to be fellow servants, a foreman in control of a bridge gang is not a fellow servant of a member of the gang.
3. A foreman of a bridge gang, whose duty is to see that the bridge is clear of obstructions upon the approach of trains, may be found negligent from the fact that a passing train struck a maul, where the surface of the bridge was plain, with nothing to cover or hide the maul.
4. The fact that the particular injury resulting from negligence was not to be anticipated will not defeat liability therefor if the negligence was such as to be likely to produce injury.
5. The negligence of a bridge foreman, whose duty it is to see that the bridge is free from obstructions on the approach of trains, in failing to see a maul left by a workman in such a way as to interfere with the passage of the train, and not that of the workman in so leaving it, is the proximate cause of an injury to a member of the bridge gang who is struck by the maul as it is hurled from the track by the train.

(November 19, 1901.)

ERROR to the Circuit Court of the United States for the Northern District of Texas to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Argued before *Pardee, McCormick, and Shelby*, Circuit Judges.

Messrs. T. J. Freeman, F. B. Stanley, M. A. Spoonts, and George Thompson, for plaintiff in error:

Before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

Schuykill & D. Improv. & R. Co. v. Munson, 14 Wall. 448, 20 L. ed. 872; *Marion County v. Clark*, 94 U. S. 278, 284, 24 L. ed. 59, 61; *Pleasants v. Fant*, 22 Wall. 120, 22 L. ed. 782; *Randall v. Baltimore & O. R. Co.* 109 U. S. 482, 27 L. ed. 1005, 3 Sup. Ct. Rep. 322; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 472, 35 L. ed. 213, 215, 11 Sup. Ct. Rep. 569; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615-619, 29 L. ed. 224, 225, 5 Sup. Ct. Rep. 1125; *Quebeco S. S. Co. v. Merchant*, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397.

There are times when it is proper for a court to direct a verdict.

Patton v. Texas & P. R. Co. 179 U. S. 659, 45 L. ed. 362, 21 Sup. Ct. Rep. 275; *Phœnia Mut. L. Ins. Co. v. Doster*, 106 U. S. 30, 32, 27 L. ed. 65, 66, 1 Sup. Ct. Rep. 18; *Griggs v. Houston*, 104 U. S. 553, 26 L. ed. 840; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478, 482, 27 L. ed. 1003, 1005, 3 Sup. Ct. Rep. 322; *Anderson County v. Beal*, 113 U. S. 227, 241, 28 L. ed. 966, 971, 5 Sup. Ct. Rep. 433; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615-619, 29 L. ed. 224, 225, 5 Sup. Ct. Rep. 1125; *Delaware, L. & W. R. Co. v. Converse*, 139 U. S. 469, 472, 35 L. ed. 213, 214, 11 Sup. Ct. Rep. 569; *Aerkfets v. Humphreys*, 145 U. S. 418, 36 L. ed. 758, 12 Sup. Ct. Rep. 835; *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 245, 37 L. ed. 1068, 14 Sup. Ct. Rep. 85.

While a servant may be a vice principal of a company, yet, if the negligent act which is complained of against him arises in the performance of one of the duties of a mere servant, which might or could be performed by any coemployee, then the negligence is not that of a vice principal, but that of a fellow servant.

Quinn v. New Jersey Lighterage Co. 23 Fed. 363; *Stockmeyer v. Reed*, 55 Fed. 259; *Minneapolis v. Lundin*, 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525; *Illinois O. R. Co. v. Bolton*, 99 Tenn. 273, 41 S. W. 442; 12 Am. & Eng. Enc. Law, p. 949; *Crispin v. Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Hoke v. St. Louis, K. & N. R. Co.* 11 Mo. App. 574.

In order to find the defendant liable for any act of the bridge foreman, it must be found that any failure on his part to discover the close proximity of the maul was negligence.

Chicago, St. P. M. & O. R. Co. v. Elliott, 20 L. R. A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 949; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed.

NOTE.—As to statutory liability of employers for negligence of servants exercising superintendence, see also *Canney v. Walkeine* (C. C. App. 1st C.) 58 L. R. A. 33, and note.

For other cases in this series as to liability for unforeseen consequences of act, see *Doyle v. Chicago, St. P. & K. C. R. Co.* (Iowa) 4 L. R. A. 420; *Sellick v. Lake Shore & M. S. R. Co.* (Mich.) 18 L. R. A. 154; *Jacksonville, T. & K.* 60 L. R. A.

W. B. Co. v. Peninsula Land, Transp. & Mfg. Co. (Fla.) 17 L. R. A. 33; *New Orleans & N. E. R. Co. v. McEwen & Murray* (La.) 38 L. R. A. 134; *Lillibridge v. McCann* (Mich.) 41 L. R. A. 381; *Sullivan v. Dunham* (N. Y.) 47 L. R. A. 715; *Osborne v. Van Dyke* (Iowa) 54 L. R. A. 367, and *Cleghorn v. Thompson* (Kan.) 54 L. R. A. 402.

256; *Texas & P. R. Co. v. Bigham*, 90 Tex. 223, 38 S. W. 162.

Messrs. Orrick & Terrell, for defendant in error:

If an ordinarily prudent person ought to have foreseen that injury might likely result to any person by reason of the negligence of the foreman in not discovering the maul on the track, under the circumstances, the anticipation of any injury would be sufficient to constitute the leaving of the maul there, while a train was approaching, the probable cause of the injury done, and the proximate cause thereof.

Texas & P. R. Co. v. Short (Tex. Civ. App.) 58 S. W. 57; *Doyle v. Chicago, St. P. & K. O. R. Co.* 77 Iowa, 607, 4 L. R. A. 420, 42 N. W. 555; *Baltimore & O. R. Co. v. Anderson*, 29 C. C. A. 235, 56 U. S. App. 137, 85 Fed. 413; *Herrick v. Quigley*, 41 C. C. A. 294, 101 Fed. 187; *Zoppi v. Postal Teleg. Cable Co.* 9 C. C. A. 308, 22 U. S. App. 136, 60 Fed. 987; *Chicago & N. W. R. Co. v. Prescott*, 23 L. R. A. 654, 8 C. C. A. 109, 19 U. S. App. 291, 59 Fed. 237.

The statutes of the state of Texas make the question of fellow servant depend entirely upon the grade of employment, and not the act done or omitted to be done.

Nis v. Texas & P. R. Co. 82 Tex. 473, 18 S. W. 571; *Sweeney v. Gulf, C. & S. F. R. Co.* 84 Tex. 433, 19 S. W. 555.

The master owes to the servant a reasonably safe place in which to perform his work, and to use ordinary care to keep the same in a reasonably safe condition, and if, instead of personally performing these obligations, he engages another to do so, he is liable for the neglect of that other.

Northern P. R. Co. v. Peterson, 162 U. S. 346-353, 40 L. ed. 994-997, 16 Sup. Ct. Rep. 843; *Jackson v. Norfolk & W. R. Co.* 43 W. Va. 380, 46 L. R. A. 337, 27 S. E. 278, 31 S. E. 258; *Flannagan v. Chesapeake & O. R. Co.* 40 W. Va. 436, 21 S. E. 1028; *Daniel v. Chesapeake & O. R. Co.* 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162; *Hess v. Rosenthal*, 100 Ill. 621, 43 N. E. 743; *Harrison v. Detroit, L. & N. R. Co.* 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034.

Shelby, Circuit Judge, delivered the opinion of the court:

This is an action for damages for personal injuries, brought by Michael Carlin, plaintiff, against the Texas & Pacific Railway Company, defendant. The petition alleged that the plaintiff was in the employ of the defendant as a member of what is known as the "bridge gang," and, while at work near where a bridge was being repaired, a train approached with great speed, and as it ran over the bridge a spike maul or heavy iron hammer, weighing 6 or 8 pounds, with a handle attached to it, was caught by the train, and thrown against the plaintiff, injuring his leg so that it had to be amputated. The negligence of the company was charged in several ways, one being that the foreman of the bridge gang had failed to see and remove the maul from the bridge.

The defendant's answer contained a general denial, and a plea that, if there were negligence, it was that of a fellow servant of the plaintiff, for which the defendant was not liable, and that the plaintiff was guilty of contributory negligence. The case was tried on these issues, and there was a verdict for the plaintiff for \$6,000 damages, on which judgment was entered. A bill of exceptions was reserved by the defendant, and the case is brought here on writ of error.

The plaintiff in error contends that the trial court should have directed a verdict for the defendant. Several of the assignments of error are dependent on that contention, and they are discussed together in the arguments submitted.

In every jury trial there is a preliminary question for the court. The court must determine whether or not there is sufficient evidence upon which the jury could base a verdict for the plaintiff. If there is no evidence, or if it is such that, on a fair construction, it does not sustain the plaintiff's case, and that no fair inference to be drawn from it sustains it, the court should give the peremptory instruction. There is no good sense in permitting a verdict that it would be the duty of the court to set aside. But it is not the province of the court to weigh the evidence, and decide between conflicting statements of witnesses, or to decide what inference should be drawn from uncontradicted evidence, if different minds could fairly come to different conclusions from it. A question of negligence, dependent on evidence, should not be taken from the jury, except in cases where there is no material conflict, and where there is no room for different minds to draw different inferences from it. The question of negligence is one of law for the court, only when the facts are such that all reasonable men must draw the same conclusions from them. A case should not be withdrawn from the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish.

The plaintiff, Carlin, was one of several members of a bridge gang. Welsh was the foreman in charge and control of the gang. The foreman and gang had gone to the bridge on the defendant's railway to repair it. Ed. Carver, one of the gang, used an iron maul or hammer about 10 inches long, weighing 6 or 8 pounds, to drive spikes in the bridge. It had a wooden handle about 3 feet long. Welsh, the foreman, directed the plaintiff to sharpen a saw. Pursuing their work under the direction of the foreman, all the men left the bridge. Welsh alone remained on the bridge. It was his duty to see that the bridge was kept free from obstructions, so that trains could safely pass. Where Carver laid the maul when he left the bridge is not shown by direct evidence. Ten or fifteen minutes after he was using the maul, a train approached rapidly, and crossed the bridge. Welsh says he looked on the bridge, and saw no obstruction; that he did not see the maul. He

stepped out of the way of the passing train. As the train passed, the plaintiff, who was more than 20 feet from the track, was seen to fall. His leg was broken so as to require amputation. Lying near him was the iron maul, with the handle freshly broken. The conclusion is irresistible that the cars in passing had struck the maul, breaking the handle, and hurling it against him.

One of the averments of negligence in the petition is that the company was negligent, in that Welsh, the foreman of the bridge gang, failed to see that the bridge was clear of obstructions, and in failing to detect the maul on the bridge, and in leaving it there to obstruct the bridge.

In the absence of a controlling statute, it may be conceded that Welsh, the foreman, and the plaintiff, a member of the bridge gang, would have been fellow servants, and Carlin would have had no cause of action against the company. *McDonald v. Buckley*, 48 C. C. A. 372, 109 Fed. 290; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85. But there are statutes in Texas applicable to the case. By these statutes, in a case like this, a servant or employee, who has the authority to direct any other employee in the performance of any duty of such employee, is a vice principal, and not a fellow servant. By the express terms of the statute, employees are not considered fellow servants unless they "are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place and at the same piece of work and to a common purpose." *Sayles's Anno. Civ. Stat. (Tex.) 1897, arts. 4560f-4560h*. The statutes are printed in the margin.*

It is clear on the proof that Welsh was in control and command of the plaintiff, and that they were not in the same grade of employment, nor at the time of the accident were they doing the same character of work or service. Under the Texas statute, according to its letter, or as construed by the Texas supreme court, they were not fellow servants. *Long v. Chicago, R. I. & T. R. Co.* 94 Tex. 53, 57 S. W. 802; *Nix v. Texas P. R. Co.* 82 Tex. 473, 18 S. W. 571. We must be controlled by these statutes and their construction by the Texas supreme court. U.

S. Rev. Stat. § 721; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914. It follows that the company would be responsible to the plaintiff if he received the injuries from the negligence of Welsh.

The contention for the peremptory charge must be and is based on the idea that there is no proof of negligence on the part of Welsh. There is no conflict in the evidence that it was Welsh's duty to see that the bridge was not obstructed. He says he looked, and saw no obstruction. It is claimed that there is no evidence as to the location of the maul when the train reached the bridge; that there is no proof that it was in sight; that, if Carver had placed it where Welsh could not have seen it, it was not negligence in Welsh to fail to see and remove it. Negligence, like any other fact, may be proved by circumstantial evidence. The indisputable fact that the cars struck the maul, and hurled it so that it struck the plaintiff, shows that the maul lay where the cars could strike it. Welsh was alone on the bridge as the train approached. It was proved that the surface of the bridge was plain,—made with the cross-ties about 18 inches apart, on which were the rails and the guard rails, with nothing on them or near them to cover or hide the maul. When the evidence shows that the cars struck the maul on the bridge so constructed, is not that a fact from which the jury might infer that it was lying in plain view, near the rail? If such inference be not unreasonable, the question was one for the jury.

We cannot adopt the suggestion or intimation that in cases like this, owing to the alleged inclination of juries to find against corporations, we should assume that the jury has been influenced otherwise than by a consideration of the evidence. To adopt the expression of a distinguished judge: "We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these, as well as others." *Jones v. East Tennessee, V. & G. R. Co.* 128 U. S. 443, 32 L. ed. 478, 9 Sup. Ct. Rep. 118.

It must be conceded that the injury for which the action is brought occurred in an

* "Art. 4560f. Every person, receiver, or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employee thereof while engaged in the work of operating the cars, locomotives, or trains of such person, receiver, or corporation, by reason of the negligence of any other servant or employee of such person, receiver, or corporation; and the fact that such servants or employees were fellow servants with each other shall not impair or destroy such liability.

"Art. 4560g. All persons engaged in the service of any person, receiver, or corporation, controlling or operating a railroad or street railway, the lines of which shall be situated in whole or in part in this state, who are intrusted by such person, receiver, or corporation with the authority of superintendence, control, or com-

mand of other servants or employees of such person, receiver, or corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice principals of such person, receiver, or corporation, and are not fellow servants with their coemployees.

"Art. 4560h. All persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow servants with each other. Employees who do not come within the provisions of this article shall not be considered fellow servants." *Sayles's Anno. Civ. Stat. (Tex.) 1897, arts. 4560f-4560h*.

extraordinary and unusual manner. Just such an occurrence was not to be anticipated. The defendant requested the trial judge to instruct the jury that, although they may find that the foreman failed to discover the maul, "yet, if you believe from the evidence that the result which followed from his failure to discover it was not such result as ought to have been foreseen in the light of the attending circumstances, then, in such event, the failure of the foreman to discover the proximity of the hammer would not be such negligence as would make the defendant liable, and you must find for the defendant." The court did not err in refusing to adopt this view of the case. It may be true that the accident in its extraordinary form, with its peculiar circumstances, could not have been expected to happen from the maul being left on the bridge near the rail, yet the act of permitting it to remain there was none the less negligent, for it threatened danger in many directions. It was liable to produce familiar results, which would cause serious injury. The fact that it happened to cause the injury in a manner so unusual that it was not to be expected cannot prevent the act from being negligent when it was likely to cause injury in a way that might be foreseen. It may be true that the negligence in this case produced an effect not before observed, the circumstances of which could not have been anticipated. But, if it was negligence likely to produce other and familiar injuries, the peculiarity of the accident does not prevent liability. *Doyle v. Chicago, St. P. & K. O. R. Co.* 77 Iowa, 607, 4 L. R. A. 420, 42 N. W. 555. The extraordinary circumstances attending the injury cannot serve as a defense. To so hold would be to say that a plaintiff must show similar injuries to have occurred in the same manner before he could recover. And it would lead to the anomalous result that for the first, and perhaps the second, injury occurring in such manner there could be no recovery; but for the third, or when the circumstances ceased to be peculiar or became familiar, the defendant would be liable.

It is contended that, if Ed. Carver left the maul close to the rail or track, this act of Carver's was the direct or proximate cause of the injury. It is true that, if the maul had not been placed near the rail, Carlin would not have been injured. But we do not think that this act of Carver's, conceding

it to be proved, constituted the proximate cause of the injury. When he finished driving the spikes with the maul he would be expected to lay it down. The tools of the workmen, and the material in use to repair the bridge, could only be rightfully on the bridge and on the track when no train was to pass. Sometimes they would necessarily be left for a short time on the bridge. They could be there without negligence on some occasions. It would, of course, be negligence to leave them on the track for a train to run over them. The fact that they were so placed on the track, the men negligently leaving them there, could not make it the less negligent for the foreman to fail to perform his duty to remove them or cause them to be removed. To illustrate: The gang might remove a defective rail on a bridge to put in a new one. If the foreman failed to put out a flag, or to use or cause to be used other means to stop the train coming on the bridge while the rail was off,—that being his duty,—and an accident occurred, it could not be said that the act of the gang in removing the rail was the proximate cause of the accident. The proximate cause of the accident would be the failure of the foreman to stop the train. Placing the maul on the bridge may have been an innocent act connected with its use. It may be conceded that Carver was negligent to leave it here. The fact, not disputed in evidence, that the duty was imposed on the foreman to see that the bridge was kept free from obstructions, shows that it was deemed unsafe by the company to rely alone on the men to voluntarily keep it free. Conceding the negligence of Carver, could that excuse or relieve Welsh from the performance of his duty? He was left alone on the bridge, and, as the proof tends to show, near the maul, when the train was approaching. He had time to remove it. If he negligently failed to see it, or, seeing it, failed to remove it, that was the negligence constituting the proximate cause of the accident. The preceding act of Carver could not relieve the company of its responsibility for Welsh's failure to perform his duty.

We have carefully examined all the assignments of error, and find no reversible error in the case. *The judgment of the Circuit Court is affirmed.*

Affirmed by Supreme Court of United States April 6, 1903.

TEXAS COURT OF CRIMINAL APPEALS.

Fines Brock, Appt.,

v.

STATE of Texas.

(.....Tex. Crim. App.....)

1. Refusal of a continuance of a prosecution

NOTE.—For a case in this series holding that bigamy is not a personal wrong within the meaning of the statute allowing testimony of a 60 L. R. A.

cution for statutory rape upon a person under fifteen years of age, to enable defendant to procure the attendance of a witness who would testify that he knew that prosecutrix was born more than fifteen years before the commission of the alleged offense, is ground for new trial in case of conviction.

2. Testimony discovered after a conviction

husband or wife against the other in case of personal wrong or injury, see *People v. Quantstrom* (Mich.) 17 L. R. A. 723.

viction of statutory rape upon a female under fifteen years of age, that the mother of prosecutrix bore a female child a little more than fifteen years before the commission of the alleged offense, which may have been the prosecutrix, will warrant a new trial.

3. A husband cannot waive the provisions of a statute that his wife shall in no case testify against him in a criminal prosecution except for an offense committed against her.

(December 11, 1902.)

A PPEAL by defendant from a judgment of the District Court for Tom Green County convicting him of rape. *Reversed.*

The facts are stated in the opinion.

Messrs. O. E. Dubois and Allen & Upton, for appellant:

The court erred in overruling defendant's application for continuance.

Dinkens v. State, 42 Tex. 250; *Williams v. State*, 10 Tex. App. 532; *Peeler v. State*, 2 Tex. App. 455.

A new trial should have been granted because of newly discovered testimony.

Thomason v. State, 2 Tex. App. 550; *West v. State*, 2 Tex. App. 209; *Lindley v. State*, 11 Tex. App. 283; *Jackson v. State*, 18 Tex. App. 596; *Estrada v. State*, 29 Tex. App. 169, 15 S. W. 644.

Mr. James O. Wiley also for appellant.
Mr. Robert A. John for appellee.

Davidson, P. J., delivered the opinion of the court:

The indictment is for rape,—the first count charging rape upon Hattie Meads, a girl under fifteen years of age; and the second count, rape upon the same girl by force, threats, and fraud. Both counts were submitted to the jury, and a verdict of guilty was returned, assessing the death penalty. The offense occurred May 28, 1902.

The absent witness Elliott was expected to testify that he knew the age of the prosecutrix; that the date of her birth was the 25th of April, 1887 (the alleged rape having occurred the latter part of May, 1902); that he was living in San Angelo, where Meads and his wife were married, during the years 1886 and 1887, and neighbor to the mother of the prosecutrix, when prosecutrix was born; that the mother's maiden name was Corintha Bell Stewart; that she married Gid Meads, father of prosecutrix, on June 14, 1886; that during the years 1886 and 1887 Gid Meads and his wife were neighbors to witness and his family; that their families visited, and witness knows all the above facts to be true. This application for continuance was refused. Attached to the motion for new trial is the affidavit of Mrs. A. J. Potter and her son Sid. Sid Potter states in his affidavit that his age is twenty-six years in September of this year; that he knew all the parties to this transaction, and knows the mother of prosecutrix gave birth to a girl child after her marriage, prior to May, 1887,—in other words, fixes the date of the birth of the child more than a 60 L. R. A.

month prior to the 28th of May, 1887. Mrs. A. J. Potter states in her affidavit that she now lives and has resided in the town of San Angelo for twenty years, continuously, and was living in the town during the years 1886 and 1887; that she was well acquainted with Corintha Bell Brock, mother of prosecutrix; that her maiden name was Stewart; that she was well acquainted with her former husband, Gid Meads, father of prosecutrix, and remembers the circumstances of the marriage of Mrs. Brock with Gid Meads; that they were married in 1886 by the Reverend A. J. Potter, affiant's husband; that immediately after the marriage Mr. and Mrs. Meads moved into the "same block" in which affiant then lived, at the rear of affiant's lot, and lived there the remainder of the year 1886 and the year 1887, during which time affiant was a constant visitor of the Meads family; that some time during the spring of 1887 Mrs. Meads gave birth to a female child; that this particular child was born in about ten or eleven months after the marriage of the mother to said Gid Meads; that affiant was at the residence of Mrs. Meads shortly after the birth of the child, and knows it was a female child, and, if called upon, would testify to the above facts. This is alleged to be newly discovered testimony, and is brought strictly within the rules authorizing a new trial upon such testimony. If the testimony of Elliott or the testimony of Mrs. Potter and her son is true, or would raise a reasonable doubt as to the age of the girl in the minds of the jury, then it was most material. A new trial should have been awarded upon both grounds.

The wife of appellant was used as a witness by the state, and gave evidence of a most damaging character against him. She was required to hold up before the jury the family quarrels, the family disturbances, and alleged assaults upon her by appellant, as evidence against him. This testimony showed him to be of a cruel disposition. In fact, it shows a life of turmoil and trouble, and assaults and threats by the husband against the wife and the prosecutrix, continuing for some time prior to the alleged rape. The question of her competency was not raised in the trial court, but for the first time is questioned on appeal. The proposition being that, under our statute, the wife is not a competent witness against the husband in a criminal proceeding of this character, with or without his consent; that neither spouse can consent to the other's testifying against him in a criminal case, except where it is an offense of one against the other. So far as we are aware, for the first time this question has been presented to this court for adjudication. In *Daffin v. State*, 11 Tex. App. 76, while not discussed, it was held that objection to an illegal cross-examination of the wife came too late after trial. In *Dill v. State*, 1 Tex. App. 278, there is an intimation that the wife would not be permitted to testify against appellant under any circumstances unless it was an offense by her husband against her. In this particular case she not only testified to

various violations of law not involved in the rape case, as well as the alleged rape, but also confidential communications and matters of that character. Code Crim. Proc. art. 774, provides that "neither husband nor wife shall in any case testify as to communications made by one to the other while married; nor shall they after the marriage relation ceases be made witnesses as to any such communication made while the marriage relation subsists, except in a case where one or the other is prosecuted for an offense and a declaration or communication made by the wife to the husband or by the husband to the wife goes to extenuate or justify an offense for which either is on trial." Code Crim. Proc. art. 775, further provides: "The husband and wife may in all criminal actions be witnesses for each other, but they shall in no case testify against each other except in a criminal prosecution for an offense committed by one against the other." The question as to whether or not this is a question of privilege, subject to waiver by the parties, or can be waived by consent of the parties, has been a matter of some discussion in the courts. In New York it was held that it could be waived, but that statute is totally unlike the Texas statute, and its language is peculiar. It provides the husband or wife of the person indicted or accused of a crime is in all cases a competent witness on the examination or trial of such person, but neither husband nor wife can be compelled to disclose a confidential communication made by one to the other during their marital relation. N. Y. Penal Code, § 715. That was the article the New York court construed in the cited cases. It would seem that in England the rule is not satisfactorily settled, but, as we understand the weight of the authorities there, the husband or wife cannot consent to the other testifying against him, and various reasons are assigned why this is true. Practically, the authorities there, as well as in the United States, have agreed that the best reason for the rule is based on public policy. Courts have been driven or have resorted to reasoning why statutory rules are prescribed. What actuated the legislative body in creating certain enactments may be satisfactory to a court to understand; but, whatever the reason for rules of this character may be, if the wording is plain it is totally unnecessary to seek out reasons. It is sufficient for the court, where the language is plain, to adhere to the language employed. Usually a party upon trial may waive such matters as are usually termed "rights," but it may be stated accurately that such matters as he may waive are those that are usually known as "privileged,"—as the relation, for instance, between attorney and client. If his rights alone were the issue, it might be, perhaps, held that they could be waived; but where the policy of the law enters into it, and goes beyond this, or where the statute places it beyond the question of privilege of the accused, and makes the inhibition a matter of public policy, it is to be seriously ques-

tioned that the court would be justified in holding such matters could be waived. In this particular character of case the spouse upon the stand has a right to be protected, under the statute, from being required to answer; the other spouse, being upon the trial, has a right to be protected; and society has an overshadowing right that family matters should not be dragged into the courts of the country, to the subversion of the family relation, which is the paramount substratum and basic principle of society. In *Stein v. Bowman*, 13 Pet. 209, 10 L. ed. 129, the Supreme Court, speaking through Justice McLean, said: "The rule which protects an attorney in such a case is founded on public policy, and may be essential in the administration of justice. But this privilege is the privilege of the client, and not of the attorney. The rule which protects the domestic relations from exposure rests upon considerations connected with the peace of families. And it is conceived that this principle does not merely afford protection to the husband and wife, which they are at liberty to invoke or not, at their discretion, when the question is propounded; but it renders them incompetent to disclose facts in evidence in violation of the rule. And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances it would afford no substantial protection to persons uninstructed in their rights, and thrown off their guard and embarrassed by searching interrogatories. In the present case the witness was called to discredit her husband; to prove, in fact, that he had committed perjury; and the establishment of the fact depended on his own confessions,—confessions which, if ever made, were made under all the confidence that subsists between husband and wife. It is true, the husband was dead, but this does not weaken the principle. Indeed, it would seem rather to increase than lessen the force of the rule. Can the wife, under such circumstances, either voluntarily be permitted, or by force of authority be compelled, to state facts in evidence which render infamous the character of her husband? We think, most clearly, that she cannot be. Public policy and established principles forbid it. This rule is founded upon the deepest and soundest principles of our nature,—principles which have grown out of those domestic relations that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife would be to destroy the best solace of human existence." In a late case by the same august tribunal the case of *Stein v. Bowman* was cited with approval. See *Bassett v. United States*, 137 U. S. 496, 34 L. ed. 762, 11 Sup. Ct. Rep. 165. This opinion was delivered by Justice Brewer, and the question was whether or not one of the polygamous wives could be heard to testify against her husband. The Supreme

Court held her incompetent. This language is found in the opinion: "Is polygamy such a crime against the wife? That it is no wrong upon her person is conceded; and the common-law exception to the silence upon the lips of husband and wife was only broken, as we have noticed, in cases of assault of one upon the other. That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed, when he forgets his integrity as a man, and violates any human or Divine enactment? Is she less sensitive, is she less humiliated, when he commits murder or robbery or forgery, than when he commits polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and, as the statute speaks of crimes against her, it is simply an affirmation of the old, familiar, and just common-law rule. We conclude, therefore, that under this statute the wife was an incompetent witness as against her husband." It has been held in this state that the statute has not changed the common-law rule. If that be true, then the two cited decisions rendered by the Supreme Court of the United States are in point. It

occurs to us that the common-law rule is rather broadened and emphasized, than weakened, by our statute. This line of reasoning finds support in many of the text-writers. See 3 Rice, Ev. p. 282. There this language is found: "And it is well that the principle does not rest on the discretion of the parties. If it did, in most instances it would afford no substantial protection to persons uninstructed in their rights, and thrown off their guard and embarrassed by searching interrogatories." See 3 Jones, Ev. § 757, and authorities cited in note 6; 1 Greenl. Ev. § 340; *Davis v. Dinwoody*, 4 T. R. 678; [*Sedgwick v. Walkins*] 1 Ves. Jr. 49. The only English authority which has been called to our attention, laying down a contrary doctrine, is *Pedley v. Wellesley*, 3 Car. & P. 558. That case does not enter into a discussion of the question, or state any reason for the holding; nor does it state whether it is under the common law, or the act of Parliament, which seems to have abridged the common law in regard to this rule. Without further discussion of the question, we are of opinion that it was error, though no exception was reserved, to use the wife as a witness against appellant. In other words, under the statute she is an incompetent witness, whose evidence cannot be used even by the consent of the husband, and she can only be used when placed on the stand by her husband, except where the offense is against her personally. Offenses against the daughter are not offenses against the wife.

For the errors discussed, the judgment is reversed, and the cause remanded.

UTAH SUPREME COURT.

STATE of Utah, *Resp't.*,

v.

Henry SOPHER, *Appt.*

(.....Utah.....)

1. Forbidding a barber to exercise his trade on Sunday is a proper exercise of the police power, and does not unconstitutionally restrain him of personal liberty, or deprive him of liberty or property without due process of law.
2. It is not an act of necessity to keep open a barber shop on Sunday for the transaction of business.
3. Forbidding the keeping open of a barber shop on Sunday, while permitting hotels, boarding houses, baths, restaurants, taverns, livery stables, and retail drug stores to be open, is not unconstitutional as depriving barbers of the equal protection of the laws, since the classification is not arbitrary.

(February 4, 1903.)

NOTE.—For work of barber as work of necessity within meaning of Sunday law, see also, in this series, *Com. v. Waldman* (Pa.) 11 L. R. A. 563, and *Ex parte Kennedy* (Tex. Crim. App.) 51 L. R. A. 270.

As to constitutionality of statute prohibiting 60 L. R. A.

APPEAL by defendant from a judgment of the District Court for Salt Lake County convicting him of keeping his place of business open on Sunday, contrary to the provisions of the statute. *Affirmed.*

Statement by Hart, District Judge:

Defendant is charged with the offense of keeping open a place of business on Sunday. It is alleged that he did "wilfully and unlawfully conduct and operate a barber shop and keep the same open, and did then and there unlawfully conduct a general barber business therein." Defendant's demurrer to the complaint was overruled, and he was found guilty in the justice's court, and also in the district court, and fined in each court the sum of \$15.

From the agreed facts it appears that defendant is a barber by occupation, and that on Sunday, June 16, 1901, he was in a barber shop in Salt Lake City, Utah, following his vocation as barber; that one J. H.

the business of a barber on Sunday, see also, in this series, *People v. Bellet* (Mich.) 22 L. R. A. 696; *People v. Havnor* (N. Y.) 31 L. R. A. 689; *Eden v. People* (Ill.) 32 L. R. A. 659; and *Ex parte Jentsch* (Cal.) 32 L. R. A. 664.

Rothwell (who was a member of the Barbers' Union, which union was against Sunday labor), the complaining witness, came into said barber shop, entering by the side door of the shop, and asked to be shaved; that defendant shaved the said Rothwell, who paid said defendant on said day the sum of 25 cents; that said barber shop was connected with the Albany hotel, in said city; and that the evidence fails to show that anyone else was shaved by defendant on said day. Defendant's motion in arrest of judgment and motion for new trial were overruled, and defendant appeals to this court, contending that the law under which this prosecution was conducted (Rev. Stat. 1898, §§ 4234, 4235) is unconstitutional and void for the following reasons: (1) As being an undue restraint of personal liberty, and deprives a person of life, liberty, and property without due process of law; (2) it is special legislation, based upon an arbitrary classification; (3) the act complained of was an act of necessity, which is allowed to be performed on Sunday; (4) it is not a proper exercise of the police power of the state.

Section 4234 prohibits, in general, the keeping open on Sunday of any place of business for the purpose of transacting business therein, while § 4235 excepts from the preceding section hotels, boarding houses, baths, restaurants, taverns, livery stables, or retail drug stores, for the legitimate business of each, or such manufacturing establishments as are usually kept in constant operation. The appellant does not contend that § 4234 would be unconstitutional if it stood alone, but that it is rendered so by the exceptions of the section which follows.

Messrs. Richard B. Shepard and Harrison O. Shepard, for appellant:

The act is an undue restraint of personal liberty, and deprives a person of life, liberty, and property without due process of law.

Millet v. People, 117 Ill. 294, 57 Am. Rep. 869, 7 N. E. 631.

A journeyman barber, or a proprietor of a barber shop, who works to support his family, is denied the right of laboring on Sunday, while the keeper of a bath house, livery stable, tavern, etc., may work at pleasure.

Eden v. People, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *Re Jacobs*, 98 N. Y. 115, 50 Am. Rep. 636; *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 556; *State v. Lorry*, 7 Baxt. 95, 32 Am. Rep. 555; *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401.

The law is special or class legislation, for the reason that the state Constitution provides that the laws of a general nature (Sunday laws) shall have uniform operation.

Ex parte Jentzsch, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803.

The act complained of was an act of necessity; and therefore the state has no authority to punish for such an act.

Edgerton v. State, 67 Ind. 588, 33 Am. Rep. 110; *State v. Lorry*, 7 Baxt. 95, 32 Am. 60 L. R. A.

Rep. 555; *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 558; Tiedeman, Pol. Power, § 85; Cooley, Const. Lim. 735; *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *Tucoma v. Kreck*, 15 Wash. 296, 34 L. R. A. 68, 46 Pac. 255; *Re Jacobs*, 98 N. Y. 115, 50 Am. Rep. 636; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784.

Messrs. M. A. Breeden, Attorney General, and **W. R. White**, for respondent:

The state may regulate the use of liberty and property, and it may compel obedience to restrictions and limitations.

State v. Holden, 14 Utah, 71, *sub nom. Holden v. Hardy*, 37 L. R. A. 103, 46 Pac. 756, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

"Sunday laws" are declared constitutional by nearly all the state courts.

Cooley, Const. Lim. 5th ed. p. 725; *Ex parte Newman*, 9 Cal. 502; *Ex parte Andrews*, 18 Cal. 679; *People v. Havnor*, 149 N. Y. 195, 31 L. R. A. 689, 43 N. E. 541; *People v. Bellet*, 99 Mich. 151, 22 L. R. A. 696, 57 N. W. 1094; *Ex parte Burke*, 59 Cal. 6; *Bloom v. Richards*, 2 Ohio St. 387; *McGatrick v. Wason*, 4 Ohio St. 586; *State v. Bott*, 31 La. Ann. 663, 33 Am. Rep. 224; *Specht v. Conn.* 8 Pa. 312, 49 Am. Dec. 518; *Voglesong v. State*, 9 Ind. 112; *Shover v. State*, 10 Ark. 259; *Warner v. Smith*, 8 Conn. 14; *Com. v. Has*, 122 Mass. 40; *Bohl v. State*, 3 Tex. App. 683; *Lindenmuller v. People*, 33 Barb. 548; *Lidberman v. State*, 26 Neb. 464, 42 N. W. 419; *State v. Powell*, 58 Ohio St. 324, 41 L. R. A. 854, 50 N. E. 900; *State v. Nesbit*, 8 Kan. App. 104, 54 Pac. 326; *State v. Petit*, 74 Minn. 376, 77 N. W. 225; *Judefind v. State*, 78 Md. 510, 22 L. R. A. 721, 28 Atl. 405; *State v. Hogreiver*, 152 Ind. 652, 45 L. R. A. 504, 53 N. E. 921; *Ex parte Kennedy* (Tex. Crim. App.) 51 L. R. A. 270, 58 S. W. 129.

Exceptions in a general law prohibiting work or business on Sundays do not render the law objectionable or unconstitutional because of class legislation.

24 Am. & Eng. Enc. Law, pp. 541, 547; *People v. Havnor*, 149 N. Y. 195, 31 L. R. A. 689, 43 N. E. 541; *People v. Bellet*, 99 Mich. 151, 22 L. R. A. 696, 57 N. W. 1094; *Com. v. Waldman*, 140 Pa. 89, 11 L. R. A. 563, 21 Atl. 248; *State v. Petit*, 74 Minn. 376, 77 N. W. 225; *Phillips v. Innes*, 4 Clark & F. 234; *Ex parte Kennedy* (Tex. Crim. App.) 51 L. R. A. 270, 58 S. W. 129; *Lidberman v. State*, 26 Neb. 464, 42 N. W. 419; *Ex parte Koser*, 60 Cal. 177; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

The work of a barber is not a necessity.

State v. Frederick, 45 Ark. 347, 55 Am. Rep. 555; *Com. v. Waldman*, 140 Pa. 89, 11 L. R. A. 563, 21 Atl. 248; *State v. Petit*, 74 Minn. 376, 77 N. W. 225; *Ex parte Kennedy*, (Tex. Crim. App.) 51 L. R. A. 270, 58 S. W. 129; *Com. v. Dexter*, 143 Mass. 28, 8 N. E. 756; *Ungericht v. State*, 119 Ind. 379, 21 N. E. 1082; *Com. v. Jacobus*, Legal Gaz. Rep. 491; 15 Cent. L. J. 145; *Com. v. Wil-*

liams, 1 Pearson (Pa.) 61; *Petit v. Minnesota*, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666.

Hart, District Judge, delivered the opinion of the court:

General laws prohibiting the transaction of business on the first day of the week, commonly called Sunday, are so uniformly upheld by the courts as a legitimate exercise of the police power of the state that it is unnecessary to cite or discuss authority in support thereof. It is only upon special statutes, or special exceptions to general so-called Sunday laws, that the constitutionality of such enactments is seriously called in question. 24 Am. & Eng. Enc. Law, p. 530.

In *Cooley*, Const. Lim. 734, the author says on Sunday laws: "There can no longer be any question, if there ever was, that such laws may be supported as regulations of police." The dissenting opinion of Judge Field in *Ex parte Newman*, 9 Cal. 518, which afterwards became the opinion of the court (*Ex parte Andrews*, 18 Cal. 678; *Ex parte Burke*, 59 Cal. 6, 43 Am. Rep. 231; and *Ex parte Koser*, 60 Cal. 177), and which has been extensively quoted and followed by other courts, clearly and forcibly explains the grounds upon which such laws safely rest. At page 520 of his opinion, in defense of a Sunday law, it is said: "In its enactment the legislature has given the sanction of law to a rule of conduct which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists, and statesmen of all nations, as on the necessity of periodical cessations from labor. One day in seven is the rule, founded in experience and sustained by science. There is no nation, possessing any degree of civilization, where the rule is not observed, either from the sanctions of the law or the sanctions of religion. This fact has not escaped the observation of men of science, and distinguished philosophers have not hesitated to pronounce the rule founded upon a law of our race." And again: "Labor is in a great degree dependent upon capital, and, unless the exercise of the power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise. . . . The law steps in to restrain the power of capital. Its object is not to protect those who can rest at their pleasure, but to afford rest to those who need it, and who, from the conditions of society, could not otherwise obtain it. Its aim is to prevent the physical and moral debility which springs from uninterrupted labor, and in this aspect it is a beneficent and merciful law." The same authority quotes with approval the following from the supreme court of Pennsylvania (*Specht v. Com.* 8 Pa. 312, 49 Am. Dec. 518): "All agree that to the well-being of society periods of rest are absolutely necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of

which the community is composed may enjoy a respite from labor at the same time. They may be established by common consent, or, as is conceded, the legislative power of the state may, without impropriety, interfere to fix the time of their stated return, and enforce obedience to the direction. When this happens some one day must be selected, and it has been said the round of the week presents none which, being preferred, might not be regarded as favoring some one of the numerous religious sects into which mankind are divided. In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labor, it is not surprising that that day should have received the legislative sanction. . . . It is still, essentially, but a civil regulation, made for the government of man as a member of society."

The necessity for Sunday laws is stated by Mr. Tiedeman as follows: "If the law did not interfere, the feverish, intense desire to acquire wealth, so thoroughly a characteristic of the American nation, . . . would ultimately prevent, not only the wage-earner, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the instinct of self-preservation, by resting periodically from labor, even if the mad pursuit of wealth should not warp their judgment and destroy this instinct. Remove the prohibition of law, and this wholesome sanitary regulation would cease to be observed." Tiedeman, Pol. Power, 181.

It is true there are some cases holding unconstitutional, for various reasons, special Sunday laws directed against some particular vocation, such as barbering; but the decisions upon such statutes are not uniform. For instance, California, while strongly upholding a general law prohibiting the transaction of general business on Sunday (*Ex parte Andrews*, 18 Cal. 678; *Ex parte Burke*, 59 Cal. 6, 43 Am. Rep. 231; and *Ex parte Koser*, 60 Cal. 177), has held unconstitutional a law directed against the open barber shop on Sunday. *Ex parte Jentsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803. This case is also followed in *Tacoma v. Krech*, 15 Wash. 296, 34 L. R. A. 68, 46 Pac. 255, involving the validity of an ordinance of the plaintiff city prohibiting barbering on Sunday "while other laboring people in different characters of employment are allowed to prosecute their work."

Illinois and Missouri have each held a special law against Sunday barbering to be unconstitutional, there being at the time in Illinois a general law making unlawful "whoever disturbs the peace and good order of society by labor (works of necessity and charity excepted)," and in Missouri a general law broad enough to include barbering, and also a constitutional provision enacting that "where a general law can be made applicable no local or special law shall be enacted." *Eden v. People*, 161 Ill. 296, 32 L. R. A. 659, 43 N. E. 1108; *State v. Granneman*, 132 Mo. 326, 33 S. W. 784. It

may be noted in this connection that Illinois has held invalid a statute enacting that no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week (*Ritchie v. People*, 155 Ill. 101, 29 L. R. A. 79, 40 N. E. 454), in marked contrast to the decision of this court in sustaining an eight-hour law (*State v. Holden*, 14 Utah, 71, *sub nom. Holden v. Hardy*, 37 L. R. A. 103, 46 Pac. 756, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383). Again, the general Sunday law of Illinois, above referred to, was so construed as to permit other business of a general nature to be transacted on the Sabbath. And so it was forcibly argued in the *Eden Case* that "if the merchant, the grocer, the butcher, the druggist, and . . . other trades and callings, are allowed to open their places of business and carry on their respective vocations during seven days of the week, upon what principle can it be held that a person who may be engaged in the business of barbering may not do the same thing?" The case of *Ragio v. State*, 86 Tenn. 272, 6 S. W. 401, cited by appellant, cannot be considered as lending much support to this contention, as the law passed upon in that case was so framed as to permit a hotel keeper, or anyone else except a barber, to keep open a bathroom on Sunday. Besides, the act legislated upon two subjects, contrary to the state Constitution.

But special laws directed exclusively against Sunday barbering and other vocations, and other Sunday laws with broader exceptions than in our own statute, have been strongly upheld by the greater number of the states and by the Supreme Court of the United States. Thus, the case of *People v. Huvnor*, 149 N. Y. 195, 31 L. R. A. 689, 43 N. E. 541, goes to the extreme of sustaining a law against Sunday barbering, with an exception in favor of barbering in the city of New York and the village of Saratoga Springs until the hour of 1 o'clock on Sunday afternoon. The decision collects many cases upholding laws which to some extent interfere with property and liberty, and the limitation is held to be "that the real object of the statute must appear upon inspection to have a reasonable connection with the welfare of the public," and the conclusion is reached that, "when thus exercised, even if the effect is to interfere to some extent with the use of property or the prosecution of a lawful pursuit, it is not regarded as an appropriation of property or an encroachment upon liberty, because the preservation of order and the promotion of the general welfare, so essential to organized society, of necessity involve some sacrifice of natural rights." In the same case it is said: "According to the common judgment of civilized men, public economy requires, for sanitary reasons, a day of general rest from labor, and the day naturally selected is that regarded as sacred by the greatest number of citizens, as this causes the least inconvenience through interference with business."

60 L. R. A.

Michigan also holds valid a special law against Sunday barbering, with an exception in favor of those who observe the seventh day of the week as a day of rest. *People v. Bellet*, 99 Mich. 151, 22 L. R. A. 696, 57 N. W. 1094.

The ordinance approved in *Lieberman v. State*, 26 Neb. 464, 42 N. W. 419, excepts many more vocations from the general prohibition of Sunday labor than does our Utah statute. Bathrooms, under that ordinance, may be kept open on Sunday until 12 o'clock noon.

That Sunday labor is constitutionally punishable under general and special Sunday laws, see *State v. Nesbit*, 8 Kan. App. 104, 54 Pac. 326; *Com. v. Deatra*, 143 Mass. 28, 8 N. E. 756; *Com. v. Waldman*, 140 Pa. 59, 11 L. R. A. 563, 21 Atl. 248; *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 555; *Breyer v. State*, 102 Tenn. 103, 50 S. W. 769.

The Minnesota statute prohibits on Sunday all labor except works of necessity or charity, and declares that keeping open a barber shop shall not be deemed a work of necessity or charity. The law is held to be constitutional in the case of *State v. Petit*, 74 Minn. 376, 77 N. W. 225, confirmed in 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666. In the latter case the Supreme Court of the United States quoted with approval the following language from the Minnesota decision: "Courts will take judicial notice of the fact that, in view of the custom to keep barbers' shops open in the evening as well as in the day, the employees in them work more, and during later hours, than those engaged in most other occupations, and that this is especially true on Saturday afternoons and evenings; also that, owing to the habit of so many men to postpone getting shaved until Sunday, if such shops were permitted to be kept open on Sunday the employees would ordinarily be deprived of rest during half that day. In view of all these facts, we cannot say that the legislature has exceeded the limits of its legislative police power in declaring that, as a matter of law, keeping barbers' shops open on Sunday is not a work of necessity or charity, while as to all other kinds of labor they have left that question to be determined as one of fact."

In *State v. Powell*, 58 Ohio St. 324, 41 L. R. A. 854, 50 N. E. 900, the court, in upholding a Sunday law as against baseball playing, remarked: "Liberty, as understood in this country, is not license, but liberty regulated by law. The personal liberty of every man is subject to such reasonable regulations as in the wisdom of the legislature are regarded as necessary to promote, not only the peace and good order of society, but its well-being."

Likewise, in *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357, involving the validity of an ordinance of San Francisco prohibiting the carrying on of public laundries and washhouses within certain prescribed limits of that city, Judge Field, for the court, said: "But neither the amendment [14th], broad and comprehensive

as it is,—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. . . . Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

And in *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, involving a similar ordinance, the same judge said, in addition to the language quoted in *State v. Holden*, 14 Utah, 71, *sub nom. Holden v. Hardy*, 37 L. R. A. 103, 46 Pac. 756: "All sorts of restrictions are imposed upon the actions of men, notwithstanding the liberty which is guaranteed to each. It is liberty regulated by just and impartial laws. . . . How many hours shall constitute a day's work in the absence of contract, at what time shops in our cities shall close at night, are constant subjects of legislation. Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor."

Many other authorities bearing on the questions raised in the case at bar are cited and reviewed in the decisions herein referred to. In view of the consideration and discussion of similar questions in *State v. Holden*, 14 Utah, 71, *sub nom. Holden v. Hardy*, 37 L. R. A. 103, 46 Pac. 756; we do not deem it necessary to more particularly consider the objections of appellant that the law in question is an undue restraint of personal liberty, and deprives a person of liberty, life, or property without due process of law, or that the same is not a proper exercise of the police power of the state. Upon the authority of that opinion, and of the cases therein and herein referred to, we are prepared

to hold that said sections of our Code, taken together, are not unconstitutional upon the foregoing grounds, nor for any other reason assigned.

Whether the question be considered one of law or a conclusion of fact, we are of opinion that the act complained of was not an act of necessity. While shaving may be regarded as an act of personal cleanliness, desirable to be performed upon the first day as well as upon other days of the week, still the statute does not prohibit a man from shaving himself or from being shaved by his servant or valet. The statute is directed simply against the keeping open of a shop or place of business for the purpose of transacting business therein upon Sunday.

Neither can the court say that the classification of the statute is arbitrary. The exception permitting baths to be kept open on Sunday approaches nearest to the act here complained of; but the court is unable to say that there is such similarity between keeping open a bathhouse and a barber shop that it was not within the province of the legislature to make a distinction between the two. Upon reflection, many points of difference in the manner in which each is conducted in this community are readily suggested. The court may not rightly assert a wisdom it would deny to the co-ordinate branch of government (the legislature), and interfere with the discretion of that department of government. All presumptions are in favor of the validity of a statute, and, unless the courts can clearly say that the legislature has erred, the act should stand, and the prerogatives of the legislature not be encroached upon. Courts may interpret, construe, declare, and apply the law, but may not usurp the functions of the lawmaking power by assuming to interfere with or control the legislative discretion. We cannot say that the law in question is not adapted in a reasonable degree to promote the health, comfort, safety, or well-being of society.

It is therefore ordered that the judgment of the lower court be affirmed.

Baskin, Ch. J., and Bartch, J., concur.

VIRGINIA SUPREME COURT OF APPEALS.

Hoge M. BROWN, *Plff. in Err.*,
v.
NORFOLK & WESTERN RAILWAY COMPANY.

(.....Va.....)

1. The publication, after due investigation by a railroad company, that

NOTE.—For other cases in this series as to privileged character of statements by employer in regard to discharged employee, see *Missouri P. R. Co. v. Richmond* (Tex.) 4 L. R. A. 280; *Fresh v. Cutter* (Md.) 10 L. R. A. 67; 60 L. R. A.

the reason for discharging an employee was that he had made statements which had been proved to be untrue, to the effect that one officer of the company had cast reflections upon the female ancestry of another officer, is privileged, and will not sustain an action for libel unless it was inspired by malice.

2. The burden of proving the fact is upon one alleging that another availed himself of the opportunity to publish a communication of a privileged class, not to protect his interests, but to gratify ill-will against plaintiff.
3. The presumption that a publication of the reason of the discharge of an

employee was made in good faith must prevail, where it was made after investigation, and embodied the result of the inquiry in accordance with the weight of evidence, if clothed in temperate and decorous language, and there is no extrinsic fact or circumstance having a tendency to show malice.

(November 20, 1902.)

ERROR to the Circuit Court for Pulaski County to review a judgment in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Affirmed.*

The facts are stated in the opinion.

Messrs. Wysor & Gardner and D. S. Pollock, for plaintiff in error:

The publication in connection with the facts and circumstances shows actual malice. Proceedings against Brown were all *ex parte*, and it was absolutely, unqualifiedly, and intentionally false to say what he had said had been proved untrue.

It was error for the circuit court of Pulaski county to hold that the said publication, under the facts and circumstances of this case, was privileged.

Chaffin v. Lynch, 83 Va. 116, 1 S. E. 803; *Wilson v. Collins*, 5 Car. & P. 373; *Odgers, Libel & Slander*, 225, 245, 280; *Sullivan v. Strathan-Hutton-Evans Commission Co.* 152 Mo. 268, 47 L. R. A. 859, 53 S. W. 912.

The publication is not protected, though the defendant may have honestly believed that in all he did he was discharging his duty. The occasion is to be judged, not in accordance with what may be the honest notions as to duty of the defendant in the premises, but upon all the surrounding circumstances.

Chaffin v. Lynch, 84 Va. 890, 6 S. E. 474.

The publication, if it had been made by Henretta, in an action brought against him for libel, could have been held to be a privileged publication made in self-defense if made bona fide and without malice, and he would have had the right to have claimed the privilege; but the Norfolk & Western Railway Company, not having been assailed in its good name, and not being the guardian of the good name of its employees, cannot be allowed in law to claim that the publication made by it in this case was privileged.

Brayton v. Cleveland Special Police Co. 63 Ohio St. 83, 52 L. R. A. 525, 57 N. E. 1085.

The question whether the occasion was used in a privileged way,—that is to say, that it was used bona fide and without malice,—was properly left to the consideration of the jury. After the jury had found against the defendant upon this issue, and brought in its verdict in favor of plaintiff, it was error for the court to sustain the demurrer of defendant to the evidence.

Trout v. Virginia & T. R. Co. 23 Gratt. 638; *Simons v. Southern R. Co.* 96 Va. 152, 31 S. E. 7; 4 Minor, Inst. 1st part, 749.

The occasion, the publication itself, and the surrounding circumstances were all in evidence before the jury, and they could and

did determine therefrom that there was express malice, either from the extrinsic circumstances, or from the language of the libel itself, or from both; and it was error to set the verdict so found aside.

Dillard v. Collins, 25 Gratt. 351; *White v. Nicholls*, 3 How. 266, 11 L. ed. 591; *Bacon v. Michigan C. R. Co.* 66 Mich. 166, 33 N. W. 181; *Behee v. Missouri P. R. Co.* 71 Tex. 424, 9 S. W. 449; *Sullivan v. Strathan-Hutton-Evans Commission Co.* 152 Mo. 268, 47 L. R. A. 859, 53 S. W. 912.

A corporation is liable for a libel published by its authority, although the corporation, as distinct from its members, cannot be guilty of malice in the ordinary sense of the word.

13 Am. & Eng. Enc. Law, p. 448; *Bruce v. Reed*, 104 Pa. 408, 49 Am. Rep. 586; *Payne v. Western & A. R. Co.* 13 Lea, 507, 49 Am. Rep. 666; *Townshend, Slander & Libel*, § 265.

A corporation is liable when the publication of libelous matter is caused by an agent within the scope of his authority.

Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. ed. 73; *Van Aernam v. Bleistein*, 102 N. Y. 355, 7 N. E. 537; *Howe Mach. Co. v. Souder*, 58 Ga. 64.

A railroad company may be held liable for a libel of its division agent in reporting causes of discharge of employees to other agents.

Bacon v. Michigan C. R. Co. 66 Mich. 166, 33 N. W. 181; *Nance v. Falls City*, 16 Neb. 85, 20 N. W. 109; *Fogg v. Boston & L. R. Corp.* 148 Mass. 513, 20 N. E. 109.

If the defendant, the railway company, can claim that publishing Brown, the plaintiff in this suit, as a proved liar, on account of giving the statement, is a privileged communication, then the defendant railway company would necessarily have to be plaintiff in a suit against Brown for making the statements. It is manifestly impossible for the defendant railway company to have such an interest therein as would or could maintain an action against Brown for such statement.

Brayton v. Cleveland Special Police Co. 63 Ohio St. 83, 52 L. R. A. 525, 57 N. E. 1085.

The publication not being privileged, the question of proof of malice does not enter into the case at bar.

Dillard v. Collins, 25 Gratt. 350.

There was proof of actual malice.

Bacon v. Michigan C. R. Co. 55 Mich. 224, 54 Am. Rep. 372, 21 N. W. 324, 66 Mich. 166, 33 N. W. 181; *Holt v. Parsons*, 23 Tex. 2, 76 Am. Dec. 49; *Behee v. Missouri P. R. Co.* 71 Tex. 424, 9 S. W. 449.

Messrs. Joseph I. Doran and Archer A. Phlegar, for defendant in error:

The posting of a notice of the discharge of a fireman (without even giving his name), and of the cause thereof, under the direction of an officer of the company in yardmaster's and telegraph offices, which were solely for the business of the company, and not for the public, was an act of privilege, and, if done bona fide, was not libel-

ous, even if the cause of discharge was not truly stated.

Chaffin v. Lynch, 84 Va. 884, 6 S. E. 474; *Strode v. Clement*, 90 Va. 553, 19 S. E. 177; *Reusch v. Roanoke Cold Storage Co.* 91 Va. 534, 22 S. E. 358.

Publications by an employer to his employees of the cause of discharge of an employee are privileged, if made without malice.

Tench v. Great Western R. Co. 33 U. C. Q. B. 8.

Malice will not be inferred from the publication; but express malice must be proved.

Dillard v. Collins, 25 Gratt. 351; *Chaffin v. Lynch*, 83 Va. 118, 1 S. E. 803, 84 Va. 886, 6 S. E. 474; *Reusch v. Roanoke Cold Storage Co.* 91 Va. 535, 22 S. E. 358; *Misouri P. R. Co. v. Richmond*, 73 Tex. 568, 4 L. R. A. 280, 11 S. W. 555; *Hunt v. Great Northern R. Co.* [1891] 2 Q. B. 189.

If the right to publish the cause of discharge exists, the occasion is privileged, and the question is not whether the language used was true, or whether there was reasonable ground to believe it to be true, but whether, in point of fact, the defendant honestly believed it to be true, and published it without actual malice.

Chaffin v. Lynch, 83 Va. 106, 1 S. E. 803, 84 Va. 886, 6 S. E. 474; *Reusch v. Roanoke Cold Storage Co.* 91 Va. 535, 22 S. E. 358.

The bulletin was privileged, and the privilege was not exceeded. Neither compensatory nor punitive damages could be recovered.

Hundley v. Louisville & N. R. Co. 105 Ky. 162, 48 S. W. 429; *Somerville v. Hawkins*, 10 C. B. 581; *Harris v. Thompson*, 13 C. B. 333; *Taylor v. Hawkins*, 16 Q. B. 308.

Keith, P., delivered the opinion of the court:

Plaintiff in error, Brown, had been a fireman in the employment of the Norfolk & Western Railway Company for several years, and was well esteemed. In July, 1898, he was directed to take an engine from Radford to Bluefield, to be used in drawing an excursion train. This engine had been standing in the roundhouse at Radford without protection, and was in a rusty and filthy condition. Brown endeavored, as he states, to clean it by the use of oil and waste cotton, but was unable to do so. When the engine arrived at Roanoke, its condition was reported to Henretta, the road foreman of engines, who summoned Brown before him. Brown reported to Henretta in obedience to the summons, and stated to him that he had done his best with the means at his disposal, and thereupon, as Brown alleges, Henretta used the following language: "Newman (meaning S. D. Newman, a master mechanic in the employment of the railway company), the damn son of a bitch, is the cause of all this trouble. He ought to have had that engine jacket lyed off,"—meaning that he ought to have had it washed with lye, in order to remove the rust and filth. Brown repeated the remark which Henretta was alleged to have made in the presence of 60 L. R. A.

several other employees of the railway company, and it was finally communicated to Newman. Thereupon Newman called upon Brown with reference to it, and Brown gave him a written statement of the occurrence as above narrated. When Newman, shortly thereafter, met Henretta, he asked him about this statement, and Henretta denied it, and asked him to get a written statement from Brown, and send it to him, which was done. Henretta also got a statement from Dickerson, who was present at the interview between Brown and himself, and then wrote to Pearce, division master mechanic, the following letter:

"The attached papers are self-explaining. I have only to state that Fireman H. M. Brown has told a deliberate lie. Mr. Dickerson was witness to all my remarks when I was investigating Fireman Brown's neglect to properly clean engine 706. His statement is attached. The papers are handed you, that proper discipline may be applied. Yours truly, F. B. Henretta."

Pearce looked into the matter, and reported the result of his inquiry in the following letter to W. H. Lewis, superintendent of motive power:

"Further concerning the case of engine No. 706, which you will remember came out on an excursion train in a very dirty condition, fireman claiming he worked two hours cleaning the engine, and engineman stating that he put ten minutes on it, please note attached, from which it appears that Fireman Brown tried to get even by intimating that Mr. Henretta had cast reflections on the female ancestry of Mr. Newman, and lied about the matter. I think, under circumstances, that Mr. Brown's services should be dispensed with without further consideration. J. S. Pearce, D. M. M."

W. H. Lewis, as a result of his investigation, published the following order:

"A fireman has been dismissed from the service for intimating that an officer of the company had cast reflections upon the ancestry of another officer, which was proved to be untrue."

For the publication of this order the Norfolk & Western Railway Company was sued. The jury rendered a verdict against the defendant for \$5,000. Subject to the judgment of the court upon the demurrer to the evidence, the court entered judgment for the defendant, and the case is before us upon a writ of error awarded upon the petition of the plaintiff, Brown.

The contention of the railway company is that the order issued by Lewis discharging Brown from the service of the company and assigning the reason for his action was a privileged communication, for which the defendant in error is not liable in damages, unless the publication was malicious; that the company acted in good faith, after due investigation, and was inspired by no other motive than a desire to promote the efficiency of its service, and to give necessary information to its employees.

In *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803, it was held that, "to justify publication

of defamatory matter, the occasion must be privileged, and must be used bona fide, without malice. Whether the occasion be privileged is a question of law for the court. Whether it has been used bona fide is a question of fact for the jury."

We think it plain that the communication which is the subject of controversy here was privileged. Brown had made a statement with reference to what was said by his superior officer, who was inquiring into the manner in which his duty had been discharged. He reported that Henretta had at that interview used language in the highest degree insulting to Newman, a coemployee. Henretta denied the truth of the statement. It was inquired into in a due and orderly course of investigation, and the conclusion reached that Brown's version of the affair was untrue. Assuming, for the moment, that it was untrue, it cannot be doubted that Brown was guilty of a very grave offense tending to produce ill will, discord, and strife among the employees of the company. If such were the case, it was altogether proper to discharge him from the service, and due to him and all concerned that the reason for his discharge should be given, so as to fix the blame where it belonged, and to exonerate those who were innocent.

As was said by Judge Lewis in *Chaffin v. Lynch*, 83 Va. 106, 1 S. E. 803: "The reported cases on the subject of privileged communications are very numerous, and they show that, while the law as to such communications is well settled, its application to particular cases is often attended with difficulty. They also show that the law in this particular was formerly more restricted than at present, the rule having been gradually extended, on the ground that it is to the interest of society that correct information should be obtained as to the character and standing of persons with whom others have business or social relations; so that it is now settled, as laid down by Baron Parke in the leading case of *Too-good v. Spyring*, 1 Crompt. M. & R. 181, that a communication honestly made in the performance of a social duty is no less privileged than one made in self-defense, or in the protection of one's own interest. And a communication made under such circumstances, and without malice, is protected, notwithstanding its imputations be false, or founded upon the most erroneous information."

Did the defendant company act in good faith in making the publication complained of, or was its action inspired by malice?

The question is not as to the truth or falsity of the publication. It is solely a question of good faith on the one hand and of malice on the other. In the interview between Henretta and Brown, at which the language with reference to Newman is said to have been used, there was, in addition to these gentlemen, Dickerson and Stauffer. Brown, of course, swears that his account of the interview is the correct one. Henretta denies that it is true, and says that the lan-

guage which he used was "that it was a damn shame for Newman to let the engine come out in that fix." Stauffer says that he was in the room when Brown was being questioned, not more than 5 or 6 feet distant, and that he did not hear the expression attributed by Brown to Henretta. Dickerson says that he was present at the interview in Henretta's office when Brown was called in; that he was not paying very much attention to what passed; that, although he was within a few feet of them, he did not hear Henretta make use of the expression imputed to him by Brown; that he twice heard him say—once at the office, and just before that when examining the engine—"that it was a damn shame that this engine was allowed to come out of the round-house in such condition."

We are aware that this case is before us upon a demurrer to the evidence, but we repeat that the question here is not as to the truth or falsity of any statement made in the published order, but merely as to the motive and intent by which the railway company was inspired. The communication being privileged, plaintiff in error can only prevail by showing that the defendant availed itself of the occasion, not for the purpose of protecting its interests, but to gratify its ill will. Upon this issue the burden of proof is upon the plaintiff in error.

The remarks of Judge Lewis in *Strode v. Clement*, 90 Va. 553, 19 S. E. 177, are applicable in this case: "There is no extrinsic evidence of malice, such as an antecedent grudge, or previous disputes, or anything of that sort, between the parties; but the contention is that the language used by the defendant is of itself evidence of malice. Undoubtedly, strong or violent language, disproportioned to the occasion, may raise an inference of malice, and thus lose the privilege that otherwise would attach to it. But when the occasion is privileged the tendency of the courts is not to submit the words to a too strict scrutiny, but rather to view them in the light of the facts as they appeared to the defendant; for the question is not whether the imputations are true, but whether the words are such as the defendant might have honestly employed under the circumstances."

In this case there is no extrinsic evidence of malice, nor is the language complained of so violent or disproportioned to the occasion as to raise an inference of malice. In other words, there is no evidence of malice. If the issue before the jury had been as to the truth of Brown's account of what passed between Henretta and himself, the evidence would have required a verdict establishing as true Henretta's version, though a verdict in favor of the truth of Brown's statement could not with propriety have been disturbed by the court (*Tyree v. Harrison* [Va.] 42 S. E. 295); but the fact that the publication complained of was only made after the controversy between Brown and Henretta had been investigated, and that it embodies the results of that inquiry in accordance

with the weight of evidence, clothed in temperate and decorous language in the absence of any extrinsic fact or circumstance having such tendency, leaves the case stripped of any evidence to support the charge of malice, and the presumption that the publication was made in good faith must prevail.

In *Tyree v. Harrison* (Va.) 42 S. E. 295, the jury rendered a verdict for the plaintiff in an action for libel. The court set aside that verdict, and at a subsequent trial rendered judgment for the defendant. Thereupon the plaintiff obtained a writ of error to this court, which reversed the case, and entered judgment for the plaintiff upon the first verdict. It was there held that it was for the jury to say which account was true,—that given by Tyree, or that given by Harrison: that the jury, in the exercise of their function, had seen fit to accept as true the statement of Tyree; and that, according to his account, the language used was so strong, violent, and abusive as to warrant an inference of malice, and destroy the privi-

lege that would otherwise attach to the communication, or, at the least, that this court was unable to say that the verdict of the jury was so plainly against the weight of evidence as to justify the interference of the court.

In the case under consideration we are not called upon to consider the weight or preponderance of evidence. There is no extrinsic evidence of malice, and the language of the communication of which complaint is made, and the manner of its publication, do not justify the imputation of malice, but rather tend to repel it. It does not name the person at whom it is directed. It states in language as mild as could have been employed the conclusion of the person charged with the duty of making the investigation, and that conclusion was warranted by the preponderance of evidence, which includes the testimony of every disinterested witness present upon the occasion.

Upon the whole case, we are of opinion that the judgment complained of should be affirmed.

NEW YORK COURT OF APPEALS.

Re Appraisal of Property of George JONES, Deceased, under the Act in Relation to Taxable Transfers.

(172 N. Y. 575.)

1. Shares in a joint-stock association are to be dealt with as personalty in applying the laws providing a transfer or succession tax, although the property of the association is real estate.
2. In determining, for the purposes of taxation, the value of shares in a joint-stock association which are not listed on the stock exchange or sold in the open market, the value of the property they represent, including the real estate, should be ascertained.

(December 9, 1902.)

A PPEAL by the State Comptroller from an order of the Appellate Division of the Supreme Court, First Department, modifying an order of the New York County Surrogate imposing a transfer tax upon the property of George Jones, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. John B. Dos Passos and Edmund F. Harding, for appellant:

The shares are personal property. The appraiser to find their value, properly made in-

quiry into the property owned by the association.

Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *People ex rel. Staten Island Rapid Transit R. Co. v. Roberts*, 4 App. Div. 334, 38 N. Y. Supp. 724; *Re Brandreth*, 28 Misc. 408, 59 N. Y. Supp. 1092.

The shares are entities and property in themselves. Their qualities alone must determine whether this property is realty or personalty.

2 Sharswood's Bl. Com. p. 16, note; *Arnold v. Ruggles*, 1 R. I. 168.

Their attributes are exactly the same as the attributes of ordinary corporate stock, which is always regarded as personalty because of those attributes.

Waterbury v. Merchants' Union Exp. Co. 50 Barb. 150; *Rice v. Rockefeller*, 134 N. Y. 187, 17 L. R. A. 237, 31 N. E. 907; *Kent v. Quicksilver Min. Co.* 78 N. Y. 179; *Arnold v. Ruggles*, 1 R. I. 165; *Weaver v. Barden*, 49 N. Y. 286; *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 492; *Bradley v. Holdsworth*, 3 Mees. & W. 424; *Re Bronson*, 150 N. Y. 8, 34 L. R. A. 238, 44 N. E. 707.

Such shares have been held to be personalty.

Myers v. Perigal, 21 L. J. C. P. N. S. 217; *Oliver's Estate*, 136 Pa. 43, 9 L. R. A. 421,

NOTE.—For a case in this series holding that the interest of a member of a joint-stock association in the property of the association is personal estate, see *Re Oliver* (Pa.) 9 L. R. A. 421.

For other cases in this series as to the nature of a joint-stock company, see *People ex rel. 60 L. R. A.*

Platt v. Wemple (N. Y.) 6 L. R. A. 303; *People ex rel. Winchester v. Coleman* (N. Y.) 16 L. R. A. 183; *State, Tide Water Pipe Co., Prosecutor, v. State Board* (N. J. L.) 27 L. R. A. 684, and *State ex rel. Railroad & W. Commission v. United States Exp. Co.* (Minn.) 50 L. R. A. 667.

20 Atl. 527; *Small's Estate*, 151 Pa. 1, 25 Atl. 23, 28.

Messrs. Einstein & Townsend, for respondents:

"The New York Times" was a partnership, both with reference to its shareholders, and in its relations with third parties.

17 Am. & Eng. Enc. Law, 2d ed. p. 636; *Witherhead v. Allen*, 4 Abb. App. Dec. 628; *Brooks v. Dinsmore*, 15 Daly, 428, 8 N. Y. Supp. 103; *People ex rel. Winchester v. Coleman*, 24 N. Y. S. R. 970, 5 N. Y. Supp. 394, 37 N. Y. S. R. 120, 13 N. Y. Supp. 833, 133 N. Y. 279, 16 L. R. A. 183, 31 N. E. 96.

Real estate belonging to a partnership retains the attributes of, and is treated as, real estate, and as such is not taxable under the transfer tax act.

Collumb v. Read, 24 N. Y. 505; *Van Brunt v. Applegate*, 44 N. Y. 544; *Fairchild v. Fairchild*, 64 N. Y. 471; *Tarbel v. Bradley*, 7 Abb. N. C. 273; *Darrow v. Calkins*, 6 App. Div. 28, 39 N. Y. Supp. 527; *Smith v. Jackson*, 2 Edw. Ch. 28; *Buchan v. Sumner*, 2 Barb. Ch. 165; Gerard, *Titles to Real Estate*, 3d ed. p. 318; *Re Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *Re Curtis*, 142 N. Y. 219, 36 N. E. 887; *Re Sutton*, 3 App. Div. 208, 38 N. Y. Supp. 277.

Any doubt as to the legality of taxing real estate in this matter should be resolved in favor of the respondents.

Re Swift, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *Re Fayerweather*, 143 N. Y. 114, 38 N. E. 278; *Re Enston*, 113 N. Y. 174, *sub nom. People v. Sherwood*, 3 L. R. A. 464, 21 N. E. 87; *Re Harbeck*, 161 N. Y. 217, 55 N. E. 850; *Re Sutton*, 3 App. Div. 208, 38 N. Y. Supp. 277.

Bartlett, J. delivered the opinion of the court:

The single question involved in this appeal is one of law upon undisputed facts. The late George Jones was a member of a joint-stock association known as "The New York Times." The property of this association was represented by the issue of 100 shares of stock, of which the deceased owned 46. This association was formed in January, 1872, its articles being executed by seven associates and provided in detail for the management of the business. The eighth subdivision thereof reads as follows: "All the property, real and personal, and all the goods and chattels, choses and rights in action, and credits of every name and nature, with the evidence thereof, including the good will of its business of the association heretofore existing, known as 'The New York Times Establishment,' are put in by the undersigned, who are the owners thereof, and constitute the value of the shares of the association." The ninth subdivision reads: "The shares of the association shall represent all the rights and property mentioned in the foregoing article, together with all said property, goods and chattels, rights and credits, as shall from time to time be required, and shall always be divided into 100 equal shares." The articles further pro-

vided that each of the associates had the power to sell his shares subject to certain conditions not important to be considered at this time; also that the title to the real estate should vest in the president of the association and be held by him for its use and benefit, subject to the control and disposition of the board of directors, who were clothed with ample powers to conduct the business. Mr. Jones died on the 12th of August, 1891, leaving a last will and testament, which was duly proved. Certain provisions of this will were read in evidence, and disclose the fact that the testator, in disposing of his interests in the association known as "The New York Times," divided it among his legatees by giving to each a certain number of shares of the stock held by him. He bequeathed some of these shares absolutely, and created separate trusts as to certain other shares. It thus appears that the associates, constituting this joint-stock association, treated their property, real and personal, as represented by shares of stock; and Mr. Jones in his will saw fit to distribute his interest by adopting the same mode of representation. It was claimed by the comptroller that these shares were personal property, and taxable as shares of stock in an ordinary corporation. The executors contended that, as the joint-stock association owned this realty, the interest therein of the shareholder was realty also, and, as it passed under his will in the direct line, was exempt, the statute taxing transfers of realty only when passing to collaterals or strangers. Laws 1891, chap. 215. The views of the comptroller were adopted by the appraiser, and by both surrogates of New York county, but the appellate division reversed with a divided court.

The history of joint-stock associations both in England and this country is interesting. Mr. Lindley, in his *Law of Companies*, 5th ed., at page 2, says: "When unincorporated companies, with a joint stock divided into numerous transferable shares, began to assume importance and to force themselves upon the attention of the legislative and judicial departments of the state, the reception they met with was by no means encouraging. Owing to the then established rules relating to parties to actions at law and suits in equity, a joint-stock company could not practically sue its own debtors, nor could disputes between its members be readily, if at all, adjusted. At the same time the doctrine that each member was answerable for the whole of the debts of the company was studiously promulgated and rigorously enforced." The learned author discusses at length the growth of joint-stock associations in England from an early time until the present day. He has, however, summed up the situation in the quotation already made, to the effect that, with all the rights and powers conferred upon them, in the face of vigorous opposition, the doctrine of individual liability has been maintained. In *People ex rel. Winchester v. Coleman*, 133 N. Y. 279, 16 L. R. A. 183,

31 N. E. 96, Judge Finch pointed out the many respects in which joint-stock associations resemble corporations, but emphasized the fact that the one derives its existence from the contract of individuals, the other from the sovereignty of the state. He said: "The two are alike, but not the same. More or less they crowd upon and overlap each other, but without losing their identity, and so, while we cannot say that the joint-stock company is a corporation, we can say, as we did say in *Van Aernam v. Bleistein*, 102 N. Y. 360, 7 N. E. 538, that a joint-stock company is a partnership with some of the powers of a corporation." This quotation states in a brief manner the law relating to these associations as it exists in this state. A joint-stock company has never appealed to the sovereignty of the state for the right to exist, but by articles of association, which take the place of the charter of a corporation, the associates have been content to do business subject to the individual liabilities of partners. In 1854 (chap. 245) the legislature made it lawful for such associations to provide by their articles that the death of any stockholder, or the assignment of his stock, should not work a dissolution, but they should continue as before and could only be wound up by the judgment of a court. This law continued in force until the enactment of the "joint stock association law" passed in 1894, when it was repealed. 2 Rev. Stat. Banks's 9th ed. p. 1471. The Code of Civil Procedure has also provided for actions by or against an unincorporated association, preserving in part previous legislation, and adding thereto new and liberal features. Sections 1919 to 1924, both inclusive. Mr. Beach, in his work on Private Corporations (vol. 1, § 167), in speaking of joint-stock associations, says: "The powers conferred upon them by these enactments are such that for many purposes they are held to be corporations, even though they have nowhere been designated as such, and though the statutes relating to joint-stock companies do not so designate them, or have expressly declared that they shall not be so considered. But with respect to the personal liability of members to creditors of the company they are still subject to the common-law rules applicable to partnerships." The principal feature of the joint-stock association is the right of perpetual succession. In this respect it is like a corporation, and enjoys all the advantages flowing from such a privilege. It has frequently been held in this state that, where a tax has been imposed upon all moneyed or stock associations, it could not be collected from a joint-stock association, for the reason that technically it could not be regarded as a corporation. *People ex rel. Winchester v. Coleman*, 133 N. Y. 279, 16 L. R. A. 183, 31 N. E. 96, reported below 37 N. Y. S. R. 120, 13 N. Y. Supp. 833. In these cases the question was whether a joint-stock association was taxable upon its capital under the provisions of the Revised Statutes (1 Rev. Stat. 414, § 1) subjecting "all moneyed or 60 L. R. A.

stock corporations deriving an income or profit from their capital or otherwise" to such a tax. The opinions of Mr. Justice Barrett at special term, Mr. Justice Van Brunt at general term, and Judge Finch in this court, all considered the question whether a joint-stock association was a corporation, and whether the acts creating for it certain privileges intended to confer a corporate franchise. It was held that, while a joint-stock association possessed certain corporate powers, nevertheless it was not a corporation within the meaning of the statute to which reference has been made. The fact that a joint-stock association is not in legal contemplation a corporation, and not liable to taxation under acts seeking to reach corporations, in no way militates against the position assumed by the comptroller in this case. It is competent for private individuals to create a joint-stock association, issue shares of stock, and in that form dispose of property by last will and testament. The associates by contract have created the same situation as to shares of stock that a corporation secures by charter. In the case at bar the appraiser fixed the value of the interest, of the estate, of the personal property, of "The New York Times" at \$15,840, the real estate at \$575,000, and the good will of the newspaper, less the existing debts, at \$184,000.

It is contended on behalf of the executors that this large amount of real estate, which is of greater value than appraised, is not subject to the tax, for the reason that it would descend to the testator's children, and was not taxable under the transfer tax law in force at the time of testator's death. The fact is that at the time of Mr. Jones's death the title to the real estate of "The New York Times" was vested in its president for the benefit of the association, and this situation was not changed by that event. It is not possible that the real estate of "The New York Times" could, after Mr. Jones's death, remain, as theretofore, the property of the association and used for its business purposes, and still be regarded, so far as testator's interest was concerned, real estate passing to his children. It was neither so in fact nor in law.

The question to be determined at this time is not whether joint-stock associations are corporations in the full meaning of the latter word, but, rather, What is the nature of the shares of stock that joint-stock associations are permitted to issue and sell in the open market? The contention of the respondent and of the prevailing opinion below is that "The New York Times," being a joint-stock association, was a partnership both with reference to its shareholders and in its relations with third parties. At this late day, and having regard to the remarkable development of joint-stock associations both in England and this country, it is not possible to strictly apply the law of partnership to the manner in which they are to hold and dispose of real estate. The fact that the associates rest under the common-

law liability of partners does not affect the question we are considering. As to the nature of the shares of stock issued by a joint-stock association, the same general principles of law are to be invoked that apply to a corporation. This court, in *Weaver v. Barden*, 49 N. Y. 286, held that the capital stock of an incorporated company is personal property. The supreme court of Rhode Island, in *Arnold v. Ruggles*, 1 R. I. 165, 167, 168, in considering the nature of a share of stock, said: "Is a share, then, thus made up, to be deemed real estate, or as necessarily partaking of the realty? A share must pass one way or the other, as an entire thing. It cannot be resolved into the elements of which the estates of the corporation consist, and a part pass to the heir and a part to the executor, without destroying it, and with it the whole concern. It is an entirety, and must be either real or personal. And which is it? It will not do to make the property of the corporation a criterion, for the property of almost every corporation is more or less mixed. We must make the share itself—those rights which constitute its beneficial interests—the criterion. Its right, then, to receive a dividend of the whole concern, whether real or personal, is the interest by which it is to be judged." This is a clear and satisfactory statement of the attributes of a share of stock.

It would be incongruous and impossible, in conducting the affairs of a joint-stock association, in view of the fact that it is allowed to issue stock, to hold, as the respondent contends, that, notwithstanding the articles of association provide that neither the death nor the transfer of the interests of any shareholder shall work a dissolution of the association, or any interruption of its business, nevertheless, on the death of an associate, his interest in the real estate of the association must be deemed to descend to his heirs at law, and his interest in the personalty to pass under the statute of distribution. The distinction between the property of a corporation represented by its capital stock and the property of the stockholders represented by their shares is discussed by the Supreme Court of the United States in a recent case. *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 46 L. ed. 456, 22 Sup. Ct. Rep. 394. The plaintiff in error, the Cleveland Trust Company, had a capital stock of \$500,000, divided into 5,000 shares of \$100 each, all of which were paid up, and the certificates were owned by a large number of persons in Ohio and elsewhere. The plaintiff was the owner of 174 bonds of the United States, of the denomination of \$1,000 each, valued at the sum of \$213,274.81, and claimed in its return, in a tax proceeding, the right to deduct the bonds from the par value of its stock. The supreme court of the state of Ohio sustained the decision of the court of common pleas overruling this claim of the plaintiff, and an appeal was taken to the Supreme Court of the United States. Mr. Justice McKenna, in delivering the opinion of the court, said:

"The plaintiff concedes the distinction between the property of the corporation, represented by its capital stock, and the property of the shareholders, represented by their shares, and bases an argument upon that distinction, and yet excludes from consideration as immaterial to the questions at issue the laws of Congress governing the taxation of the shares. . . . In other words, the contention is that, the tax on the shares being equivalent to the tax on the property of the trust company, there must be deducted from the value of the shares that portion of the capital of the company invested in the United States bonds. The answer to the contention is obvious, and may be brief. The contention destroys the separate individuality—recognized, as we have seen, by this court—of the trust company and its shareholders, and seeks to nullify one provision of the Revised Statutes of the United States (§ 5219 [U. S. Comp. Stat. 1901, p. 3502]) by another (§ 3701 [U. S. Comp. Stat. 1901, p. 2480]), between which there is no want of harmony. And what the Constitution of the state of Ohio requires, or what the statutes of the state require, as to taxation, must be left to be decided by the supreme court of the state, and whether that court has decided logically or illogically that a tax authorized by the laws of the United States on the shares of the company satisfies the Constitution of the state as a tax on the corporation is not open to our review or objection. The manner of taxation being legal under the statutes of the United States, its effect cannot be complained of in the Federal tribunals. We do not mean to be understood as implying that the plaintiff's view of the Constitution of the state or of the laws of the state is correct. The inquiry is not necessary. Accepting such view as correct, plaintiff shows no right under the Constitution or laws of the United States which has been violated."

The principle that the stock of a joint-stock association is similar in its nature to that of a corporation has been recognized in a number of cases. *Waterbury v. Merchants' Union Exp. Co.* 50 Barb. 157, 161; *Rice v. Rockefeller*, 134 N. Y. 174, 187, 17 L. R. A. 237, 31 N. E. 907; *People ex rel. Platt v. Wemple*, 117 N. Y. 146, 149, 6 L. R. A. 303, 2 Inters. Com. Rep. 735, 22 N. E. 1046. As to the nature of the stock of corporations, it has been frequently held that not only is stock personal property, but that it is so no matter what the character of the corporate property may be. *Kent v. Quicksilver Min. Co.* 78 N. Y. 179; *Weaver v. Barden*, 49 N. Y. 286; *Jermain v. Lake Shore & M. S. R. Co.* 91 N. Y. 492; *Bradley v. Holdsworth*, 3 Mees. & W. 424; *Cook, Corp.* § 12. In *Re Bronson*, 150 N. Y. at page 8, 34 L. R. A. 242, 44 N. E. 709, this court held that shares of stock actually represented undivided interests in a corporate enterprise, the corporation holding the legal title for the benefit of stockholders.

The statutory construction law (Laws

1892, chap. 677, § 4), in defining personal property, says: "The term personal property includes chattels, money, things in action, and all written instruments themselves, as distinguished from the rights or interests to which they relate, by which any right, interest, lien, or encumbrance in, to, or upon property, or any debt or financial obligation, is created, acknowledged, evidenced, transferred, discharged, or defeated, wholly or in part, and everything, except real property, which may be the subject of ownership." This very exhaustive definition covers certificates of stock. The Code of Civil Procedure (§ 647) provides, in substance, that the rights or shares which a defendant has in the stock of an association or corporation, together with the interest and profits thereon, may be levied upon by attachment, thus recognizing that the stock of an association, as well as that of a corporation, is deemed personal property.

The question we are now considering does not seem to have been directly passed upon by this court, but has been in other jurisdictions. In England the case of *Myers v. Perigal*, 21 L. J. C. P. N. S. 217, holds that the bequest of the proceeds of shares in a joint-stock banking company did not come within the "statute of mortmain" (9 Geo. II. chap. 36). In Pennsylvania we are cited by the appellant to the following cases, the first of which involved the law of joint-stock associations, and the other of limited partnership, which closely resembles joint-stock associations. *Oliver's Estate*, 136 Pa. 43, 9 L. R. A. 421, 20 Atl. 527; *Small's Estate*, 151 Pa. 1, 25 Atl. 23, 28.

We are of opinion, on principle and authority, that the shares of a joint-stock association should be treated as personal property, and taxable as such. The difference between a corporation and a joint-stock association, in view of the many corporate powers bestowed upon the latter, is more in degree than kind. The policy of the legislature in creating corporations is to continue to a certain extent the common-law liability of partners or joint debtors under which the stockholders would rest if unin-

corporated and engaged in a joint venture or partnership. This liability is primary, and not statutory, and rests upon the directors and stockholders alike. The legislature says in effect to all the members of the corporation: "You shall enjoy certain corporate powers, but as to creditors you remain liable as partners at common law, subject to such limitations as we have placed upon that liability." In *Corning v. McCullough*, 1 N. Y. 47, 49 Am. Dec. 287, it was held that, where the charter of an incorporated company provides that the stockholders shall be liable for the debts, and that the creditor may, after judgment obtained against the corporation and execution returned unsatisfied, sue any stockholders and recover his demands, such stockholders are liable in an original and primary sense, like partners or members of an unincorporated association, and their liability is not created by the statute of incorporation. In other words, the directors and stockholders of a corporation rest under a modified common-law liability, while the associates in a joint-stock association rest under the full common-law liability. Assuming that the shares of "The New York Times" are personal property, and taxable as such under the transfer act existing at the time Mr. Jones died, the remaining question is, whether the appraiser was authorized to consider the value of the real estate in ascertaining the value of the shares. It is clear from the figures resulting from the appraisal that the real estate constituted the greater part of the assets of the association. These shares were not listed upon the stock exchange, or sold in the open market, and the only way to get at their value was to ascertain the property they represented. *People ex rel. Union Trust Co. v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818.

The order appealed from should be reversed, and the order of the surrogate affirmed, with costs to the appellants in all the courts.

Parker, Ch. J., and O'Brien, Haight, Martin, Vann, and Cullen, JJ., concur.

OHIO SUPREME COURT.

STATE of Ohio
v.
Henry SHAW et al.
(.....Ohio.....)

- *1. To acquire a property right in animals *feræ naturæ*, so that they may be the subject of larceny, the pursuer must bring them into his power and control, so that he may subject them to his own use at his pleasure, and must so maintain his possession and control as to indicate that he does not intend to abandon them again to the world at large; but, in cases where larceny is charged, the law does not require absolute security against the possibility of escape.
2. When fish are inclosed in a net, or in any other inclosed place which is private property, from which they may be taken at any time at the pleasure of the owner of the net or inclosure, the taking of them therefrom with felonious intent will be larceny.

(November 18, 1902.)

•Headnotes by the Court.

NOTE.—*Right to fish.*

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- IX. Shell fisheries.
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I. Public right of fishery.

Fish, being *feræ naturæ*, are, while in their natural element, the property of no one, unless they have been brought into an inclosure so that they are completely under the power of the captor, or they can be regarded as the property of the one who owns the water. The consequence is that they may be captured and taken by anyone who can gain access to them, except so far as the water is in private ownership. Following out the contentions of Selden in his attempt to establish the title of the sea in the British sovereign against the claims of the other nations, the subjects of that realm have conceded to their rulers the title to the seas. See note to Goff v. Cogle (Mich.) 42 L. R. A. 161. Such ownership was held to include both bed and water, and consequently whatever was in or upon either. Therefore the right to reduce the fish to possession resided in the King. But this right was one which was of little practical value to him, and he had neither the time nor the inclination to interfere with the taking by his subjects of such fish as they chose. This habit, together with the aggressiveness on the part of the subjects to augment their own rights and limit those of

EXCEPTIONS by the State to rulings of the Court of Common Pleas for Lake County made during the trial of an indictment charging defendants with grand larceny, which resulted in a verdict of acquittal. *Sustained.*

Statement by Davis, J.:

The indictment is as follows: "In the court of common pleas of Lake county, Ohio, of the term of May, in the year of our Lord 1901. The jurors of the grand jury of the state of Ohio, within and for the body of the county of Lake, duly impeaneled, sworn, and charged to inquire of crimes and offenses committed within the said county of Lake, in the name and by the authority of the state of Ohio, upon their oaths do find and present, that Henry Shaw, John Thomas, and James Fostine, late of said county, on the 15th day of May, in the year of our Lord 1901, with force and arms, in said county of Lake and state of Ohio, unlawfully and feloniously did steal, take, and carry away 730 pounds of fish, of the value of \$41,

the Crown, in the course of time resulted in the formulation of the theory that the Crown held his fishery rights as a sort of trustee, and that the people were the real beneficiaries. Such was not the original idea. It finds no expression at the time of the decision of the case of the Royal Fishery of the Banne, Davies, 149. There the fishery right is treated as a part of the King's private property, to be dealt with for his own emolument, at his pleasure. But the doctrine is now firmly established that the ultimate right resides in the people, and that the Crown cannot abridge it. This conclusion has been aided by the necessity of asserting the public rights against the claims of private owners. As long as the Crown regarded the fisheries as his, he used them for his own advantage by making exclusive grants of them to individuals. The King's ownership of the fisheries would seldom inconvenience the rights of his subjects, but a few private grants might exclude the people generally from access to places where fishing might be successfully practised. This necessitated a holding that the King had no title which he could grant, and Magna Charta is referred to as the instrument by which he parted with his title. There is nothing in that instrument which directly works that result. For a discussion of the clauses relied upon, see *infra*, II. a. However, whether the prohibition is found in Magna Charta or not, the general rule now is that in tidal waters all have an equal right to fish, and that this right cannot be abridged by grants to individuals.

By the Roman law all rivers and ports are public; hence, the right of fishing is common to all in a port and in rivers. Sandars' Justinian, p. 158.

The fishery in every tidal stream is a royal fishery, and belongs to the King by his prerogative, since such river partakes of the nature of the sea, and is said to be a branch of the sea so far as it flows; but where a stream is nontidal the fishery pertains to the tenants. Royal Fishery of the Banne, Davies, 149.

The public have *prima facie* a common right of fishing in tidal rivers. Reg. v. Stimpson, 32

of the personal property of Morris E. Grow and John Hough, partners as Grow & Hough, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Ohio." One of the defendants, John Thomas, was tried separately. On the trial, no evidence was offered by the defendant. The evidence offered by the state disclosed that on the morning of May 15, 1901, about 5 or 6 o'clock, a small sailboat was discovered 2 or 3 miles off Fairport harbor; a tug ran out and overhauled this boat, and discovered they had fish on board. In reply to an inquiry where they had got the fish, they said near Cleveland, out of a trap net. They were asked to come to the harbor with the tug, and refused; two other tugs came to the assistance of the one already there, and brought in the defendants, with their boat,

and they were arrested. It is in evidence that, on the way in, the defendant John Thomas said that "they lifted two pound nets west of the pier and got the fish." The testimony further tended to show that the two pound nets belonged to Grow & Hough, the parties named in the indictment, and that the defendants had taken from these two nets somewhere from 100 to 150 pounds of fish each. It also appears that the construction of these pound nets is such that the entrance to the net was about 35 feet deep, 8 rods long, and terminated in an aperture leading into the net, which was 2 feet 10 inches in diameter. This tunnel, as it is called, extended into the net, or pot, some 5 or 6 feet, and the pot was about 28 feet square, reaching, perhaps, 4 feet above the water. The evidence shows that the opening of the tunnel into the pot was the

L. J. M. C. N. S. 208, 4 Best & S. 307, 9 Cox C. C. 356, 10 Jur. N. S. 41.

Prima facie the right to fish in a tidal river is common to all, and the burden is upon one claiming an exclusive privilege. 16 Vin. Abr. title *Piscary* (B); Johnston v. Bloomfield, Ir. Rep. 8 C. L. 68.

Woolrych says that the absence of any impost for taking fish by the public is a strong argument to show that the right to take them in the sea was never vested exclusively in the Crown. Waters, p. 76.

The King seems to have his proprietary dominion of fishing as lord of the soil of the sea. Id. p. 437.

But that, in regard to the right of fishery, the principle of lord and tenant holds. The soil abides in the sovereign, but all rights profitable to the advancement of commerce and the general welfare have accrued, by degrees, to the subject. *Ibid.*

The general public privilege of fishing may be claimed independently of the prerogative. Id. p. 129.

Schultes says that the privilege of fishing belongs to the subject of common right. Aquatic Rights, 17.

That the right of fishing never was vested in the Crown exclusively. As a public right belonging to the people, it prima facie vests in the Crown; but such legal investment does not diminish the right or counteract its exertion. Id. 15.

The right of the public to fish in the sea or arms thereof, which extends to the taking of shell fish left on the seashore, on the reflux of the tide between high and low water mark, is upon the ground that the taking of fish is a public benefit. Howe v. Stowell, Alcock & N. 848, 358.

Where a channel is cut through a sea wall separating a body of brackish water from the sea, and the tide flows and reflows through it, and sea fish and ships pass through, the public right of fishery in such waters attaches. Naah v. Newton, 30 N. B. 610.

A citizen who takes fish from public waters can stand upon his common right thereto until the claimant of the *locus* as a private fishery establishes a superior title; and, until a private grant is made, the public right exists. Polhemus v. Bateman, 60 N. J. L. 163, 37 Atl. 1015.

The fishery in tidal waters is prima facie in the public, and can be held vested as a private right only upon a showing of title. Carter v. Murcott, 4 Burr. 2164; Gould v. James, 6 Cow. 60 L. R. A.

369; Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 498.

All subjects have a right to take bait and fish in any harbor, river, or public water in Upper Canada (not duly set apart by the governor in council for the natural or artificial propagation of fish), so that in so doing they trespass not on the Crown lands or beaches, or, by their place, time, or mode of fishing, contravene any provision of the Canada fisheries act, or regulations thereunder; and this applies, not merely to individuals, but equally to all Her Majesty's subjects. Daragh v. Dunn, 7 U. C. L. J. 273.

While a several fishery in a navigable river cannot be created since the Magna Charta, yet, if it existed previous to that time, it may be subsequently granted. Devonshire v. Hodnett, 1 Hudson & B. 322.

The right of fishing in a public navigable river belongs to the public, and not to the land bounded on the river. Rose v. Belyea, 1 Hannay (N. B.) 109.

The right to a fishery in a public stream is prima facie in the public. Russell v. Stocking, 8 Conn. 286.

While in a private stream it puts the proof upon those that claim *liberam piscariam*, "in case of a river that flows and reflows, and is an arm of the sea," prima facie it is common to all, it being a good justification to say that the *locus in quo* is *brachium maris* in *quo unus quisque subiectus dominus regie habet et habere debet liberam piscariam*. Fitzwalter's Case, 1 Mod. 105.

The state is the owner of the beds of all tide-water rivers within its boundaries, unless they have been granted away, and has the right to prescribe the mode in which fish may be taken in such waters. Hughes v. State, 87 Md. 298, 39 Atl. 747.

In Scotland, however, the law is in its original form so far as the salmon fisheries are concerned, and has not been subjected to the modifying influence which has occurred in England.

And the right of the Crown in salmon fisheries in the open sea around the coast of Scotland is to be determined by the law of Scotland. Gammell v. Wood & Forest Comrs. 3 Macq. II. L. Cas. 419.

The right of salmon fishing in the sea around the coast of Scotland belongs to the Crown, and is *inter regalia*, except so far as it has been parted with by grant. McDouall v. Lord Advocate, L. R. 2 H. L. Sc. App. Cas. 431; Lord Advocate v. Lovat, L. R. 5 App. Cas. 273.

place where the fish entered, and that it was at all times left open. There is no evidence as to the quantity of fish escaping from the nets; it simply appears that it was possible for the fish to go out in the same way they got in. It was also in evidence that these nets were frequently disturbed by wind and storm, and at such times so disordered that fish escaped over the top. When the state had rested its case, the defendant Thomas moved the court to arrest the testimony from the jury and direct a verdict of not guilty. The court overruled this motion, but after argument did direct a verdict of not guilty, which was returned by the jury, and to which the state excepted.

Messrs. J. M. Sheets, Attorney General, Harry P. Bosworth, and Homer Harper, for plaintiff:

The right belongs to the Crown, not as a trustee for the public, but as a part of its hereditary revenue, and may be granted by it, and may be feudalized. *Gammell v. Wood & Forest Comrs.* 3 Macq. H. L. Cas. 419.

The royal interest in-salmon fishings extended to those in the open sea, as well as in rivers and estuaries. *Ibid.*

By that law the Crown is presumed to be entitled to all salmon fisheries to which the vassal cannot affirmatively establish his claim. *Lord Advocate v. Lovat*, L. R. 5 App. Cas. 288.

In *Gammell v. Wood & Forest Comrs.* 3 Macq. H. L. Cas. 419, the lord chancellor, in discussing the right of the Crown to salmon fisheries on the coast of Scotland, says that salmon fishings at an early period in the history of Scotland were regarded as possessing a peculiar value over other fishings, and were distinguishable from them in a remarkable manner. They were only capable of belonging to a subject by an express grant from the Crown, or by a grant of fishings generally, followed by such user of salmon fishing as proved that it was intended to be comprehended within the general terms of the grant.

As between subjects of different nations.

It is not competent for the subjects of one country to fish in those seas or rivers which are acknowledged to be under control of another sovereign, unless they obtain his consent prior to their undertaking. *Woolrych, Waters*, p. 77.

In *The Grace*, 4 Can. Exch. 283, it is said that it is an axiom of international law that every state is entitled to declare that fishing on its coasts is an exclusive right of its own subjects.

If a body of water is wholly within the dominion of a country, it may regulate the public right of fishing therein, and the regulations will apply to acts done more than 3 miles from the shore. *Mowat v. McFee*, 5 Can. S. C. 66.

By a convention between England and France regulations were made as to fishing upon the seas lying between the two countries. By the English act to enforce the convention, jurisdiction over violations of it is given to justices of the peace, and therefore no action can be maintained in the Queen's bench for injuries done by a violation of the act. *Marshall v. Nicholls*, 16 Jur. 1155, 21 L. J. Q. B. N. S. 843, 18 Q. B. 882.

By a convention between the United States and Great Britain, dated 1818, the United States renounced any liberty to take fish within 3 marine miles of any of the coasts, bays, creeks, 60 L. R. A.

Fish caught or confined in a net or trap are the subject of larceny.

4 Chitty's Bl. Com. p. 189; 2 Russell, Crimes, 5th ed. p. 83; Clark, Crim. Law, p. 243; Desty, Am. Crim. Law, § 145 Q; 2 Am. & Eng. Enc. Law, 2d ed. p. 345; *State v. House*, 65 N. C. 315, 6 Am. Rep. 744; 2 Bishop, Crim. Law, § 775; 3 Lawson, Rights, Rem. & Pr. § 1367.

Messrs. A. G. Reynolds and Foran, McTigue, & Baker, for defendants:

Fish, while roaming at will in public waters, are animals *feræ naturæ*, and are the property of the community at large; but, when they become the subject of a qualified property in an individual if reclaimed, confined, or dead, and if fit for food when such qualified property is acquired, they become the subject of larceny. In order to render

or harbors of his Britannic Majesty's dominions in America, and by statute 59 Geo. III. chap. 38, it was enacted that if any foreign vessel should be found fishing within 3 marine miles of such coasts, she should be forfeited. And by the Canadian statute (Rev. Stat. chap. 94, § 3), it was enacted that if any foreign, unlicensed ship should be found fishing within 3 marine miles of the coast she should be forfeited. In *The Frederick Gerring*, Jr., 27 Can. S. C. 271, Affirming 5 Can. Exch. 164, it was held that a vessel was subject to forfeiture which, after having pursued its seine with a draught of fishes taken outside the 3-mile limit, drifted within the 3-mile limit, after which the hauling of the fish from the seine was continued.

The remedy imposed by an article of the convention between England and France for the guidance of the fishermen of the two countries in the sea lying between them, for a breach of any article of the convention, is exclusive, and no action can be maintained for such a breach or for damages caused by it. *Marshall v. Nicholls*, 18 Q. B. 882, 16 Jur. 1155, 21 L. J. Q. B. N. S. 343.

The United States, upon acquiring the Pribilof Islands from Russia, asserted a jurisdiction over the Behring sea for the protection of the seal fisheries. This jurisdiction was disputed by other nations, and finally became the subject of arbitration in which the questions submitted involved the extent of the Russian claims to the sea prior to the cession of the territory to the United States, and how far its claims have been acquiesced in by Great Britain; and further, whether or not the United States had any right of protection of property in the seals outside the ordinary 3-mile limit. The arbitrators found that Russia had not established any exclusive right to the sea, and that, therefore, the United States had acquired none, and could enforce no regulation against subjects of foreign powers outside the regulation 3-mile limit. 27 Am. L. Rev. 703. Prior to the arbitration, the courts, as in duty bound, recognized the assertions of the political department of government as to its dominion, and enforced the statutes passed for the protection of the seals. *The Alexander*, 60 Fed. 914. But, after the award had been acquiesced in by the political department of the government, the courts refused to take jurisdiction of proceedings against foreign vessels found outside the 3-mile limit (*The La Ninfa*, 21 C. C. A. 434, 44 U. S. App. 648, 75 Fed. 513, Reversing 49 Fed. 575; *The Alexander*, 21 C. C. A. 441, 44 U. S. App. 659, 75 Fed.

them subject to larceny they must be brought under the dominion of man.

People v. Bridges, 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115; *State v. Krider*, 78 N. C. 481; *Com. v. Chace*, 9 Pick. 15, 19 Am. Dec. 348; *Wheatley v. Harris*, 4 Sneed, 468, 70 Am. Dec. 258; *State v. Doe*, 79 Ind. 9, 41 Am. Rep. 599; *Ward v. Stats.*, 48 Ala. 161, 17 Am. Rep. 31; 25 Alb. L. J. 444; *State v. Brown*, 9 Baxt. 53, 40 Am. Rep. 81; *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573; *State v. House*, 65 N. C. 315, 6 Am. Rep. 744.

Confinement must be actual, and such as to deprive the fish of their natural liberty, and render escape impossible.

Young v. Hichens, 6 Q. B. 606; *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115; *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374.

519, Reversing 60 Fed. 914); although they did enforce the statutes passed by Congress for the protection of the seals within 60 geographical miles of the islands against United States citizens. The *James G. Swan*, 77 Fed. 478.

Public rights in United States.

The limitation upon the rights of the Crown in England, and upon its power to grant private rights of fishery, did not extend to the people themselves as represented in Parliament, and that body has always had the power to make such grants. When the American colonies acquired their independence, they acquired with it, not only the powers of the British Crown, but also those of Parliament. In the absence of a constitutional limitation, these powers are vested in the lawmaking representatives of the people of the several states, and there is nothing to prevent them from making private grants. In the absence of such grants, however, the right of fishing in all waters the title to which is in the public belongs to all the people in common.

The right to fish in the public waters, in the absence of express prohibitory legislation, is a right common to all of the citizens of the state; and, while the legislature has ample power to regulate the right, or grant it to one to the exclusion of others,—for a limited time, at least,—the statute expressing such intent must have the directness and certainty of a penal statute, or, at least, not be capable of a different construction, before it will be given that effect. *Legoe v. Chicago Fishing Co.* 24 Wash. 175, 64 Pac. 141; *De Mere v. Sandy Spit Fish Co.* 24 Wash. 582, 64 Pac. 799.

Every man has an equal right to take for his own use all creatures fit for food (such as fish) that are wild by nature, so long as he does no injury to another's rights. *Sterling v. Jackson*, 69 Mich. 488, 37 N. W. 843.

To fish is a right accorded by the state, and the question of individual enjoyment is one of public privilege, and not of private right. *People v. Collison*, 85 Mich. 105, 48 N. W. 292.

In *Yensen v. State*, 7 Ohio N. P. 18, it is said that the business of fishing is itself a lawful one, in which anyone has the right to engage. The right of public fishery in the waters of the Great Lakes is one of the time-honored, we might say almost sacred, rights of the people.

Open-water fishing is an essentially a maritime business as any other use of the water outside the line prescribed by statute. Anyone has the right to fish with such appliances as 60 L. R. A.

Food fish in the "trap" or "pot" of a pound net set in public waters are not the subject of larceny so long as the aperture through which they entered is left open so that they may escape therefrom at will. The facts being agreed upon, it remained for the court to say whether in such a net the fish could be said to be confined, within the meaning of the law.

People v. Bridges, 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115; *Wharton, Crim. Pl. & Pr.* 9th ed. 812; *Kinhead, Pr.* §§ 768, 770.

No one has property in animals and fowls until they are reduced to possession.

Magner v. People, 97 Ill. 320; 2 Bl. Com. 381; *State v. Krider*, 78 N. C. 481; *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573; *State v. House*, 65 N. C. 315, 6 Am. Rep. 744; *State v. Geer*, 61 Conn. 144, 13 L. R. A. 804, 3 Inters. Com. Rep. 732, 22 Atl.

are appropriate to open water fishing. *Lincoln v. Davis*, 58 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103.

The right of fishery in tidal waters is a common right, and any derogation thereof by private rights must be clearly shown by prescription or private grant. *Slingerland v. International Contracting Co.* 48 App. Div. 215, 60 N. Y. Supp. 12.

In the absence of statutory authority, no exclusive right to any portion of a fishing district on the public waters of a sound can be appropriated; but such right is common to all. *Gerhard v. Worrell*, 20 Wash. 492, 55 Pac. 625.

Until appropriation is made of a fishery by the state or municipality, any citizen may use it. *Coolidge v. Williams*, 4 Mass. 140.

In waters above the tide.

In England the King's title to the water depended upon its character, and, since the right to the fish follows the title to the water, his right, and therefore the right of the public, to the fish went no farther than the flow of the tide. The right did not depend upon the navigable character of the water, nor upon its actual navigation, but solely upon the tide.

In all tidal waters, or *flumen regale*, the fishery belongs to the King by his prerogative, but in nontidal streams the terre-tenants of either side have an interest in the fishery of common right. *Selden, Mare Clausum*, lib. 2, chap. 21, 16 Vin. Abr. 576 (B a), (16), (17).

A common fishery cannot be claimed in private waters. *Woolrych, Waters*, p. 78.

The public have no right of fishery in a tidal stream at a point above the action of the tide, though it be navigable in fact. *Blount v. Layard* [1891] 2 Ch. 681, note; *Ashworth v. Browne*, 10 Ir. Ch. Rep. 421, 7 Ir. Jur. O. S. 315; *Reece v. Miller*, L. R. 8 Q. B. Div. 626, 51 L. J. M. C. N. S. 64, 47 J. P. 37; *Pearce v. Scotcher*, L. R. 9 Q. B. Div. 162, 46 L. T. N. S. 342, 46 J. P. 248; *Queen v. Robertson*, 6 Can. S. C. 52; *Smith v. Andrews* [1891] 2 Ch. 678, 65 L. T. N. S. 175.

The right of catching fish in the navigable and nontidal part of the river belongs exclusively to the riparian owner, who has the same right precisely as to catching fish there as the riparian owners have in the nonnavigable part of the river. It is thus clear that the right to catch fish does not depend in any way on the right of public passage. The public right of navigation and the public right of fishing are entirely separate rights. *Leconfield v. Lonsdale*, L. R. 5 C. P. 665, 39 L. J. C. P. N. S.

1012; *American Exp. Co. v. People*, 133 Ill. 649, 9 L. R. A. 138, 24 N. E. 758; *State ex rel. Corcoran v. Chapel*, 64 Minn. 130, 32 L. R. A. 131, 66 N. W. 205.

Davis, J., delivered the opinion of the court:

Fish are *feræ naturæ*; yet, "where the animals or other creatures are not domestic, but are *feræ naturæ*, larceny may, notwithstanding, be committed of them, if they are fit for food of man, and dead, reclaimed (and known to be so), or confined. Thus . . . fish in a tank or net, or, as it seems, in any other inclosed place which is private property, and where they may be taken at any time at the pleasure of the owner, . . . the taking of them with felonious intent will be larceny." 2 Russell, Crimes, 83: "Fish

confined in a tank or net are sufficiently secured." 2 Bishop, Crim. Law, § 775.

The trial judge seems to have directed the jury to return a verdict of not guilty on the theory that the fish must have been confined so that there was absolutely no possibility of escape. We think that this doctrine is both unnecessarily technical and erroneous. For example, bees in a hive may be the subject of larceny, yet it is possible for the bees to leave the hive by the same place at which they entered. To acquire a property right in animals *feræ naturæ*, the pursuer must bring them into his power and control, and so maintain his control as to show that he does not intend to abandon them again to the world at large. When he has confined them within his own private inclosure, where he may subject them to his own use at his pleasure, and maintains rea-

306, 23 L. T. N. S. 155, 18 Week. Rep. 1165 (commissioners' opinion).

In point of law, there can be no common right of fishery in a nonnavigable river. *Hudson v. MacRae*, 4 Best & S. 585, 9 L. T. N. S. 678, 33 L. J. M. C. N. S. 65, 12 Week. Rep. 80; *Mussett v. Burch*, 35 L. T. N. S. 486.

Where the lands adjoining fresh-water rivers have been granted, the exclusive right of fishing is in the riparian proprietor; and where such lands have not been granted, the right is in the Crown for the benefit of the public. *Steadman v. Robertson*, 2 Fuglesley & B. (N. B.) 580.

Riparian proprietors have an exclusive right of fishing in nonnavigable lakes, rivers, streams, and waters, the beds of which have been granted them by the Crown. *Re Provincial Fisheries*, 26 Can. S. C. 444.

There is no connection whatever between a right of passage and a right of fishing. A right of passage is an easement,—that is, a privilege without profit, as in a common highway. A right to catch fish is a profit *à prendre*, subject, no doubt, to the free use of the river as a highway, and to the private rights of others. *Queen v. Robertson*, 6 Can. S. C. 52.

The Crown, in right of the Provinces, may grant the soil of all land under nontidal waters, and the right to a several fishery thereon passes as an incident unless expressly reserved. *Re Provincial Fisheries*, 26 Can. S. C. 444.

A navigable river, for the purpose of the common and public right of fishing, must be a tidal river in which the tide ebbs and flows, and the right cannot be extended to a river merely capable of navigation by ships and boats. *Murphy v. Ryan*, Ir. Rep. 2 C. L. 143, 16 Week. Rep. 678.

At common law the public right of fishing in rivers was confined to such portions of the rivers as were covered by the ebb and flow of the tide. *Willow River Club v. Wade*, 100 Wis. 86, 42 L. R. A. 805, 76 N. W. 273.

A river is not tidal, so as to give a public right of fishery, where it is unaffected by ordinary tides, although upon the occasion of very high tides the rising of salt water in the lower part of the river dams back the fresh water, and causes it, upon those occasions, to rise and fall with the flow and ebb of the tide. In this case *Grove, J.*, says, in order that the river may be tidal at the spot in question, it may not be necessary that the water should be salt, but the spot must be one where the tide in the ordinary and regular course of things flows and refluxes. There is no case which shows that, because at exceptionally high tides, 60 L. R. A.

some portion of the river is dammed up and prevented from flowing down, and so rises and falls with the tide, that that portion of the river can be called tidal. *Reece v. Miller*, L. R. 8 Q. B. Div. 626, 51 L. J. M. C. N. S. 64, 47 J. P. 37.

In *Smith v. Andrews* [1891] 2 Ch. 693, 65 L. T. N. S. 175, North, J., in speaking of the Thames at a point above the action of the tide, and holding that no right of fishery existed there, said: The idea is sometimes entertained that the right to pass along a public navigable river carries with it the right to fish in it; but, so far as regards nontidal rivers, this is not so. Persons using a navigable highway no more acquire thereby a right to fish there, than persons passing along a public highway on land acquire a right to shoot upon it.

Whoever claims the right to fish in private waters has the burden of showing the foundation of such right. *Fitzwalter's Case*, 1 Mod. 105.

The owner of the soil may have an exclusive right of fishery in water which is so far navigable that he cannot prevent the public from passing over it. *Micklethwait v. Vincent*, 67 L. T. N. S. 225.

Property rights to a several fishery in non-navigable nontidal waters are not abridged when the waters are made navigable by Parliament by artificial improvements. *Hargreaves v. Diddams*, 32 L. T. N. S. 600, L. R. 10 Q. B. 582, 44 L. J. M. C. N. S. 178, 23 Week. Rep. 828; *Mussett v. Burch*, 35 L. T. N. S. 486.

Where a river runs through a manor the legal presumption is that the right of fishing belongs to those owning land on its side, and extends to the center of the stream. *Lamb v. Newbiggin*, 1 Car. & K. 549. In this case it was argued that where a private river runs through a manor the right to fish along the shore thereof *prima facie* belongs exclusively to the lord; but the court held that it belonged to those owning the land abutting on the river, and that, if a lord claims a several fishery therein, the burden is upon him to prove it.

An exclusive fishery in a private stream passes as an incident to a grant of adjoining upland. *Queen v. Robertson*, 6 Can. S. C. 52.

There is a statement in *Warren v. Matthews*, 1 Salk. 357, 6 Mod. 78, that a subject has a right to fish in all navigable rivers the same as in the sea; but this must be regarded as an inaccurate use of the word "navigable" when "tidal" is meant.

But the right of fishery is public in all tidal waters, and all other waters *de facto* navigable, where or so long as the title to the bed remains

sonable precautions to prevent escape, they are so impressed with his proprietorship that a felonious taking of them from his inclosure, whether trap, cage, park, net, or whatever it may be, will be larceny. For such cases, as is clearly shown by the authorities above quoted, the law does not require absolute security against the possibility of escape, and none of the authorities cited for the defendants in error, except *Norton v. Ladd*, 5 N. H. 203, 20 Am. Dec. 573, sustain their contention. *Young v. Hichens*, 6 Q. B. 606, is not applicable to this case. That was an action for the conversion of fish which were never in the plaintiff's net, but had been frightened away from entering into the plaintiff's net by the defendant, and caught in his own net.

In the present case the fish were not at large in Lake Erie. They were confined in nets, from which it was not absolutely impossible for them to escape, yet it was prac-

tically so impossible; for it seems that under ordinary circumstances few, if any, of the fish escape. The fish that were taken had not escaped, and it does not appear that they would have escaped, or even that they probably would have escaped. They were so safely secured that the owners of the nets could have taken them out of the water at will as readily as the defendants did. The possession of the owners of the nets was so complete and certain that the defendants went to the nets and raised them with absolute assurance that they could get the fish that were in them. We think, therefore, that the owners of the nets, having captured and confined the fish, had acquired such a property in them that the taking of them was larceny.

Exceptions sustained.

Burket, Ch. J., and Spear, Shanek, Price, and Crew, JJ., concur.

In the Crown. *Re Provincial Fisheries*, 26 Can. S. C. 444.

The common right to take fish not only extends to navigable waters, but exists as to all waters, the lands underlying which are not in private ownership,—to all lakes, ponds, or streams, navigable or otherwise, upon the public lands of a state or the United States, not protected by reservation. *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374.

Where the Crown grants the land on both sides of a river above the flow of the tide, and expressly reserves the bed of the river, the public has the same common right of fishery there that it has in tidal rivers. *Robertson v. Steadman*, 3 Pugsley (N. B.) 621.

The old law of France in regard to the right of fishery in nonnavigable streams flowing through private lands is that it does not depend upon the ownership of land adjacent to the stream, but may be conferred by the sovereign upon individuals from whom permission must be obtained in order to enjoy the right. *Re Provincial Fisheries*, 26 Can. S. C. 444.

In the United States.

The strict rule of the common law as to the ownership of land under nontidal water, and therefore of the fishery, has not been followed in all of the states of the Union. So far as this change was made by the adoption of the original Constitution, it was undoubtedly proper.

So far as it was done by the legislature without constitutional authority, it deprived the riparian owner of property without due process of law, or took his property for public use without compensation. So far as it was done by the court, it was judicial legislation of the worst kind.

A fishery is property of which the owner cannot be deprived without compensation. *Tudor v. Cambridge Waterworks*, 1 Allen, 164.

The right of a riparian owner to fish in the water of a private river is not a riparian right in the nature of an easement, but is strictly a right of property. *Queen v. Robertson*, 8 Can. S. C. 52.

So far as the mere angling with hook and line is concerned, the exercise of the right by the public is subject to no serious objection; but the establishment of the principle involves the use of destructive modes of fishing, as well as the liability to trespass on the adjoining land.

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From the earliest times, fisheries were recognized as part of the estate. *Maitland's Domesday*, 330.

Most of the states have followed the common law without question.

Above the ebbing and flowing of the tide the right of fishery belongs exclusively to the adjoining proprietors. *Adams v. Pease*, 2 Conn. 481.

The right of fishing in a canal is incident to the soil. *Woolrych, Waters*, p. 65.

A grant of the exclusive enjoyment of a non-navigable inland stream to a mill owner confers an exclusive fishery, and there is no implied power reserved to the state to regulate it. *People v. Platt*, 17 Johns. 195, 8 Am. Dec. 382.

The common law limits the exclusive right of fishing in streams not navigable, nor public waters, in the riparian owner of the soil. *Beach v. Morgan*, 67 N. H. 529, 41 Atl. 349.

Grant of riparian lands on a private stream confers right to an exclusive fishery. *State v. Glen*, 52 N. C. (7 Jones L.) 321.

The fishery in a river emptying into one of the Great Lakes, in which there is no ebb and flow of the tide, is not free or common to all, but belongs exclusively to the owners of the adjacent land. *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 249.

The riparian proprietor on a nonnavigable stream owns the fishery to the middle of the stream opposite his banks. *Ingram v. Threadgill*, 14 N. C. (3 Dev. L.) 59.

Under the statutes and interstate agreement with New Jersey, the fisheries in the Delaware river are exclusive, and originally belonged to the owner of the upland, but may be leased, sold, or devised to a person not owning the adjoining shore. *Hart v. Hill*, 1 Whart. 124.

Even in Washington, which has departed as far from the common law of riparian rights as any of the states, it is said that, even in a navigable or public river, the right of fishing remains in the owner of the bank, the public only having an easement over the stream; and the taking of fish therefrom would be a trespass against the riparian proprietor. *Griffith v. Holman*, 23 Wash. 347, 54 L. R. A. 178, 63 Pac. 239.

In most of the cases dealing with this question the courts have followed the inaccurate use of the word "navigable" as being synonymous with "tidal," which originated with Chancellor Kent (see note to *Willow River Club v. Wade* [Wis.] 42 L. R. A. 305); so that, when they state that the right of fishery in nonnavigable

streams is private, they intend to follow the common-law rule, and hold that the right is private except in tide waters.

There is no question but that the riparian proprietor of land on a nonnavigable, nontidal stream has the fishery to the middle of the stream. *Jackson v. Lewis*, Cheves L. 259.

If a stream is not navigable for boats or any water craft, the owner of the land can exclude everyone from the right of fishing. *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 383.

Massachusetts at first followed the common-law rule.

Proprietors of land on the Connecticut river, above the flowing of the tide, have an exclusive right of fishing, and of the use of the water generally, to the middle of the river, subject only to the public right of passage, with boats, rafts, etc. *White v. Whittier*, 2 Dane Abr. 702.

The fishery in nontidal, though navigable, waters is the property of the riparian owner, exclusive so far as the taking of fish is concerned; but as to their passage, that others may enjoy the same privilege, the maxim, *Sic utere*, etc., applies, and he cannot place a dam across the stream without providing an adequate fishway. *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

In *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 383, it is said that the legislature, in establishing the right to occupy fresh-water streams not connected with the sea for the use of mills, made no provision in regard to fish. And that the right of fishery in such streams was exclusive in the owner of the banks.

But this rule was changed by statute. How the change could be made, and the right to the fishery be taken from the owner and vested in the public without compensating the owner, in the face of a constitutional provision that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor,"—is difficult to understand. It may be that the individual demanded no compensation, for the question of his right to it does not seem to have been presented to the courts.

However, by a long course of legislation in Massachusetts the right of fishery, even in private streams, is paramount in the public, to that extent changing the common law. But, as against all others than the public, the riparian owners of fishing privileges have the rights which belong to private property. *Cole v. Eastham*, 138 Mass. 65.

The right of fishery in such rivers as the Connecticut and Merrimac has been regarded by the laws and decisions of Massachusetts for upwards of a century and a half as a public right even above the points where navigable. *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 183.

By reason of the form of the early grants in Pennsylvania, it has been held that the title to the beds of its principal rivers did not pass to the riparian owners.

The right of piscary must be a right appurtenant to the soil covered with water; and, since the Susquehanna and similar navigable nontidal streams have been treated as though tidal as regards riparian boundaries, the fishery is vested in the public. *Carson v. Blazer*, 2 Binn. 475, 4 Am. Dec. 463; also *Shrunk v. Schuylkill* Nav. Co. 14 Serg. & R. 71.

An exclusive fishery in a navigable stream must be established by grant, actual or prescriptive. *Carson v. Blazer*, 2 Binn. 475.

The grantee of a riparian owner's right of fishery "as heretofore conducted" in a public stream cannot recover damages from another fishing therein, but is entitled to damages for 60 L. R. A.

a deprivation of an appurtenant easement to draw nets on and pass over the upland to which the fishery was formerly appurtenant, when such acts are used with the fishery "as heretofore conducted." *Harvey v. Vandegrift*, 1 W. N. C. 629.

In South Carolina it was held first that the right of fishing in a stream which is navigable in fact and actually used by the public for purposes of navigation is common in equal degree to the whole community. *Boatwright v. Bookman*, Rice L. 447.

But in *McCullough v. Wall*, 4 Rich. L. 68, 53 Am. Dec. 715, the court held that the common-law rule giving the common right of fishing in waters in which the tide ebbs and flows does not apply to streams not affected by the tide, but which have been rendered navigable or floatable by artificial means,—at least to that part of a stream above a falls which, in their natural state, obstruct the serviceable use of the river.

And *Wardlaw, J.*, stated that neither the common-law rule relating to the right of fishing in waters affected by the ebb and flow of the tide, nor the one relating to the title to the land under such waters, had been applied in South Carolina to streams not affected by the tide, although they may be navigable or floatable. *Ibid.*

In Wisconsin the legislature has asserted the public right of fishery in every floatable stream, and the court has upheld the legislation.

The public use of a stream navigable in fact for the floatage of logs and small boats includes the right to fish, and such stream is a public water within the meaning of a statute asserting title to the fish in such waters and permitting any individual to take the fish, although the title to the bed of the stream is in the riparian owner; so that one fishing from a boat in the stream is not guilty of trespassing upon such owner's rights. *Willow River Club v. Wade*, 100 Wis. 86, 42 L. R. A. 305, 76 N. W. 273.

The fishery in public waters may be enjoyed as of common right and without showing right by grant or prescription. *Wright v. Mulvaney*, 78 Wis. 89, 0 L. R. A. 807, 46 N. W. 1045.

The public right of fishery does not extend to streams which are nonnavigable in their natural condition. *Burroughs v. Whitwam*, 59 Mich. 279, 26 N. W. 491.

II. Grant of exclusive right to individual.

a. Right to make.

There is no doubt that, under Selden's conception of the rights of the Crown in the seas surrounding the British coast, the right of fishery was a perquisite, to be used or disposed of for the benefit of the Crown. This, also, is the idea found in the case of the Royal Fishery of the Banne, *Davies*, 149. The doctrine of the Crown's trusteeship does not seem to have been advanced until after the deposition of Charles I., and the time and place of its beginning do not clearly appear. Even as late as *Carter v. Murcot*, 4 Burr. 2162, the court, in speaking of the right of fishery, says: That in navigable rivers the proprietors of the land on each side have not the exclusive right of fishery; that navigable rivers or arms of the sea belong to the Crown; and that the Crown may grant a several fishery in a navigable river where the sea flows and reflows, or in an arm of the sea.

In modern times the limitation upon the power of the Crown is usually ascribed to *Magna Charta*, but a reference to the provisions of that instrument shows that it contained no specific reference to the right of fishery. The

clause mostly relied on for that purpose is known as chapter 23, and is as follows: All weirs from henceforth shall be utterly put down by Thames and Medway, and through all England, but only by the seacoasts. The law has always been that the owner of a fishery on a river could not operate it so as to prevent the fish from passing up to fisheries higher on the stream. The placing of weirs and traps near the mouth of such streams as Thames and Medway might completely destroy the possibility of fish reaching the manors of the barons living along the stream, and be a serious interference with their rights. Looking at the words of the statute, and considering them in the light of the surrounding circumstances, it would seem that the object of that section was to prevent the maintenance, by the King's license, of such infringements upon the barons' rights, and not to prevent the granting of exclusive rights of fishery.

Another chapter of the charter which is sometimes referred to as affecting the Crown's right to grant several fisheries is 16, which reads as follows: "No river banks shall be guarded (placed in defense, — *defendantur*) from henceforth, but such as were in defense in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time."

Some support is given to the contention that that chapter limited the right of the Crown to grant several fisheries by Coke's commentary on it as follows: "That is, that no owner of the banks of rivers shall so appropriate or keep the rivers several to him to defend or barre others, either to have passage or fish there otherwise than they were used in the reign of Henry II." 2 Inst. 30.

There is little reason to doubt that Lord Coke entirely misconceived the purpose of that chapter. He himself states, on the authority of the Mirror, that the statute is out of use, for "many rivers are now appropriated and placed in defense which used to be common for fishing and use in the time of Henry II."

Lord Hale's explanation of this chapter is as follows: "Before the statute of Magna Charta, chap. 16, it was frequent for the King to put as well fresh as salt rivers in *defensio* for his recreation; that is, to bar fishing and fowling in a river till the King had taken his pleasure or advantage of the writ *de defensione riparia*." De Jure Maris, chap. II.

Lord Hale further states that the form of the writ was changed so as to require the placing in defense of such rivers only as were in defense in the time of Henry II. He further states that, as the custom created great trouble to the country and little benefit or addition of pleasure to the King, it "hath long been disused."

When it is remembered that Magna Charta was intended to check the encroachment of the Crown upon the rights of the barons, and that, according to Lord Hale's interpretation, chapter 16 was immediately put into operation and given its intended effect, while, according to Lord Coke's, it was not in use, the conclusion is irresistible that Lord Coke misapprehended its scope, and that it did not affect the granting of private fisheries. In all probability Magna Charta was not intended to deal with any claim of power to grant exclusive fisheries. In fact, the strongest authority in support of the Crown's right came into existence several centuries after that instrument was established. The fact is, the courts are by no means agreed as to the scope and effect of chapter 23 of the charter. In Rolle v. Whyte, L. R. 3 Q. B. 286, 37 L. J. Q. B. N. S. 105, 17 L. T. N. S. 560, 16 Week. Rep. 503, 8 Best & S. 118, the court said, while, in Magna Charta, *kiddell* or weirs generally

are mentioned as to be put down, not only in the Thames and Medway, but also *per totam Angliam nisi per coeterum maris*, in the key to this enactment, to be found in 25 Edw. III. St. 4, chap. 4, after citing that the common passage of ships and boats in the great rivers of England be oftentimes disturbed by the levying of weirs, mills, etc., to the great damage of the people, it is provided that "all such weirs, mills, stanks, stakes, and kiddies, which were levied and set up in the time of King Edward, the King's grandfather, and after till now in such [*tidal*] rivers, whereby the said ships and boats be disturbed, shall be put out and utterly pulled down without being renewed." Hence, such use is not prohibited in municipal corporations in nonnavigable waters.

And it is further said that the Magna Charta and the succeeding statutes prohibiting the acquisition of a fishing weir in a river, including the act of 12 Edw. IV., relate to navigable rivers only. *Ibid.*

If such conclusion is correct, then that chapter was leveled, not at interference with fishing rights, but with those of navigation.

In Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 498, Judge Woodworth said that, under the authorities, the Crown may grant an exclusive fishery in tidal waters, and by grant of Chas. II. the Duke of York had and could grant same in New York.

The court examined fully the contention as to chapter 16, and concluded that it did not affect the question.

But in Lowndes v. Dickerson, 34 Barb. 586, while choosing to decide the case on other grounds, the judge noted that the force of Magna Charta upon royal grants of private fisheries as stated in Rogers v. Jones, 1 Wend. 237, 19 Am. Dec. 498, was against the weight of authority, and that Judge Woodworth failed to distinguish between grants by the Crown alone, and with concurrence of the legislature.

However, in Brookhaven v. Strong, 60 N. Y. 56, the court said that Magna Charta was only intended to restrain the King from granting exclusive rights of fishery disconnected with any rights of soil, in disregard of the rights of the owner of the soil.

And, following that case, the court, in Robins v. Ackerly, 91 N. Y. 98, held that the King had the right to grant soil under water, and with it exclusive rights of fishery.

It thus appears that there is no agreement as to what weight is to be given to Magna Charta upon this question, and it is very probable that the attempt has been made to compel the charter to do a duty it was never intended to do. A more logical explanation of the curtailment of the power of the Crown is found in Freeman, English Const. 2d ed. p. 139, where it is said that, at the time of their coronation, the English sovereigns are required to cede to the people certain of the rights which were formerly part of the regalia.

Whatever the cause, the course of decision has been that formerly the Crown had a right to make private grants of fishing rights, but that now he cannot do so. And the present disability is to some extent given a retroactive effect, so that a grant must be an ancient one to be upheld.

Contrary to the civil-law rule that all rivers and seas are public and the fisheries therein common to all, as stated in Bracton, lib. 2, chap. 12, by the common law of England a man may have a several fishery. Royal Fishery of the Banne, Davies, 149.

Prior to Magna Charta the Crown had the right to create a several fishery in tidal water, which he could grant to a private individual even after the adoption of that statute. Mal-

colmsom v. O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1185, 9 L. T. N. S. 93, 12 Week. Rep. 178.

Fishings in the open sea were subject to feudal grant. Gammell v. Wood & Forest Comrs. 3 Macq. H. L. Cas. 419.

Though the soil of navigable rivers be in the King, and *prima facie* the fishing is in the subject, yet one may have a fishery in particular, exclusive of others, in a common river. Fitzwalter's Case, 3 Keble, 242, 459, 555.

In O'Neill v. Allen, 9 Ir. C. L. Rep. 155, a question involving the existence of a several fishery in the sea, the court says: It seems to be settled that there may be a several fishery, not only in a navigable river, but in an arm of the sea or on the sea coast, although outside of the river.

An appropriation before Magna Charta, properly evidenced by subsequent user and dominion as of right, establishes a several fishery in tidal waters. Neill v. Devonshire, L. R. 8 App. Cas. 135, 81 Week. Rep. 622, Affirming Ir. L. R. 2 C. L. 169.

Where a several right of fishery has been exercised for a long period of time, it will be presumed that such right to a fishery has existed from time immemorial; and consequently, in the absence of evidence to the contrary, it will be presumed that it was created by a valid grant by the Crown anterior to the Magna Charta, under which a subsequent grant of such a fishery would have been void. Northumberland v. Houghton, 39 L. J. Exch. N. S. 66, L. R. 5 Exch. 127, 22 L. T. N. S. 491, 18 Week. Rep. 495.

The existence of a several fishery in the sea, under a title obtained prior to Magna Charta, may be presumed from proof of modern user carried back as far as living memory, from which an anterior user may be presumed in the absence of evidence to the contrary. O'Neill v. Allen, 9 Ir. C. L. Rep. 182.

No several fishery in tidal navigable waters can be presumed if commencing in a later reign than Henry II. Edgar v. English Fisheries, 23 L. T. N. S. 732.

A several fishery in tidal waters cannot be presumed. A claim thereto must be established by a title existing anterior to Magna Charta. Carlisle v. Graham, L. R. 4 Exch. 361, 38 L. J. Exch. N. S. 226, 21 L. T. N. S. 133, 18 Week. Rep. 318.

A franchise granting a several right of fishery in a navigable river, where the tide flows and reflows, could not be granted after the Magna Charta. Somerset v. Fogwell, 5 Barn. & C. 886, 1 Dowl. & R. 747.

Every subject of common right may fish with lawful nets, etc., in a navigable river as well as in the sea, and the King's grant cannot bar them thereof; but the Crown only has a right to royal fish, and that the King only may grant Warren v. Matthews, 6 Mod. 73, 1 Salk. 357.

If, however, a tidal river in which there was *prima facie* a right in the public to fish was appropriated by an individual or by the Crown before Magna Charta, that individual, or the Crown, if the Crown has got it back, can grant it after Magna Charta. Neill v. Devonshire, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, Affirming Ir. L. R. 2 C. L. 169.

In Little v. Wingfield, 11 Ir. C. L. Rep. 63. Affirming 8 Ir. C. L. Rep. 279, it was held that where a several fishery in a tidal river granted before Magna Charta had reverted in the Crown, and been regranted in fee simple to one through whom the plaintiffs claimed and in whose chain of title there was a break, the possession of the plaintiff and his privies for sixty or seventy years was sufficient to raise a presumption of a grant from the grantee of the Crown.

Where an exclusive fishery existed before 60 L. R. A.

Magna Charta, when it again passes to the Crown it does not become extinct, but it is presumed to be "nominally yielded up for the purpose of regnant;" and this is not altered where it was "surrendered." Saltash v. Goodman, L. R. 5 C. P. Div. 431.

The legal origin and existence of an ancient fishery will be presumed from uninterrupted enjoyment under a grant from the Crown, which grant, although since Magna Charta, describes the fishery as having previously existed. Bridges v. Highton, 11 L. T. N. S. 658.

A several salmon fishery in a tidal river, granted by the Crown before Magna Charta, does not, on reverting to the Crown, merge in the prerogative of the Crown, but may be regranted to a subject. Northumberland v. Houghton, 39 L. J. Exch. N. S. 66, L. R. 5 Exch. 127, 22 L. T. N. S. 491, 18 Week. Rep. 495. This was a mere expression of opinion by the court, as the case was determined upon another point.

The great charter left untouched all fisheries which were made several, to the exclusion of the public, by act of the Crown not later than the reign of Henry II.; so that, where a fishery has been long treated as of right, distinct and separate property to the exclusion of the public, and there is nothing to show that its origin was modern, it must have been created before legal memory. Malcolmsom v. O'Dea, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 12 Week. Rep. 178.

Crown grants in America.

The above discussion has its chief interest in its bearing upon certain Crown grants in this country during the colonial period. At the time these grants were made there seems to be no authority to deny the power of the Crown to grant fisheries. Having the power, the question whether or not the rights passed to his grantees is a matter of construction. If the rights were granted, and the proprietaries of the territory granted them into private ownership before the Revolution, there is no reason why the rights of such grantees should not be upheld. On the other hand, as to all rights not granted by the King, or which he reassumed, or which had not reached the possession of colonists who espoused the cause of the revolutionists before their independence was secured, the Revolution cut them off, and they passed into the possession of the newly formed states for the common good.

In Moulton v. Libbey, 37 Me. 472, 59 Am. Dec. 57, it is said that the royal grant of Maine to the Georges did not alter the common law, *jus publicum*, as to fisheries.

In Arnold v. Mundy, 6 N. J. L. 4, 10 Am. Dec. 356, it is said that since Magna Charta the fisheries in tidal waters, not then exclusive, have been held by the Crown in trust for the public, and cannot become the subject of private property.

Also that the provincial proprietor in New Jersey obtained no greater rights to the public fisheries than were held by the Crown. *Ibid.*

So that, under grants from the King to the Duke of York, thence to Sir George Carteret and Lord Berkley, the proprietors of New Jersey took no such title in the soil of navigable waters below low-water mark as to enable them to grant a several fishery. *Ibid.*

So, in Gough v. Bell, 21 N. J. L. 156, it is said that the Crown could not grant a several fishery in New Jersey waters, since such rights were a part of the royal regalia held in trust for the public, subject to the laws of England regarding their alienation.

And in Lowndes v. Dickerson, 34 Barb. 586,

the court said that the weight of authority is against the right of the King to grant an exclusive fishery in the sea, although the grant might have been made by Parliament.

And in *Martin v. Waddell*, 16 Pet. 367, 369, 10 L. ed. 997, 998, it is said that, while there is nothing in the charters to the Duke of York of 1664 and 1674 granting to him lands now included in New Jersey with all the royal prerogatives and interest therein, which appears to have altered in any way the common-law rights of a public fishery for floating or shell fish in tidal waters, if there was, it was included in the surrender of all such prerogatives to the Crown in 1702.

Since an exclusive fishery in navigable waters could not be made after *Magna Charta*, there can be neither a grant nor presumption thereof in *Pennsylvania*, the title to the bed being in the state. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

A large part of this struggle to nullify the power of the Crown to make the grants was needless, as it was futile. Where the grants had been lawfully made common justice required that they should be upheld, while the principles stated above were sufficient to dispose of all not so made.

Legislative grants.

Notwithstanding the denial of the power of the Crown, there is no doubt that the people themselves can make valid grants of fisheries to private individuals. If they have not limited the power of their representatives, the latter may make them. Therefore, all argument which has been adduced to overthrow the power of the Crown for the purpose of limiting the power of the legislature is wasted because the legislature possesses, not only the power of the Crown, but of Parliament also.

Although the power of the Crown to grant private fisheries in tidal waters was restrained by *Magna Charta*, the right of Parliament to do so is undoubted. *Queen v. Robertson*, 6 Can. S. C. 52.

There is no ground for questioning the power of the legislature to authorise a grant to private individuals of a public fishery. *Com. v. Weatherhead*, 110 Mass. 175.

But neither the provinces, except Quebec, nor the Dominion, can, without legislative authority, grant exclusive rights of fishing in tidal waters, except in tidal waters within the limits and jurisdiction of the provinces respectively. *Re Provincial Fisheries*, 26 Can. S. C. 444.

At the Revolution the Crown's title to the sea shore with the proprietorship of fisheries, shell and floating, thereon or over, passed to the states, and is subject to disposal or regulation as the legislature may determine. *Rowe v. Smith*, 48 Conn. 444.

When New Jersey acquired sovereignty the state acquired all right and control over public waters and fisheries before pertaining to Parliament or the Crown. *Martin v. Waddell*, 16 Pet. 367, 369, 10 L. ed. 997, 998; *Den es dem. Russell v. Jersey Co.* 15 How. 432, 14 L. ed. 760.

The legislative and judicial departments of the government have from an early period recognized a property in the riparian owners in the fisheries adjacent to their lands lying upon the tidewaters of the Delaware, which is exclusive of the common right of fishery which subsists at common law in all public waters. *Fitzgerald v. Faunce*, 46 N. J. L. 596.

While navigable tide waters for navigation and fishery are common to all the people of the state, these public rights may be abridged or 60 L. R. A.

taken away by the legislature, which became by the Revolution the depository, not alone of the royal prerogatives, but of the powers of Parliament as well. *Wooley v. Campbell*, 37 N. J. L. 163.

In *Den es dem. Blispham v. Rice*, cited in *Gough v. Bell*, 22 N. J. L. 468, private recovery was had for a fishery in public water, without any question, apparently, as to the ownership of the public.

Where the state has reserved the power of regulating fisheries in nonnavigable streams, it may grant a stranger a right of fishery in such a stream to the exclusion of the riparian owner. *Lunt v. Hunter*, 16 Me. 9.

Title to an exclusive fishing privilege in a navigable river may be obtained by actual or presumptive grant. *Carter v. Tinicum Fishing Co.* 77 Pa. 310.

The ownership and control of fisheries in navigable waters is in the state; and it may grant individual rights and privileges therein either directly or through a committee; and it may empower the committee to grant privileges outside of the navigable waters of the town of which they are residents. *Rowe v. Smith*, 48 Conn. 444.

The compact between Pennsylvania and New Jersey of 1783 recognizes a right of several fishery in the riparian owners on the Delaware river above tidal waters. *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 1.

The proprietors of New Jersey acquired, by the compact of 1676, no right of fishery in the Delaware to the common use of which they could grant a right to the inhabitants of New Jersey; but the right to the entire bed of the river remained in the Crown till the Revolution, when it accrued to the state in its sovereign capacity. *Bennett v. Boggs, Baldw.* 60, Fed. Cas. No. 1,319.

In *Shreeves v. Liveson*, 2 N. J. L. 247, it is intimated that individuals may have a several fishery in a tidal river.

It is within the competency of the legislature to grant to a person a several fishery in a public stream in a place which he may clear out and occupy as a fishing place. *Munson v. Baldwin*, 7 Conn. 168.

The power of the legislature to grant an exclusive privilege to fish in certain waters, for a limited time, was decided in *Walker v. Stone*, 17 Wash. 578, 50 Pac. 488; and *Halleck v. Davis*, 22 Wash. 398, 60 Pac. 1116.

Fishery in tidal waters is presumptively free, but may become exclusive to the owner of the adjacent land by grant or prescription. *Brookhaven v. Strong*, 60 N. Y. 56.

A fishery in nontidal, navigable waters may be acquired by grant or prescription. *Cobb v. Davenport*, 32 N. J. L. 369.

The King, or the state as his successor, has the right to grant the exclusive right to fisheries except so far as the right conflicts with the grant of the adjacent upland. *People v. Thompson*, 30 Hun, 457.

A statute giving county supervisors power to legislate for the protection and preservation of fish within their counties does not give them power to confer exclusive rights of fishing in tide waters. *Hallock v. Dornay*, 7 Hun, 52, *Reversed upon other grounds* in 69 N. Y. 238.

The right of fishery in tidal waters is *prima facie* in the public, "which belongs to all inhabitants of the town," unless restricted by acts of the legislature or of the town, inconsistent therewith, or by prescription. *Proctor v. Wells*, 103 Mass. 216.

A common-law right to a common fishery in the Delaware river is not secured to the inhabitants of New Jersey by either the state or

Federal Constitution. *Bennett v. Boggs*, *Baldw.* 60, Fed. Cas. No. 1,319.

But in *Arnold v. Mundy*, 6 N. J. L. 4, 10 Am. Dec. 356, it is said that at the Revolution the commonwealth became the depository of all the royal and parliamentary rights over fisheries in tidal waters, and, while it can make regulations for, and grant, private privileges therein to secure their improvement, it cannot consistently, by direct and absolute grant, divest all citizens of their common right.

And in *Slingerland v. International Contracting Co.* 43 App. Div. 215, 60 N. Y. Supp. 12, it is said that to grant to one person the exclusive right of fishing in any part of the Hudson river would unconstitutionally deprive, without due process of law, every other person of his privilege of fishing there.

How that result can be reached by any process of reasoning is difficult to understand. Individuals have no constitutional rights of that kind as part of the general public. Public rights are subject at all times to the control of the legislature.

The Dominion Parliament has no jurisdiction to enact laws conferring on lessees or licensees of the Dominion a right of fishing in any waters, navigable or nonnavigable, the beds and banks of which are assigned to the provinces by statute. *Re Provincial Fisheries*, 26 Can. S. C. 444.

Nor to interfere with the right of the owners of beds of nonnavigable waters to fish therein, by authorizing the giving of leases or licenses for the right of fishing in such waters. *Ibid.*

b. How made.

The determination of what is necessary to effect a grant of a fishery requires an inquiry into what a fishery is, and to what it pertains.

And, first, a fishery is real estate, for it lieth in grant and tenure; by a grant of it the soil passeth; *monstraverunt* and assize lie of it; it is demandable by præcipe; and it is a freehold in itself. *Royal Fishery of the Banne*, *Davies*, 149.

So, upon the death of a person placing fish in a pond, they pass to his heirs; otherwise where they have been placed in a trunk or narrow place, to be taken out at pleasure. *Greyes's Case*, *Owen*, 20.

A general definition of a fishery, sufficient for present purposes, may be a right to employ within a particular stretch of water lawful means for the taking of the fish which may be found there. It is to be distinguished from a fishing place or the right to use a particular shore or beach as a basis for carrying on the business. The latter is always vested in the shore owner, and is entirely distinct from the right to take fish from the water.

A "place of fishing" in tidal waters is that part of the shore used for employing seines and nets, or other engines, and for bringing the fish to land, and not any part of the tide waters in which they are swimming; so that a grant of a fishing place in such waters will not divest the public of its right to take fish in those waters, unless such intention is clearly expressed. *Coolidge v. Williams*, 4 Mass. 140.

The definition of a pool or fishing place, in § 3 of the act of 1808, relating to the Delaware river, to be from the place where seines or nets are usually or may hereafter be thrown into the water to the place where they are taken out, applies only to a place on the shore to which a fishery is annexed, and does not refer to a claim of fishery by common right on such river. *Bennett v. Boggs*, *Baldw.* 60, Fed. Cas. No. 1,319.

The "fisheries" of a proprietor of land 60 L. R. A.

bounded by a navigable stream, as referred to in statutes, comprise the exclusive privilege of drawing his seines on the shore. *Shrunk v. Schuylkill Nav. Co.* 14 Serg. & R. 71; *Carson v. Blaser*, 2 Binn. 475, 4 Am. Dec. 463.

But in *Parker v. Thomson*, 21 Or. 523, 28 Pac. 502, it is said that the term "fishing grounds" has never been held applicable to the bank of a tide stream or slough, or the beach of the ocean.

A person fishing by claim of common right on a river can be in no sense the owner or possessor of a fishery. *Bennett v. Boggs*, *Baldw.* 60, Fed. Cas. No. 1,319.

Furthermore, a fishery, so far as exercised upon another's soil, is a profit à prendre.

Therefore, it cannot be claimed by way of easement. *Albright v. Cortright*, 64 N. J. L. 330, 48 L. R. A. 618, 45 Atl. 634; *Cobb v. Davenport*, 83 N. J. L. 223, 97 Am. Dec. 718.

The questions then arise: Is it inclusive or subordinate? Does a grant of fishery carry the other necessary elements, or is a grant of water or soil requisite to pass a fishery?

When the soil over which the water runs, and the water itself, belong to the same person, the owner cannot be correctly said to have a right of fishery, because the land and its profits are so completely identified as his inheritance that they cannot be separated. *Woolrych, Waters*, p. 110.

Therefore, the fishery is included in land and water; and since, in the absence of express reservation, land includes water, a grant of land will include both water and fishery.

The presumption is that a grant of land on a river above the ebb and flow of the tide passes the right of fishery to the grantee. If the right is expressly reserved, the Crown may grant the right of fishery to another person, and there is no common right of fishery in the public. *Queen v. Robertson*, 6 Can. S. C. 52.

The Crown, in right of the provinces, can grant the beds of navigable lakes and nontidal navigable rivers; in which case the exclusive right of fishing, unless expressly reserved, passes to the grantee as an incident of the ownership of the soil in the bed, and the province can also grant an exclusive right of fishing in the same waters, distinct from and without any grant of the bed. *Re Provincial Fisheries*, 26 Can. S. C. 444.

The right to fish depends upon the right to the soil upon which it is taken; and the lord of the manor has no greater right in this respect than any other person as owner. *Clarke v. Mercer*, 1 East. & F. 492.

Prima facie the ownership of the fishery in nontidal, though navigable, waters is in the owner of the bed. *Cobb v. Davenport*, 82 N. J. L. 369.

The right of fishery in nonnavigable waters prima facie is in the owner of the soil, and the presumption is against title in another. *McFarlin v. Essex Co.* 10 Cush. 309.

But a royal fishery is a fishery in gross, and will not pass as an appurtenance to the adjoining lands by general words. *Royal Fishery of the Banne*, *Davies*, 149.

That the fishery is primarily attached to the soil is illustrated by cases in which a river has changed its course.

In *Carlisle v. Graham*, L. R. 4 Exch. 361, 38 L. J. Exch. N. S. 226, 21 L. T. N. S. 833, 18 Week. Rep. 318, it is said that the locus of a subject's several fishery in a tidal river does not change with that of the river, which has permanently receded from a portion of its course and flows into and through another course, where the soil and the land on both sides of the new channel thus formed belong to another subject; since the Crown could not

have granted a several fishery in the new channel, not having title to the soil thereof, no fishery could have been created in the *locus in quo*, since, before Magna Charta, it was dry land.

Bramwell, B., said that when the owner of a several fishery in a tidal river changes the course of the river onto the land of another he cannot reasonably claim the fishery on such lands. *Ibid.*

And that a several fishery must be "capable of ascertainment;" it must have been granted or acquired by metes and bounds, or as extending from one definite point to another, and cannot be changed therefrom with the course of the river onto another's lands. *Ibid.*

But where the channel of a tidal river running through an estuary and being visible when the tide is out, but entirely covered when the tide is in, changes its course, though still flowing through the estuary, by leaving the old channel nearly dry so that salmon can pass up the new channel, a several right of fishery therein, enjoyed by two persons each to the middle of the old channel, passes to the new channel, and each is entitled to the same right of fishery therein as he had in the old one. *Miller v. Little*, Ir. L. R. 4 C. L. 302, Affirming Ir. L. R. 2 C. L. 304.

And where the river has changed its channel gradually, *Carlisle v. Graham*, L. R. 4 Exch. 861, 38 L. J. Exch. N. S. 226, 21 L. T. N. S. 333, 18 Week. Rep. 318, does not apply; and the riparian proprietor on such a stream, who has an appurtenant right of fishery therein, either from ownership of the bed or otherwise, is not deprived thereof by the shifting of the stream, his boundaries being *ipso facto* shifted, under the law of accretions. *Foster v. Wright*, L. R. 4 C. P. Div. 488, 49 L. J. C. P. N. S. 97, 44 J. P. 7.

So that where the lord of a manor, having by grant a several fishery in a nontidal stream running through the manor, enfranchised some of his land which was somewhat distant from the river, the owner of the enfranchised land does not gain a right of fishery in the river by its subsequently encroaching upon his land until part of it forms a portion of the bed of the stream, but the exclusive right of fishery over the entire bed of the river remains in the lord of the manor, notwithstanding its gradual encroachment onto the enfranchised land. *Ibid.*

The court said that it was immaterial whether the plaintiff's right of fishery existed as an incident to his ownership of the soil or was independent of it, being a mere exclusive right to fish in the river, as, if it depends on his ownership of the soil, the encroachment inures to him as the owner of the soil; if it is a mere right of fishery, it extends over the entire river, even though it continues gradually to change its course. Lord Coleridge, Ch. J., in concurring, doubted whether the soil of the river belonged to the lord of the manor, though, if it did, the encroachment would inure to his benefit; but held that, even though the lord of the manor had a mere right of fishery, the fishery would follow the slow and gradual flow of the river in its encroachment upon adjoining land.

If a new cut, now a recognized part of a certain river, did not exist at the time of a grant of the right of fishery in the river at a part which now includes the new cut, the right to fish in the new cut is not given by the grant. *O'Neill v. McErlaine*, 16 Ir. Ch. Rep. 280.

There is an exception to the above rule where public rights exist in the water. When such is the case a mere grant of the soil will not 60 L. R. A.

carry the water or fishery, but those will remain in the public, and require special mention to pass them to the grantee.

A grant of soil under tidal waters will not be presumed to include the fishery in such waters. *Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 493.

The mere ownership of the soil of public waters will not exclude the public from fishing there. *Hall, Sea Shores*, 54, 194; *Gage v. Bates*, 7 U. C. C. P. 116; *Coolidge v. Williams*, 4 Mass. 140.

A state grant of a parcel of land covered with tide water, by the name of an island, without any words showing an intention to grant a fishery, will not pass the right of fishery, but that will remain public. *Brink v. Richtmyer*, 14 Johns. 255.

Grant of land under public waters for reclamation purposes vests no authority therein until the condition is fulfilled; and the right of common fishery exists until the vesting of private ownership. *Polhemus v. Bateman*, 60 N. J. L. 163, 37 Atl. 1015.

Patentees of land covered by navigable water can only claim in subordination to the rights of the public of fishery and navigation. Such land does not admit of possession and acts of ownership in the ordinary way. *Hammond v. Inloes*, 4 Md. 138.

Disturbing the thatch of a riparian owner by digging clams below high-water mark is not a trespass, as the public right of fishery is paramount to the private right to cut grass or sedge. *Allen v. Allen*, 19 R. I. 114, 30 L. R. A. 497, 32 Atl. 166.

The public has the right to take fish below high-water mark, although the soil belongs to a private individual as within the original lines of his land called for in his patent, but not below high-water mark by reason of the gradual encroachments of the sea. *Bickel v. Polk*, 5 Harr. (Del.) 325.

The public has a right to take shell fish from the shore of a private individual between high and low water mark. *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Proctor v. Wells*, 103 Mass. 216.

The public has a right to take shell fish upon the land of a private individual between high and low water mark, although it is necessary to dig the soil in order to obtain them. *Peck v. Lockwood*, 5 Day, 28; *Parker v. Cutler Milldam Co.* 20 Me. 353, 37 Am. Dec. 56; *Moulton v. Libbey*, 37 Me. 493, 59 Am. Dec. 57.

The Massachusetts colonial ordinance did not give the owner of the upland the right to exclude the public from taking shell fish upon flats until he had actually appropriated them by filling or placing buildings upon them. *Lake-man v. Burnham*, 7 Gray, 437.

Since it is now well settled that there is a public right to take shell fish on the shore and flats below high-water mark and within 100 rods of the upland, until the flats are inclosed by the proprietors, *a fortiori* there is a right to pass over them for fishing in the stricter sense; and there is no trespass chargeable against one who enters upon the said flats from tidal waters, walks along them, and takes trout, in the exercise of his common right. *Packard v. Ryder*, 144 Mass. 440, 59 Am. Rep. 101, 11 N. E. 578.

But in one case it was held that the right to take mussel on shore between high and low water marks is with the private ownership of the soil. *Le Strange v. Rowe*, 4 Fost. & F. 1048.

And in *Brookhaven v. Strong*, 60 N. Y. 56, it was held that a grant of land under tidal waters will convey a several fishery thereover.

And the public has no right to take shell fish

from flats lying between high and low water mark which have been improved by the owner for more than twenty years. *Ipswich v. Herrick*, 9 Gray, 529.

Both water and fishery may be separated from the soil.

In the River Severn the soil belongs to the lords on either side, and a special sort of fishing belongs to them, while the common sort of fishing is common to all. The soil of the River Thames is in the King, and it is common to all fishermen; and, therefore, there is no such contradiction between the soil being in one and the river being common to all fishers. *Fitzwater's Case*, 1 Mod. 105.

A fishery is included in the word "water," so that if one grants his water, the fishery in it will pass. *Royal Fishery of the Banne, Davies*, 149.

If a man grant *eam aquam*, the soil shall not pass, but the fishery passes. Co. Litt. 4b.

It is clear, upon the authorities, that a right of fishery may exist independently of the ownership of the adjoining shore or banks. *Marshall v. Ulleswater Steam Nav. Co.* 3 Beat & S. 782, 82 L. J. Q. B. N. S. 139, 9 Jur. N. S. 988, 8 L. T. N. S. 416, 11 Week. Rep. 489.

Whenever the ownership of water is in one person, and the ownership of soil under the water is in another person, the right of fishing in the water belongs to the former. *Turner v. Hebron*, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951.

Though the soil be not included, the fishery therein will be included, in a grant of water and other rights of the kind. *Saltash v. Goodman*, L. R. 5 C. P. Div. 431.

The grant of a well-defined pool or pond by the absolute owner thereof, without reservation, gives to the grantee the exclusive right to the fishery; but a grant, not only of the pond, but of all adjoining lands, gives title, not only to the water in the pond, but to the land which it covered. *Gibbs v. Sweet*, 20 Pa. Super. Ct. 275.

North Carolina does not adhere to the rule that the fishery may be separated from the soil, holding that there can be no several fishery in navigable, though nontidal, streams, as such a right is an incident to the ownership of the soil, a *locus* that cannot be granted in North Carolina. *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722; *Collins v. Benbury*, 27 N. C. (5 Ired. L.) 118, 43 Am. Dec. 155; *Fagan v. Armistead*, 33 N. C. (11 Ired. L.) 433.

A several fishery in the ocean, or in a navigable stream, is not, and never has been, the subject of private ownership in North Carolina, because land covered by a navigable water course has always been expressly excluded from entry, and a grant of it by one individual to another would therefore exhibit on its face its own nullity. *Den ex dem. Gilliam v. Bird*, 30 N. C. (8 Ired. L.) 280, 284, 49 Am. Dec. 379.

At common law there cannot be a several fishery in a navigable stream, because it must be predicated on a right to the underlying soil, and such a right cannot be granted under the *Magna Charta*, and consequently cannot arise from presumption. *Collins v. Benbury*, 27 N. C. (5 Ired. L.) 118, 43 Am. Dec. 155.

Although a several fishery can be acquired by a grant thereof from the owner of the soil. *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722.

Grant of fishery.

The right or liberty of several fishery is not necessarily inseparable from ownership of soil. *Schultes, Aquatic Rights*, 85.

A fishery is *separatum tenementum*, which may be held apart from the ownership of adjacent land. *Warrant v. Mackintosh*, L. R. 15 App. Cas. 52; *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68; *Neill v. Devonshire*, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, *Affirming*, Ir. L. R. 2 C. L. 169; *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146; *Woolrych, Waters*, p. 112.

The fact that real writs were held to lie for the recovery of a fishery is not conclusive that a several fishery must also be united with the soil, since such might have been the case in the particular instance, while in other cases *quod permittat*, which is not a real writ, should be used. *Woolrych, Waters*, p. 118.

The owner of soil beneath water may convey his fishing privileges separate from the upland. *Matthews v. Treat*, 75 Me. 594.

A fishing place may be granted separate from the soil. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

One may have several fishery in another's land. 7 Hen. VII., 13, pl. 3.

The principal controversy has been as to whether or not the grant of the fishery included the title to the soil.

A grant of a free fishery by the owner of the soil of the bed of a lake is an exclusive fishery, and does not pass title to the soil. *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68, 91. In this case the court discussed at length the question whether there was any distinction between a grant of *libera piscaria* and *separata piscaria*, and held that they were not the same, and that a grant of *libera piscaria* does not amount to an exclusive fishery or pass title to the soil.

If one who, being seised of a river, grants *separatam piscariam* in the same, and maketh livery of seisin *secundum formam chartae* the soil doth not pass, nor the water. Co. Litt. 4b.

There may be free fishery in another's land. 18 Edw. IV. 4, pl. 24.

But the owner of a several fishery is presumed to be the owner of the soil, whether the river be navigable or one neither navigable nor public, in the absence of evidence to the contrary. *Hanbury v. Jenkins* [1901] 1 Ch. 401; *Partheriche v. Mason*, 2 Chitty, 658; *Anonymous*, Loft, 364.

In *Hindson v. Ashby* [1896] 2 Ch. 1, 65 L. J. Ch. N. S. 515, 74 L. T. N. S. 327, where the owner of land adjoining a nontidal river in which another had a several fishery claimed title to lands forming to his land as an accretion, the court, in speaking of the presumption of ownership of the soil arising from a several fishery, says: The presumption of ownership in the defendant's predecessors as owners of the several fisheries displaces the presumption that would otherwise arise in favor of the riparian proprietors being the owners of the bed of the river to the center of the stream.

If a man have a fishery in another's soil, he may justify the fixing of poles in the soil, or any other thing done. 2 Rolle Abr. 564, pl. 3.

The title to the bed of a river passes under a grant from the Crown of several fishery, together with the weirs in and upon the waters and rivers mentioned; and where the grant was an ancient one, it passed, not only the soil on which the weirs were constructed, but the soil over which the river runs, and upon which there is a right to construct weirs for the purpose of taking fish, as in ancient times weirs were the means of taking fish by means of putting an obstruction across the stream and intercepting them as they went up. *Hanbury v. Jenkins* [1901] 1 Ch. 401.

Blackstone (2 Com. 39) intimates that a several fishery comprehends the soil, but *Butler's note*, 181, to Co. Litt. 122a, favors *Coke's*

statement that a granting of a right of fishery does not pass title to the soil. Also Co. Litt. 4b.

A plea of freehold to an action of trespass on a several fishery is good. 10 Hen. VII., 24, pl. 1.

Since the right of fishery is so intimately connected with the soil, it is not strange that it should be contended that a grant of a fishery includes the soil. From the authorities it seems that it may or may not do so, and that the question whether it will or not depends upon the intention of the parties.

The presumption that the owner of a several fishery is the owner of the soil will be indulged in only where the terms of the grant under which he claims are unknown; but when they appear and are such as convey an incorporeal hereditament only, the presumption is destroyed. *Somerset v. Fogwell*, 5 Barn. & C. 375, 1 Dowl. & R. 747.

A grant by the Crown of a several fishery in a navigable stream conveys no property in the soil, and is not a territorial, but is an incorporeal, franchise. *Somerset v. Fogwell*, 5 Barn. & C. 386, 8 Dowl. & R. 756.

A grant of a *separatis piscariis* passes nothing but a right to take the fish and to use such means as are necessary for that purpose, "which is in truth nothing more than a liberty to fish." *Somerset v. Fogwell*, 5 Barn. & C. 384, 8 Dowl. & R. 756.

But in *King v. Old Arlesford*, 1 T. R. 358, in determining whether a pauper had a settlement, the court held that where he rented "the fishery of a pond with the spear, sedge, flags, and rushes growing in and about the same," the soil passed with it.

A fishery must have been a several fishery, and presumably includes the soil thereof, when in a feoffment the description of fishery is left uncertain, but is made with livery of seisin duly indorsed, conveyed subject to a free rent to the lord of the manor; the livery not being appropriate in case of an incorporeal hereditament, and a free rent being incapable of being reserved from such an estate by a common person. *Marshall v. Ulleswater Steam Nav. Co.* 3 Best & S. 732, 32 L. J. Q. B. N. S. 139, 9 Jur. N. S. 988, 8 L. T. N. S. 416, 11 Week. Rep. 489.

Riparian rights.

It has been said in a New Brunswick case that the right of fishery does not depend upon the ownership of the bed of a river, but of the bank; it depends upon the lateral, and not the vertical, contact of the water of the river. *Steadman v. Robertson*, 2 Pugsley & B. (N. B.) 580.

But that is not the general rule. A right of fishery is not one of the riparian rights.

Independently of statutory authorization, there is no exclusive right of fishing by the riparian proprietor opposite to his shore in any navigable stream. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

A riparian proprietor has no more title or right to fish in tidal navigable waters adjoining his land than other members of the public. *Arnold v. Mundy*, 6 N. J. L. 4, 10 Am. Dec. 356.

The owners of land on the banks of the Susquehanna and other principal rivers have not an exclusive right to fish in the river immediately in front of their lands, as the right to fisheries in these rivers is vested in the state and open to all. *Shrunk v. Schuykill Nav. Co.* 14 Serg. & R. 71.

While an adjoining proprietor on a navigable river has the exclusive right to draw a seine on his own land, the right of fishery in the

river is a common right. *Lay v. King*, 5 Day, 72.

Riparian proprietorship confers no exclusive fishery in the public waters. *Skinner v. Hettrick*, 73 N. C. 53.

A plain distinction between a fishery annexed to the shore and a fishery by common right in a river is made by the Pennsylvania-New Jersey compact of 1783 authorizing the guarding of fisheries on the rivers annexed to the respective shores against interruptions by persons fishing under claim of common right on the River Delaware. *Bennett v. Boggs, Baldw.* 60, Fed. Cas. No. 1,319.

A several fishery does not arise as an incident to riparian ownership along navigable waters, for in such waters the right of fishing is "prima facie in the King, and is public." *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722.

The Crown may grant an exclusive right of fishery between high and low water lines, though the upland had previously been granted to another. *Wilson v. Codyre*, 27 N. B. 320.

The fishing privilege on flats may be separated from the title to the adjoining upland, and the occupant of the privilege may maintain trespass against the owner of the upland if he places a weir on said flats. *Wyman v. Oliver*, 75 Me. 421.

But a baronial title, even though it contains no express words as to fishing, constitutes a sufficient foundation for a claim to salmon fishing, if the requisite enjoyment and usage are established. *McDonall v. Lord Advocate*, L. R. 2 H. L. Sc. App. Cas. 431.

Riparian owners on the Delaware have an exclusive fishery in the fisheries established by them opposite their shores. *Re Delaware Fisheries*, 4 Am. L. Reg. 582.

And there the owner of upland has a right of fishery adjacent to his shore, which is capable of alienation. *Fitzgerald v. Faunce*, 46 N. J. L. 536.

A several fishery cannot be appurtenant to a several pasture by reason of incongruity,—and especially a fishery for taking all the fish for commercial purposes in distant parts. *Edgar v. English Fisheries*, 23 L. T. N. S. 732.

Construction of grants.

The grant of an exclusive fishery in tidal waters is in derogation of common right, and cannot be created by implication. *Lowndes v. Dickerson*, 34 Barb. 586.

A grant of "white fishings" in certain waters excludes all others, such as salmon. *Gammell v. Wood & Forest Comrs.* 3 Macq. H. L. Cas. 419.

A royal grant of salmon fishings described by precise and definite limits constitutes a bounding charter; and the grantee cannot by usage extend his right beyond these limits. *Warrant v. Mackintosh*, L. R. 15 App. Cas. 52.

Half of the salmon fishing *ex adverso* of lands on one side of a river may mean one of two things: (1) A *pro indiviso* right to a moiety of the fishings all along the frontage; or (2) the whole fishing along such part of the frontage as will, having regard to the suitability of the water for fishing purposes, fairly represent a moiety. *Ibid.*

A grant from the Crown of a fishery passes a several fishery, although the word "several" is not used, where the grant also includes weirs, as the grant of weirs passes title to the soil, and thereby creates a several fishery. *Hanbury v. Jenkins* [1901] 1 Ch. 401.

A right of fishery expressly conferred by the sovereign will not be presumed to exclude the public right of fishery notwithstanding the title

to the soil may be in the grantee. *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

A grant from the sovereign of flats, together with a right of fishery in the waters covering them, will not be held to confer on the grantee an exclusive right of fishery. *Ibid.*

A royal grant of territory adjoining a river, and all fisheries within this territory except three parts of a fishery in a tidal river, will not pass the fourth part, for the King's grant passes nothing by implication. *Royal Fishery of the Banne, Davies*, 149.

A special act of the legislature conferring upon a particular person, his heirs and assigns, a certain right of fishing below low-water mark is not repealed by a subsequent general enactment which does not do so in terms, or by inconsistency or repugnancy. *State v. Cleland*, 68 Me. 258.

An exclusive fishery cannot be predicated upon a grant from the state of liberty and license to a riparian proprietor, his heirs and assigns, to use and occupy an ancient fishing place in certain public waters, unrestricted by an act establishing a close season thereon. *Chalker v. Dickinson*, 1 Conn. 610.

A grant of land with the fishings pertaining thereto *prima facie* means the fishings *ex adverso* of them, *ad medium flum aquæ*. *Warland v. Mackintosh*, L. R. 15 App. Cas. 52.

Because the words of a grant are sufficient to pass the fishery in the whole river if it had been then vested in the Crown, it is not ineffectual to pass the moiety of those parts of the river in which the Crown had that, and no more, to give. *Neill v. Devonshire*, L. R. 8 App. Cas. 185, 31 Week. Rep. 622, *Affirming Ir. L. R. 2 C. L. 169*.

When it is intended to grant an exclusive right of fishery to inhabitants of a city, to the exclusion of the general public and the owner of the previously granted upland, such intention must be clearly expressed, and not left to implication. This rule affords a fair and reasonable construction, and not a strict one which must be relinquished when the grant provides that it shall be interpreted most in favor of the grantee, full effect being given to the grant. *Wilson v. Codyre*, 27 N. B. 320.

Land adjoining a river conveyed "subject to the right of all parties in respect of the Glen river" will not include a several fishery in the river belonging to a third party. *Hamilton v. Munro*, Ir. Rep. 6 C. L. 129, 19 Week. Rep. 443.

c. Private grants.

If one having a several fishery grant *liberam piscariam* the grantee shall have free fishing with the grantor; but if he grant *piscariam suam* without more, the entire fishery passes. *Alderman v. Hasting*, 2 Sid. 8.

As the right of fishery in a navigable river is an incorporeal hereditament, the owner cannot grant a term for years in it except by deed. *Somerset v. Fogwell*, 5 Barn. & C. 886, 8 Dowl. & B. 756.

The right to take fish from the private waters of another, which is merely personal to the one exercising or owning such right, and not appendant to any estate, is not capable of alienation, either by conveyance or devise. *Beach v. Morgan*, 67 N. H. 529, 41 Atl. 349.

A grant of a several fishery in navigable waters by a riparian owner who could not acquire such a right from the state is merely void, and cannot estop. *Collins v. Benbury*, 25 N. C. (3 Ired. L.) 277, 38 Am. Dec. 722.

The right of fishing, being an incorporeal hereditament, cannot be the subject of an exception in a lease of the adjoining land to the 60 L. R. A.

center of the stream. *Corker v. Payne*, 18 Week. Rep. 436, Ir. Rep. 4 C. L. 380.

In the case of an ordinary lease of land on the banks of a stream, the right of fishing in the stream opposite the land passes to the lessee, unless it is specially reserved. *Davies v. Jones*, 18 Times L. R. 367.

The attempted reservation, by a grantor of land upon Lake Erie and Sandusky bay, of the exclusive right of fishing in the bay or lake, being a right which he never had, is inoperative; but the reservation to the grantor of the exclusive right to land on either shore to take fish, or to carry to and from the shore seines and fishing tackle, is good, since, being a right which he could grant, it is a right which he could reserve. *Sloan v. Blemler*, 84 Ohio St. 492.

An easement, and not a fee, is granted by an instrument conveying "one half the privilege of the fishing place," where the grantees are given the privilege of fishing only in a specified manner, the implements to be furnished by the grantor, and he to have one half of the catch. *Butrick v. Tilton*, 155 Mass. 461, 29 N. E. 1088.

A grant of a several fishery may be made by deed, and confers a right to enter and kill and carry away fish, and to bring actions against persons who interfere with such rights. *Ecroyd v. Coulthard*, 66 L. J. Ch. N. S. 751 [1897] 2 Ch. 554, 77 L. T. N. S. 357, 46 Week. Rep. 119, 61 J. P. 791.

A liberty to fish, granted to one, his heirs and assigns, is an interest or profit *à prendre*, and may be exercised by servants in the absence of the master; and the addition of "with servants or otherwise" does not limit the privilege, and exclude the exercise of it by servants. *Wickham v. Hawker*, 7 Mees. & W. 63.

A grant by the lord of the manor of the exclusive right of fishing in a defined part of a river is not a mere license to fish, but a right to carry away the fish caught, and constitutes an incorporeal hereditament. *Fitzgerald v. Firbank* [1897] 2 Ch. 96, 66 L. J. Ch. N. S. 529, 76 L. T. N. S. 564.

A grant of one undivided moiety of a certain lot, "and including the salmon fishery contiguous to said land," conveys a half interest in the fishery as well as of the land. *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400.

A grant of land beginning on the bank of a river and extending from it by various courses until the boundary comes back to the river with all the ponds, pools, water courses, and streams of water and fishing within the limits and bounds aforesaid, does not convey any exclusive right of fishery in the river to the grantee. *Slingerland v. International Contracting Co.* 48 App. Div. 215, 60 N. Y. Supp. 12.

A grant of a several fishery is not invalidated by a reservation to the lord of the manor of the right of taking fish for the supply of his own table, or by a reservation of oyster beds, as a partial independent right in another, or a limited liberty, does not derogate from the right of the several fishery, and one may have a several fishery, although another has the right to a particular species of fishing or a limited liberty of fishing. *Seymour v. Courtenay*, 5 Burr. 2816.

An exclusive right of catching the particular kinds of fish by permanent fixtures attached to the flats is acquired by the grantee of all the right of taking salmon, shad, and alewives, together with all the privileges necessary for carrying on the said fishing. *Matthews v. Treat*, 75 Me. 594.

Part of the proprietors of a pond cannot give an exclusive lease of the right of fishing therein. *Com. v. Perley*, 180 Mass. 460.

The rule of *caveat emptor* applies to the purchaser of a fishing location with full liberty and opportunity to investigate, regarding its boundary. *Fall & S. Fish Co. v. Point Roberts Fishing & Canning Co.* 24 Wash. 630, 64 Pac. 792.

When a riparian proprietor, in dividing his property between two grantees, conveys in the deed of one the fishery "as it has heretofore been conducted," the other has no notice thereby that the fishery extends further than grantee's shore line, as the grant referred to the manner of conducting the fishing, rather than its extent. *Harvey v. Vandegrift*, 89 Pa. 346.

A license to fish in the ponds of the grantor, contained in a demise of a house, in writing but not under seal, is void, as it amounts to a demise of an incorporeal hereditament which lies in grant only, and cannot pass by parol. *Bird v. Higginson*, 4 Nev. & M. 505, 2 Ad. & El. 698, 1 H. & W. 61.

A license to use a rod and line will not include the right to use a night line. *Williams v. Long*, 57 J. P. 217.

When a several fishery is appurtenant to a manor, the mere granting of land in such manor will give grantee no right in the fishery. *Neill v. Devonshire*, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, *Affirming Ir. L. R. 2 C. L. 169*.

A conveyance of land which falls by reason of want of title in the grantor does not operate as a conveyance of a right to maintain a fishing stand on a piece of such land acquired by the grantor by prescription, as such a right is an incorporeal hereditament, not incident to the particular estate conveyed. *Jackson v. Lewis*, *Cheves* L. 259.

III. Prescriptive rights.

a. In general.

Under the doctrine that the Crown could grant an exclusive fishery in public water, title may be shown by long enjoyment under the doctrine of presumed grant. Whether or not a prescriptive title can be acquired will depend on the attitude of the courts as to the running of time against the state.

Prescriptive rights against the public have been very generally upheld. *Hale*, *De Jure Maris*, chap. 5, found in *Hargrave, Law Tracts*, p. 18; also in *note* to *Mather v. Chapman* (Conn.) 16 Am. Rep. 56; *Orford v. Richardson*, 4 T. R. 437; *Carter v. Murcot*, 4 Burr. 2162; *Gould v. James*, 6 Cow. 369; *Brookhaven v. Strong*, 60 N. Y. 58; *Jackson v. Lewis*, *Cheves* L. 259; *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250; *Rogers v. Jones*, 1 Wend. 259, 19 Am. Dec. 493.

A person may have by prescription a separate fishery in a navigable river. *Reg. v. Downing*, 23 L. T. N. S. 398, 11 Cox C. C. 580.

But a several fishery cannot be established in an arm of the sea, or in a navigable river, unless it is by immemorial usage. *Schultes, Aquatic Rights*, 85.

In Connecticut a several fishery in public waters may be presumed from fifteen years' sole occupation; but such a claimant must prove his right. *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250.

To acquire an exclusive right of fishery in a navigable river by prescription, the use and enjoyment must not only be uninterrupted, but exclusive. *Ibid.*

Where fishing was exercised by one as a right which, *prima facie*, belonged to him in common with all other citizens, his fishing is referable to that right, and cannot of itself be a ground for presuming an exclusive right. *Collins v. Hienbury*, 27 N. C. (5 Ired. L.) 118, 48 Am. Dec. 60 L. R. A.

155; *Fagan v. Armistead*, 38 N. C. (11 Ired. L.) 438.

A person may prescribe for an exclusive right of fishing in a navigable river where the tide ebbs and flows, but it cannot be presumed, it must be proved. *Carter v. Murcot*, 4 Burr. 2162.

The above case was an action for trespass for breaking and entering the plaintiff's close in the River Severn. Defendant pleaded that it was a navigable river, also that it was an arm of the sea wherein every subject had a right to fish. Plaintiff replied prescribing for a several fishery there, which was found in his favor. Defendant claimed that, although it was so found, yet, on the authority of *Warren v. Mathews*, 6 Mod. 73, prescription was not good because everyone has a right to fish in a navigable river, or in an arm of the sea. The court follows the language of *Warren v. Mathews* to the effect that in navigable rivers the fishery is common, but that, since prescription was found to exist in this case, the plaintiff's right was good, *Yates, J.*, saying the Crown may grant a several fishery in a navigable river where the sea flows and reflows, or in an arm of the sea.

No presumption can be raised of a grant of a several fishery in a public navigable river from the fact that an individual uses the same in common with others. *Delaware & M. R. Co. v. Stump*, 8 Gill. & J. 479, 29 Am. Dec. 561.

There can be no exclusive fishing privilege established by prescription where no grant could have been made to support it. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

An adverse and exclusive use is indispensable to the acquisition of several right of fishery in navigable waters, if such right may be acquired by prescription in the absence of legislation to that effect. *Day v. Day*, 4 Md. 262.

The *prima facie* right of the public is not rebutted by proof of mere uninterrupted enjoyment of the privilege of fishing for a period requisite to acquire title by prescription, since the mere lawful exercise of a common right for that period has never been considered as conferring an exclusive right. *Sloan v. Blemiller*, 34 Ohio St. 492.

That one for over fifty years has claimed the exclusive right of fishing in navigable waters, and that in the main his neighbors respected the claim, do not constitute adverse possession as against the state, or give rise to a prescriptive right, where the state is not authorized to grant such privilege; nor can it be charged with notice of the necessity of protecting its title, since the right of fishing is common to all. *Slingerland v. International Contracting Co.* 43 App. Div. 215, 60 N. Y. Supp. 12.

Under the "old law," a fishery easement would have been presumed from sixty years' user. *Rolle v. Whyte*, L. R. 3 Q. B. Div. 286, 37 L. J. Q. B. N. S. 105, 17 L. T. N. S. 360, 16 Week. Rep. 593, 8 Best & S. 116.

The possessor of a *habile* title to a barony may prescribe a right of fishery in a tidal river adjoining it as against the Crown. *Lord Advocate v. Lovat*, L. R. 5 App. Cas. 288.

A claim to a fishery by an owner of the soil cannot be proved by the fact that his initials were engraved in a rock in the stream near his boundary line, without any proof when, or by whom, or for what purpose, they were so engraved. *Melvin v. Whiting*, 13 Pick. 184.

But in Massachusetts it is held that no prescriptive title to a private fishery belonging to the state can be allowed. *Nickerson v. Brackett*, 10 Mass. 212.

A right of fishery in gross cannot be acquired

by a family, but only by them as individuals. *Bevins v. Bird*, 12 L. T. N. S. 308.

The acquisition of a several fishery in gross by a common-law prescription (immemorial user) is not shown where the acts of user relied upon were done under a misconception as to the effect of a certain deed which, it was thought, passed the freehold of the soil of the bed of the river, and with that soil the exclusive right of fishing. Under such circumstances, the principle prevails that, if the origin of the use is not lost in obscurity, but is explained, and appears to be subsequent to the reign of Richard I., the head of the prescription is cut off, and the prescription at common law cannot be maintained. *Warwick v. Gonville & Caius College*, 6 Times L. R. 447, Affirming 5 Times L. R. 461.

Occasional angling will not be sufficient to establish a prescriptive right of fishery; nor will the use of the rod be of any avail, when practised in certain waters in competition with net and cable fishing. The latter is by far the more destructive method, and, furthermore, seriously interferes with angling. *Warrand v. Mackintosh*, L. R. 15 App. Cas. 52.

Where a river constitutes a *unum quid*, the whole fishery is prescribed for or occupied by the suitable and natural mode of using it according to the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests,—a guide which varies according to circumstances. *Lord Advocate v. Lovat*, L. R. 5 App. Cas. 273.

A river is a *unum quid*, as relates to the fishery therein, when the whole fishery is included in one possession and title. *Ibid*.

If the fishery of the whole river (so far as it belonged to the plaintiff or his predecessors in title) was what has been sometimes called a *unum quid*, there can be no doubt that evidence of acts of ownership and enjoyment in any part of it would be applicable to the whole. *Neill v. Devonshire*, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, Affirming Ir. L. R. 2 C. L. 169.

If the right has been once acquired by prescription to a several fishery in navigable water, it may pass as appurtenant to the owner's estate. *Rogers v. Allen*, 1 Campb. 309.

Against individual.

A man may prescribe to have a several fishery in such a water, and the owner of the soil shall not fish there. *Co. Litt. 122a*.

A man may prescribe to have *separalem piscariam* in such water, and exclude by this the owner of the soil. But a man may not prescribe to have a common of fishery or free fishery in such water, and to exclude the owner of the soil, for this is against the nature of a common or free fishery. *Chimney v. Fishen*, 2 Rolle, Abr. 267; *White v. Shirland*, 2 Rolle, Abr. 267.

There appears to be no doubt of the right of an individual to acquire by prescription rights of fishery in private waters. *Melvin v. Whiting*, 10 Pick. 295, 20 Am. Dec. 524, 18 Pick. 188.

An exclusive right to fish in the estate of another may be acquired by adverse, uninterrupted, and exclusive use. *Turner v. Hebron*, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951.

The exclusive right of fishery is *prima facie* in the owner of the soil, but may be acquired separate from the ownership of the soil by grant or prescription. *Cobb v. Davenport*, 32 N. J. L. 369.

Title to an exclusive fishing privilege, given by statute to the owner of land fronting on a river, cannot be acquired by adverse user thereof, where the statute declares such a violation of the owner's rights a trespass punishable by 60 L. R. A.

fine or imprisonment, or both, as a misdemeanor. *Heckman v. Swett*, 99 Cal. 303, 33 Pac. 1099.

A prescriptive right to fish in a pond is not gained by a person who does not own land adjoining the pond, by reason of one's having fished therein every summer for over twenty years, where it does not appear that he did so under claim of right, and nothing in the evidence shows that the use was not a mere indulgence allowed by the owner. *Gibbs v. Sweet*, 20 Pa. Super. Ct. 275, Affirming 7 Lack. Legal News, 18.

A title by prescription to an exclusive fishing privilege, given by statute to the owners of land fronting on a river, can be acquired only by adverse possession of the land to which such right attaches as an appurtenance under the statute, and not by mere user of the right to the exclusion of such owner. *Heckman v. Swett*, 99 Cal. 303, 33 Pac. 1099.

One prescribing for a fishery in navigable waters, i. e., for the right of drawing his nets on another's shore, must for twenty-one years have enjoyed such an exclusive user as to be adverse and exclusive, and not a mere enjoyment such as was accorded the public generally. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

An adverse right to an easement to take fish cannot grow out of a mere permissive enjoyment continued for any length of time. *Beach v. Morgan*, 67 N. H. 529, 41 Atl. 349.

A prescriptive right to fish in another's several fishery must be based on an exercise of that privilege under claim of right, and not as a trespasser. *Paley v. Birch*, 8 Best & S. 336, 16 L. T. N. S. 410.

The evident fact that one has fished in another's several fishery for twenty years will justify the conclusion that he had got the right. *Ibid*.

A prescriptive right of an adjoining proprietor to fish in another's private fishery will not authorise him to admit the public to the enjoyment of his privilege. *Lembeck v. Nye*, 47 Ohio St. 336, 8 L. R. A. 578, 24 N. E. 686.

An enjoyment for sixty years and as far back as living memory extends, of maintaining a coop weir in nonnavigable waters, is presumptive of a grant thereof. *Leconfield v. Lonsdale*, L. R. 5 C. P. 657, 23 L. T. N. S. 155, 18 Week. Rep. 1165, 39 L. J. C. P. N. S. 305.

The annual temporary occupation of a fishery cannot amount to a disseisin of the private owner. *Nickerson v. Brackett*, 10 Mass. 212.

The claimant must prove satisfactorily an actual, exclusive possession of the fishery adverse to the right of the riparian owner, against his interest, uninterrupted and continuous for at least twenty years. *McFarlin v. Essex Co.* 10 Cush. 310.

Using a rock in a river for fishing purposes during two months in each year is not such a continuous possession as will give a title under the statute of limitations. *McCullough v. Wall*, 4 Rich. L. 68, 53 Am. Dec. 715; *Turner v. Hebron*, 61 Conn. 175, 14 L. R. A. 386, 22 Atl. 951.

Long enjoyment of a fishery by leave of the several owners thereof, granted from time to time, cannot become a right to have such license granted. *Mills v. Colchester*, L. R. 2 C. P. 476, 36 L. J. C. P. N. S. 210, 16 L. T. N. S. 626, 15 Week. Rep. 955, Affirmed in L. R. 3 C. P. 575.

The public cannot have a right by prescription to fish in a nontidal stream. *Smith v. Andrews* [1891] 2 Ch. 678, 65 L. T. N. S. 175; *Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250.

The public cannot prescribe for profit &

prendre in a several fishery. *Neill v. Devonshire*, L. R. 8 App. Cas. 135, 31 Week. Rep. 622, Affirming *Ir. L. R. 2 C. L. 169*; *Cobb v. Davenport*, 32 N. J. L. 369.

The practice of the public of fishing in a nontidal stream will not raise the presumption of a lost grant, as there can be no presumption of a lost grant with respect to matter which cannot be the subject of prescription. *Smith v. Andrews* [1801] 2 Ch. 678, 65 L. T. N. S. 175.

No private right to participate in a fishery can be acquired by an exercise of a public right, though for fifty-five years. *Com. v. Weatherhead*, 110 Mass. 175.

An individual, merely as one of the public, cannot prescribe for the right to fish in another's pond. *Albright v. Cortright*, 64 N. J. L. 330, 48 L. R. A. 616, 45 Atl. 634.

A prescriptive right cannot be presumed in an indefinite number of persons to enjoy another's private fishery, when its origin must have been within living memory. *Tilbury v. Silva*, L. R. 45 Ch. Div. 98, 63 L. T. N. S. 141.

An exclusive fishery cannot be predicated by prescription upon the exercise of the public right of fishing or the continued violation of a public statute in relation thereto. *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

When the owner of soil around a 108-acre pond artificially raises the height of the water, although the title to the bed is in another, when he has been in the actual, exclusive, and uninterrupted possession and occupation of the entire fishery therein for more than twenty years, claiming it as his own and keeping others away, he has obtained right to an exclusive fishery. *Turner v. Hebron*, 61 Conn. 175, 187, 14 L. R. A. 386, 22 Atl. 951.

b. By custom.

A right to take fish from private waters cannot be set up, either by way of lawful custom, or as a profit *à prendre*. *Beach v. Morgan*, 67 N. H. 529, 41 Atl. 349.

A custom for the public to go upon private land and fish in a stream is in the nature of a profit *à prendre* in the soil, and void, although no right is claimed to carry away the fish, as the catching of the fish would destroy the fishery. *Bland v. Lipscombe*, 24 L. J. Q. B. N. S. 155, note, 4 El. & Bl. 713, note.

"The public cannot have a right to fish in a non-tidal stream founded upon custom however long the practice has continued. *Smith v. Andrews* [1801] 2 Ch. 678, 65 L. T. N. S. 175.

A right to fish in another's pond cannot be acquired by custom. *Albright v. Cortright*, 64 N. J. L. 330, 48 L. R. A. 616, 45 Atl. 634.

But the right to several fisheries in the Delaware river is established by custom variant from the common law. *Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1097.

The inhabitants of a town cannot have a custom to go on to the land of another to fish, as such a custom is in effect to have profit *à prendre* in the soil of another. *Lloyd v. Jones*, 6 C. B. 81, 17 L. J. C. P. N. S. 206, 12 Jur. 657; *Murphy v. Ryan*, *Ir. Rep.* 2 C. L. 143, 16 Week. Rep. 678.

A custom for all the dwellers in a parish to have common of fishery over the lord's waters in the waste of the manor is unreasonable and void as including too many persons, thereby ruining the property over which it is exercised. *Allgood v. Gibson*, 34 L. T. N. S. 883, 25 Week. Rep. 60.

Also because such a custom amounts to a profit *à prendre* in the soil of another. *Ibid.*

A license to fish in a private stream cannot be inferred from a common usage for anyone to enter and do so. *Winder v. Blake*, 49 N. C. (4 Jones L.) 332, 60 L. R. A.

A custom to take fish from a private stream is for a profit *à prendre*, and cannot be sustained in law, unless shown to be prescribed for as belonging to some estate, and to be pleaded with a *que estate*. *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 338.

A right of fishery in private waters cannot be claimed by custom, but must be prescribed for in *que estate*; and a right claimed by prescription is not established by proof of customary right. *Cobb v. Davenport*, 32 N. J. L. 369.

An alleged custom in other persons than the owners of the shore, to take mussel between high and low water marks, is unreasonable. *Le Strange v. Rowe*, 4 Fost. & F. 1048.

The inhabitants of a town acquire no right to the continuance of a public fishery by an enjoyment of sixty years. *Com. v. Weatherhead*, 110 Mass. 175.

"The public cannot acquire by immemorial usage any right of fishing in a river in which, though it be navigable, the tide does not ebb and flow," since the fishery is dependent upon ownership of the soil, and a public right of fishery can only exist in tidal waters the soil of which belongs to the Crown. *Mussett v. Burch*, 35 L. T. N. S. 486.

A custom is not created by the conduct of the owner of a fishery in issuing licenses to all persons of a particular class to fish in the fishery on payment of a fee, as to create a custom the long enjoyment must have been as of right, and not by license or leave. *Mills v. Colchester*, L. R. 2 C. P. 476, 36 L. J. C. P. N. S. 210, 16 L. T. N. S. 626, 15 Week. Rep. 955.

One accused of unlawful fishing in a nontidal river cannot justify on the ground that for many years the public at large fished there, as the public cannot acquire a right of fishing in a nontidal stream. *Hudson v. MacRae*, 4 Best & S. 585, 33 L. J. M. C. N. S. 65, 9 L. T. N. S. 678, 12 Week. Rep. 80.

"A prescriptive right to fish in respect of an ancient tenement is not established by proof of user, when the only evidence is that the right was exercised in respect of the inhabitants of the parish generally," ancient tenements being shown, and such a general custom being bad in law. *Saltash v. Goodman*, L. R. 5 C. P. Div. 446.

Where a borough corporation was shown to have a prescriptive right to a several fishery in a navigable, tidal river which, as exercised from time immemorial, had been subject to a qualification that the free inhabitants of ancient tenements in the borough had, without interruption, exercised, under claim of right, the privilege of dredging for oysters from Canledmas to Easter eve in each year, the court held that a lawful origin for the usage of such inhabitants ought to be presumed if reasonably possible, and that it must be presumed that the original grant to the corporation of its several fishery was subject to a trust or condition in favor of such free inhabitants to dredge for oysters in accordance with the usage. *Goodman v. Saltash*, L. R. 7 App. Cas. 633, 52 L. J. Q. B. N. S. 193, 48 L. T. N. S. 239, 31 Week. Rep. 293, 47 J. P. 276, Reversing L. R. 7 Q. B. Div. 106, 50 L. J. Q. B. N. S. 508, 45 L. T. N. S. 120, 29 Week. Rep. 639, 45 J. P. 844, and L. R. 5 C. P. Div. 450, where the court said: No doubt the courts will go very far in presuming lawful origin of a custom for all inhabitants of a parish to fish in a several fishery, where there has been immemorial user; but where the nature of the thing claimed is itself destructive of the subject-matter, an oyster fishery; and where it is antagonistic to other dominant claims with which it comes in conflict; or where there are other reasons which

interfere and show that the immemorial user cannot possibly point to that which alone makes it good in law,—the courts will not presume an alleged lost grant.

IV. *Kinds of fishery.*

Much discussion has occurred as to the kinds of fishery which may exist, most of which is merely curious learning at the present. The principal kinds which have been mentioned are four (1) several, (2) free, (3) common fishery, (4) common of fishery. Attempt has been made to distinguish between the last three kinds, but not with marked success.

In *Benett v. Costar*, 8 Taunt. 183, 2 J. B. Moore, 88, an action for interfering with plaintiff's fishery when the plaintiff declared on the right to a common fishery whereas he should have alleged a common of fishery, the court, in discussing the difference between the two rights, said a common of fishery is a right in common with certain other persons in a particular stream. Though text writers have used the terms *common piscarium* and *communium piscaria*, a common fishery extends to all mankind.

Holt, Ch. J., divided fisheries into three classes (1) *separatis*, (2) *libera*, (3) *communis*. *Smith v. Kemp*, Holt, 322, 2 Salk. 637.

Schultes, after a careful consideration of the question, concluded that there are in fact only two sorts of fishery, free or common of fishery and several fishery, or fishery in gross, though fisheries may acquire various provincial denominations, and be subject to peculiar and different restraints according to the locality of their situation and the usage of the neighborhood. *Aquatic Rights*, 60.

And in *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68, Fitzgerald, B., said that "the most important distinction in fisheries lies in their being exclusive or otherwise. Still, the exclusive right of fishing may be either in the soil of the owner or not."

The distinction between free and several fishery goes back to the year books, for in 17 Edw. IV., 6, pl. 5, the majority of the judges recognized a difference between several fishery and free fishery.

A free fishery is to be distinguished from a several fishery in that the latter is exclusive, while the former may be in common with others. *Hall, Sea Shores*, 68.

A free fishery is the same as an unlimited common of fisheries. *Woolrych, Waters*, p. 123.

Blackstone thought that a free fishery was an exclusive right of fishing through franchise in a public river, and differs from a several fishery in that the latter must be connected with, or derived from, ownership of the soil, while the latter need not be. 2 Bl. Com. 39.

Libera piscaria is a common of fishery. *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68; *Yard v. Carman*, 3 N. J. L. 987.

It is not an exclusive fishery. *Melvin v. Whiting*, 7 Pick. 79.

A man may have a free fishery both in a public and private stream; but with this distinction, that in the latter his right must arise by grant, prescription, or usage, and may be transferred from one person to another, whereas in the former it is vested in him of common right whether he exercises it or not, and it is not transferable. *Schultes, Aquatic Rights*, 61.

The grant by a riparian proprietor of a "free fishery" in a non-navigable stream passes nothing more than the same right of fishery as is claimed by everyone who has land in the manor along the bank of the river. *Lamb v. Newbiggin*, 1 Car. & K. 549. 60 L. R. A.

Libera piscaria cannot be held to refer to an exclusive fishery in case of a large inland sea and without warrant by subsequent usages or the act of the parties. *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68.

"A man may have a free fishery on his own soil, as, for instance, he may have a river in his own manor, and another may have a right of fishing there with him." *Gibbs v. Woollicott*, 3 Salk. 291, Comb. 433, 464. This case was decided on the point that plaintiff brought trespass, but did not allege ownership of the fish.

See also 16 Vin. Abr. title, *Piscary*, (B).

A riparian proprietor has no such property in *libera piscaria* as to be able to call the fish his own and maintain trespass for their taking by another. *Upton v. Dawkin*, 3 Mod. 97.

"In order to constitute a several fishery, it is requisite that the party claiming it should so far have the right of fishing, independent of all others, as that no person should have a co-extensive right with him in the subject claimed;" although a lesser or "partial independent" right in another does not derogate from the general owner. *Seymour v. Courtenay*, 5 Burr. 2814.

A several fishery is an exclusive one. No other person can lawfully fish within its bounds. *Preble v. Brown*, 47 Me. 284.

A several fishery may exist either apart from or as incident to the ownership of the soil over which the river flows. *Hanbury v. Jenkins* [1901] 1 Ch. 401.

Common of fishery may be appendant to an estate. 4 Edw. IV. 29, pl. 7.

"Several" fishery is not a word of art, and means "an exclusive right to fish in a given place, either with or without the property in the soil,"—an "always valuable property." *Malcolmson v. O'Dea*, 10 H. L. Cas. 593, 9 Jur. N. S. 1135, 9 L. T. N. S. 93, 12 Week. Rep. 178.

So, equivalent expressions may be used, and after verdict "a sole and exclusive fishery" is held equivalent to "a several fishery." *Holford v. Bailey*, 13 Q. B. 426, 18 L. J. Q. B. N. S. 109, 13 Jur. 278, Reversing 8 Q. B. 1000, where it was held that a declaration in trespass for entering and disturbing a several fishery does not properly describe the fishery by referring to it as a sole and exclusive fishery, as the word "several" has acquired a technical meaning, and is the only word having the same and no other meaning than the word *separatis*, found in the old entries.

The only practical distinction at the present time is between a several or exclusive fishery and a common fishery, the former being one in which the owner may exclude all others from enjoying it, and the latter being one which is shared in common by a greater or less number of persons, usually by the public in general.

V. *Public regulation.*

The fisheries are of such importance to the public that they are a matter of public regulation. See note to *People v. Truckee Lumber Co.* (Cal.) 30 L. R. A. 581. Although a man has an exclusive fishery on his own land, he does not own the fish until he has reduced them to his possession; so that his fishery right amounts to no more than the right to use lawful means upon his land for the capture of the fish. As long as they remain free in the water they are the property of the public of common right, and the public may make regulations for the preservation of its property. The individual has no right to exercise wasteful or destructive methods of fishing, or destroy the fish at a time when they are not fit for food

or their preservation is necessary to the multiplication of the species. Of a regulation of any of these matters by the public, he has no ground of complaint. See *infra*, VI.

Royal fish.

One of the earliest regulations of the right of fishery was the assertion of a claim on the part of the Crown to certain kinds of fish which were regarded as of such a character as properly to be rendered to it in recognition of its prerogative.

It is probable that at one time in the English history no claims were made with reference to fishery rights. Burke says (Works, Vol. 7, p. 242), on the authority of Bede, that because of Druidical superstition which forbade this class of food, the people, although maritime, did not know how to use fish, and that early in the seventh century, because of a drought, a famine came upon the people, and they were preparing to cast themselves over a precipice into the sea when Bishop Wilfred collected nets and with attendants plunged into the sea and gathered food from that source.

The fishing industry soon became established, however, for Maitland says it is by no means impossible that in the seventh and eighth centuries the King has some claim to the nobler kinds of fish. Domesday, 239.

Whenever the custom originated, by Lord Hale's time it was well established, and the royal fish were sturgeon, porpoise, and whale. Hale, De Jure Maris, chap. 7.

Sturgeons taken within the King's dominions shall belong to him. And of whales the head shall belong to him, and the tail to his consort. Kelham's Britton, 97.

Royal fish, if taken within the portion of the seas which belongs to the Crown, belong to him, but, if taken outside, belong to the one who takes them. Hale, De Jure Maris, chap. 7.

Royal fish (whale and sturgeon) are inherently the property of the Crown. Royal fish "found and taken within the precincts, liberties, limits, or jurisdiction of the Cinque Ports, or their members" belong to the lord warden, under royal grant. Cinque Ports v. King, 2 Hagg. Adm. 439.

The King had the right to royal fish, and no subject can have them without the King's special grant. Royal Fishery of the Banne's Case, Davies, Rep. 149, Angell, Tide Waters, p. 35, Appx. 1.

There can be little doubt that salmon fishings at an early period of the history of Scotland were regarded as possessing a peculiar value over other fishings, and were distinguished from them in a remarkable manner. They were classed *inter regalia*. They were only capable of belonging to a subject by an express grant from the Crown, or by a grant of fishings generally, followed by such a user of salmon fishing as proved that it was intended to be comprehended within the general terms of the grant. Gammell v. Wood & Forest Comrs. 3 Macq. H. L. Cas. 419.

Onslow, in arguing in the case of Mines, 1 Plowd. 315, that the title to ores of gold and silver were in the King, said that the common law appropriates everything to the persons whom it best suits, excellent things to the person who is the most excellent, the King. And so does it likewise in regard to the water as well as the earth. For the things of value which the sea or water yields are the fishes therein, and, of the fishes which are in the sea in England, two are more excellent than the others, *viz.*, sturgeons and whales, and the common law has appropriated them to the King, as appears by Treatise de Prerogative de Regis, 60 L. R. A.

chap. 11, which says the King shall have whales and sturgeon taken in the sea, which is not a new law but a declaration of the common law.

The subject may have the right to royal fish by grant or by prescription. Hale, De Jure Maris, chap. 7.

Regulation generally.

The regulation of fisheries began at an early period.

Magna Charta, chap. 23, provided that all weirs should be put down throughout all England, except on the sea coast.

And Hale says the fishing which the public has in any public or private river or creek, fresh or salt, is subject to the laws for the conservation of fish and fry, which are many. De Jure Maris, 23.

A state may regulate the privilege of fishing in waters belonging to the state. Morgan v. Com. 98 Va. 812, 35 S. E. 448.

A common-law right to a common fishery in a river is to be enjoyed in subordination to the laws which regulate its use. Bennett v. Boggs, Baldw. 60, Fed. Cas. No. 1,319.

The fish in the waters of the state are the property of the people in their collective sovereign capacity, and they may permit or prohibit the taking of them at their pleasure. State v. Snowman, 94 Me. 99, 50 L. R. A. 544, 46 Atl. 815.

In *Ex parte Marsh*, 57 Fed. 719, the court says: "We think it may be laid down as a proposition of natural law that, inasmuch as oysters are becoming more and more valuable and necessary every year, with the growth of populations, as human food, and state possessing great and productive oyster deposits owes it as a duty to humanity, no less than to her own citizens engaged in the oyster culture, to protect these deposits from such depredations as destroy their valuable product."

The power of the legislature to make laws for the protection of fish follows from the great importance of fish as an article of human food, and therefore their protection and preservation have been regarded as a matter of public concern. A different result might follow if it rested on some public easement like navigation. People v. Bridges, 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115.

The owner of a several fishery must exercise his right by means not prohibited by law. Devonshire v. Smith, 1 Alcock & N. 442.

The right of the public to the passage of fish in rivers, and the private rights of riparian proprietors incident to and dependent on the public right, are subject to the regulation of the legislature. Com. v. Essex Co. 13 Gray, 239.

The power of a state legislature over public rights of fishing in any waters within its boundaries is unrestricted. In those waters within or beyond the ebb and flow of the tide which are not navigable from the sea for any useful purpose there can be no restriction upon the authority of the legislature to regulate the public rights of fishing, or to make any grants of exclusive rights which do not impair any private rights already vested. Com. v. Vincent, 108 Mass. 441.

Fisheries in navigable, and therefore public waters, may be appropriated and regulated by the state. Fuller v. Spear, 14 Me. 417.

A state may retain a right paramount to all or any riparian proprietors, to subject all fisheries of salmon, shad, and alewives to its control. Cottrill v. Myrick, 12 Me. 222.

The legislature has absolute control of public fisheries unless specifically restrained by

the Constitution. *Bennett v. Boggs*, Baldw. 60, Fed. Cas. No. 1,319.

In Massachusetts the legislature has power, in the public interest, to determine the mode of using fisheries, even to the granting of exclusive rights of fishing to individuals. *Com. v. Hilton*, 174 Mass. 29, 45 L. R. A. 475, 54 N. E. 362.

Because of the public's common right to the fish passing up or down a stream the bed of which is private property, the legislature may regulate and control such private ownership. This is a rule from necessity. *Parker v. People*, 111 Ill. 588, 53 Am. Rep. 643.

The state has an undoubted right to regulate the manner in which fish shall be caught, and to protect their migrations, even into private waters, when the ownership of such fish is in the public by reason of their migratory habits, and no individual has any property right in them until he has subjected them to his control. *People v. Collison*, 85 Mich. 105, 48 N. W. 292.

The state has a right to protect fish in all streams through which they have freedom of passage to and from the public fishing grounds, although they flow over lands entirely subject to private ownership. *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374.

The legislature may prohibit the taking of fish during certain seasons of the year or with certain implements, even on the part of a private individual from waters in which, as riparian owners, he has the exclusive right of fishing, if such waters connect with the public waters of the state. *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684, 81 N. E. 115.

Whether or not the fisheries are of sufficient importance to warrant legislative interference with and regulation thereof, is a legislative question: *Gentile v. State*, 29 Ind. 409, Affirmed in *State v. Boone*, 30 Ind. 225.

The manner in which, the time when, and the amount of fish a riparian proprietor can take from a stream endowed with a public use, are a legislative and governmental function. *Parker v. People*, 111 Ill. 588, 53 Am. Rep. 643.

The right of the legislature to regulate fisheries is not inconsistent with an individual's claim to an exclusive fishery or soil under the water. *Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 493.

In its regulation of fisheries, the state may interfere to some extent with the natural right of its citizens to fish in navigable waters. *State v. Woodard*, 123 N. C. 710, 31 S. E. 219.

A mere permissive right of fishery is not so solemn as to be incapable of restraint or regulation by the sovereign authority of the state. *Bennett v. Boggs*, Baldw. 60 Fed. Cas. No. 1,319.

A power in the legislature to regulate fisheries includes power to prohibit certain kinds of fishing deemed distinctive both to the supply of fish and to the equal chance and right of all the inhabitants to engage in fishing, since the public fishery ordained by the Constitution is to be preserved, not destroyed. *Drew v. Hilliker*, 56 Vt. 641.

A common public right to regulate the passage of fish through a stream cannot be prescribed against by a riparian proprietor. *Cottrill v. Myrick*, 12 Me. 222.

A license is necessary to use night lines reasonably calculated to catch trout, although none are caught, and the lines are set to catch eels. *Hill v. George*, 44 J. P. 424.

Since the colonial ordinances, the right of fishing, both in the tide waters and in the great ponds, belongs to the public, unless otherwise appropriated by the legislature, or by the towns 60 L. R. A.

acting under its authority. *Com. v. Vincent*, 108 Mass. 441.

Notwithstanding the individual may have a right to fish in streams passing over his land, the state may, for the common good, regulate the times and manner of taking fish so that the general interests may not be diminished. Laws for the regulation of the time and appliances for catching fish may prohibit a landowner from fishing in a small stream running through his own land in which the state has at great expense planted California mountain trout. *Com. v. Bender*, 7 Pa. Co. Ct. 624.

Upon the separation of the colonies from England, the fishery rights in tide water remained in the several states, to be exercised for the common good. But the rights of the states in the management and regulation of these fisheries are not limited, like that of the Crown in England. The states hold them in trust for the public; but they exercise, not only the rights of sovereignty, but also the rights of property as to everything which remains in common for all the people. *Com. v. Hilton*, 174 Mass. 29, 45 L. R. A. 475, 54 N. E. 362.

While at common law the fishery on nonnavigable streams pertains to the riparian proprietor, the constant course of legislation upon this subject from the first settlement of the country has qualified this right, so far as to subject it to the legislature in the manner and to the extent it has been immemorably exercised. *Vinton v. Welsh*, 9 Pick. 87.

The legislature has power over the whole subject of fishery so far as public and common rights are concerned, and may by statute impose penalties upon the taking of fish by anyone except under certain restrictions, even in the waters contiguous to his own land; and it cannot be doubted that it can also abridge the common right in favor of the proprietor when it is satisfied that the interests of the public will be best served by an ampler recognition of the right of private property. *Barrows v. McDermott*, 73 Me. 441.

The state, by virtue of its sovereignty, has authority to regulate fisheries within its borders, and may prescribe the places as well as the times in which fish may be taken, and may make exclusive grants of fisheries in designated waters, so far as the same do not impair private rights already vested. *Heckman v. Swett*, 107 Cal. 276, 40 Pac. 420.

A right of fishery in Massachusetts is held subject to the control of the legislature, unless by particular grant or prescription it has been held free of that control. *Ingraham v. Wilkinson*, 4 Pick. 268, 16 Am. Dec. 342.

A public privilege of taking clams along a sea shore and of fishing in the waters is enjoyed in subordination to the paramount authority of the legislature to regulate and modify and, to some extent at least, to extinguish. *Clarke v. Providence*, 16 R. I. 337, 1 L. R. A. 725, 15 Atl. 763.

The legislature has the right to regulate the taking of fish in private rivers. *Hooker v. Cummings*, 20 Johns. 90, 11 Am. Dec. 240.

Rivers, though not navigable even for boats or rafts, and even smaller streams of water, may be, and often are, regarded as public rights subject to legislative control as the means of creating power for operating mills and machinery, or as a source for furnishing a valuable supply of fish suitable for food and sustenance. Such water power is everywhere regarded as a public right, and fisheries of the kind, even in waters not navigable, are also so far public rights that the legislature of the state may ordain and establish regulations to prevent obstructions to the passage of fish, and to promote the usual and uninterrupted enjoyment of the right by the ri-

parian owners. *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133.

Statutes may be passed, in the discretion of the legislature, placing the public fisheries under the care and superintendence of certain persons to make them as valuable or useful as possible, as well as for their preservation. *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

The fact that a private individual has the sole and exclusive right to take fish from a certain pond or lake by reason of his ownership of the land under and surrounding the same does not deprive the legislature of the power to control and regulate the exercise of that right; and a statute which has that effect is not void because it is an undue and unwarrantable interference with the property rights of such owner of the land upon which the lake is situated. The right of a riparian owner to take fish does not inhere in the individual, but is a boon or privilege granted by the sovereignty. *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115.

In Massachusetts and Maryland from the earliest times the English common law as to fisheries was changed by common consent in that in all conveyances by individuals of lands upon streams through which salmon, shad, and alewives passed, to cast their spawn, it was understood that fishing for such fish should remain in the public, and therefore is always subject to legislative regulation. *Cottrill v. Myrick*, 12 Me. 222.

Legislation restricting the sale for food of trout propagated artificially by private owners during the closed season, is constitutional, and not a violation of private rights. *Com. v. Penn. Forest Brook Trout Co.* 26 Pa. Co. Ct. 163.

Public fisheries may be leased and disposed of by the legislature in any manner so that it does not interfere with or impair the public right of navigation, or the power of the general government to regulate commerce and navigation in bays and harbors. *Gough v. Bell*, 21 N. J. L. 156.

The legislature may declare the forfeiture of any vessel employed in violating the fishery laws of the state without regard to the guilt or innocence of the owner. *Boggs v. Com.* 76 Va. 989.

The attorney general may proceed, without the intervention of a private relator, to enjoin the unlawful destruction of fish. *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374.

Specific regulations.

The exclusion of residents of the state who are not taxpayers, but who are willing to pay the license tax, from fishing in the public waters of the state as taxpayers are allowed to do, is in violation of Const. art. 1, § 3, which guarantees equal rights, and prohibits exclusive, separate public emoluments or privileges, except in consideration of public services. *Gustafson v. State*, 40 Tex. Crim. Rep. 67, 43 L. R. A. 615, 45 S. W. 717, 48 S. W. 518.

Under the Massachusetts statutes it is illegal to fish in a great pond leased by the commonwealth for the cultivation of useful fishes, though the fishing be for other fish than the useful fish alleged to be cultivated in the pond. *Com. v. Richardson*, 142 Mass. 71, 7 N. E. 26.

Mass. Pub. Stat. chap. 91, § 53, imposing a penalty for selling trout, extends to the sale of trout artificially propagated and maintained, and is valid. *Com. v. Gilbert*, 160 Mass. 157, 22 L. R. A. 439, 35 N. E. 454. The court says such laws are not to be held unreasonable because owners of property may thereby to some

extent be restricted in its use. All property is acquired and held under the tacit condition that it shall not be so used as to destroy or greatly impair the public rights and interests of the community.

Under the New York game laws providing that any person who shall violate the provision against throwing refuse into any stream, or any member of any corporation, association, or company who shall authorize its violation, shall be subject to a penalty, the word "person" will include a corporation, so that the penalty may be exacted from it in its corporate capacity. *Cartwright v. Canandaigua Gaslight Co.* 32 Hun. 403.

To violate a game law prohibiting the casting of refuse or deleterious substance into streams, the refuse must be such in quantity as to have the effect of destroying the lives of fish or of disturbing in some degree their habits. 1744.

The provisions of a statute giving the state fish commission a purely arbitrary discretion to grant permission to fish for certain fish within prohibited waters are unconstitutional as in violation of the 14th Amendment to the Federal Constitution. *French v. Shirley*, 7 Ohio N. P. 26.

A fish law providing for the seizure and confiscation of nets used in violation thereof, and the placing of the proceeds of their sale in the public treasury, but which fails to provide any legal proceedings by which the confiscation may be adjudged, is unconstitutional as an attempt to take and sell private property and place the proceeds in the public treasury without any process of law, in violation of art. 1, § 16, Ohio Const., providing that the courts shall be open, and every person for any injury done him shall have remedy by due process of law. *Edson v. Crangle*, 62 Ohio St. 49, 56 N. E. 647.

A statute providing that a vessel used by those violating fishing laws shall be forfeited to the state is void so far as it fails to provide for a proceeding *in rem* whereby the property rights of innocent owners may be determined. *Boggs v. Com.* 76 Va. 989.

Under the Arkansas fish laws, it is a misdemeanor to erect or maintain a dam in any waters for the purpose of catching fish, unless the waters are wholly on the premises of the person using the dam. *Lynch v. State*, 69 Ark. 555, 64 S. W. 950.

A statute providing that it shall not be lawful for "any person" to fish in certain public rivers within certain points "with seines or nets, except from the shore in the usual and customary manner," makes no discrimination in favor of the owners of shores so as to be unconstitutional, but prohibits all persons from fishing except in the mode prescribed, and is a valid exercise of the police power of the state to regulate fisheries. *Hughes v. State*, 87 Md. 298, 39 Atl. 747.

It is no defense to a complaint against the occupier of a fishing milldam for not lifting or removing the sliding doors of his fishery, that the doing so would in some way affect, but not ruin, his milling power. *Hodgson v. Little*, 16 C. B. N. S. 198, 33 L. J. C. P. N. S. 229, 10 Jur. N. S. 953, 11 L. T. N. S. 136, 12 Week. Rep. 1103.

The United States, after taking land without compensation for lighthouse purposes, may make extensions and erect structures to protect it from freshets and ice, but cannot maintain them for the use of the fish commission; and the owner of the premises is entitled to make such use of the extension as is consistent with the maintenance and protection of the lighthouse. *Edmondson Island Case*, 42 Fed. 15.

A reservoir constructed for mercantile purposes by a water company is not a tributary of a river within the meaning of the salmon fishery

acts under which a fishery district is formed consisting of the river and its tributaries, although the reservoir is formed by water taken from a former tributary of the river, and its surplus water is cast into the river, and the young of salmon pass from the river up the tributary from which the water is taken for supplying the reservoir and thence into the reservoir. *Harbottle v. Terry*, L. R. 10 Q. B. Div. 131, 137, 52 L. J. M. C. N. S. 31, 48 L. T. N. S. 219, 31 Week. Rep. 289, 47 J. P. 186.

A river may be a tributary of another river so as to be within a fishery district consisting of such other river and its tributaries, although its waters do not flow directly into the main river, but flow into it by first discharging into another river, and thence from that river into the main one. *Hall v. Reid*, L. R. 10 Q. B. Div. 134, note, 48 L. T. N. S. 221, note.

Interstate rights.

Under the provisions of the Federal Constitution giving the citizens of each state all the privileges and immunities of the citizens of the several states, it has been contended that no state could exclude the citizens of other states from the privilege of fishing in its waters on the same terms with its own citizens; but this contention has not prevailed.

Mr. Angell states that from the language of the charters to the colonies in this country, the effect of the Revolution was to give all the inhabitants of the United States the right to fish on the sea coasts of New England. But in Maryland the right may be limited to the inhabitants of that state. *Angell, Tide Waters*, pp. 53 *et seq.*

But, so far as the waters can be said to be within the jurisdiction of a particular state, it may exclude the citizens of other states at its pleasure.

As against the general government, the state may make regulations for the protection of fisheries within bays upon its coast which are not more than 6 miles wide at the mouth; and such regulations may be enforced against vessels licensed under the laws of the general government. *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559, *Affirming Com. v. Manchester*, 152 Mass. 230, 9 L. R. A. 236, 25 N. E. 113.

The states have control of their public fisheries, and may forbid all such acts as would render the public right less valuable, or destroy it altogether. *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269.

It is within the legislative power of a state to interrupt the voyage and inflict the forfeiture of a vessel enrolled and licensed under the laws of the United States for a disobedience by those on board of the commands of a state fish law. *Ibid.*

A public fishery is a property right, not a mere privilege or immunity of citizenship; and a state possessing lands under water adapted to the propagation and improvement of oysters may reserve their use to the citizens of that state exclusively. *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248.

Subject to the paramount right of navigation, the regulation of which as respects foreign and interstate commerce has been granted to the United States, public fisheries remain under the exclusive control of the states. *Ibid.*

A state law regulating its sea fisheries discriminates in no wise between citizens of different states, must be observed by all persons using the fisheries, and it is immaterial that the ships used are enrolled and licensed as fishing vessels under the United States laws. *Dunham v. Lamphere*, 3 Gray, 268, 60 L. R. A.

A state bordering on the "great lakes" may regulate the fisheries in adjoining waters out to the United States boundary line in the absence of any act of the Federal legislature abridging it. *Dunlap v. Com.* 108 Pa. 607.

A constitutional provision conferring upon the citizens of each state all the privileges and immunities of citizens in the several states does not entitle the citizens of the several states to enjoy equal rights to take oysters in beds belonging to the citizens of a state in common, and which have never been ceded by that state to the United States. *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230.

A statute for the preservation of clams and oysters, which prohibits the raking or gathering of these bivalves in any waters of the state, by anyone not a resident of six months' standing, extends to planted, as well as natural-grown, oysters; and, inasmuch as it merely prohibits foreigners from subverting the soil of the state and carrying away her property, while leaving vessels free to pass over the waters wherever they choose, is not in conflict with the United States Constitution as a regulation of foreign or interstate commerce; nor does it deny to citizens of other states any privilege or immunity of citizens of the state, the state having the right to grant its property to whomsoever it chooses; nor are the provisions relative to seizure of vessels engaged in violation of the statute, and condemning them after regular judicial proceedings in a tribunal organized for the purpose, subject to review as in other cases, open to the objection that the owner is deprived of his property without due process of law; nor is the act repugnant to the state Constitution as an invasion of the security against unreasonable searches and seizures in the homes, persons, and effects of the people, or a violation of the right of trial by jury. *Haney v. Compton*, 36 N. J. L. 507.

The state has the exclusive jurisdiction to regulate and control the fisheries in its waters, both tidal and fresh; and the right to fish is not given to citizens of other states by the Amendments to the Federal Constitution, nor is the state prohibited from discriminating against them. *State v. Tower*, 84 Me. 444, 24 Atl. 898.

The legislature may prohibit the taking of oysters and shell fish in the public waters of the state, by citizens of other states, without infringing on the privileges and immunities of citizens of other states. *State v. Medbury*, 3 R. I. 138.

The right to the fisheries and to regulate the use of the fisheries on the coasts and in the tide waters of the state are left to the states, subject to the powers of Congress over commerce. *Dunham v. Lamphere*, 3 Gray, 268.

The right of regulating fisheries in the states extends to the preservation of fish not used as food for human beings, but as food for other fish so used. *Com. v. Manchester*, 152 Mass. 230, 9 L. R. A. 236, 25 N. E. 113.

Each state owns the beds of all tide waters within its jurisdiction, and may grant to its own citizens the exclusive use of lands covered by water for raising oysters. *State v. Corson*, 67 N. J. L. 178, 50 Atl. 780.

The right of regulation and control of the fisheries by the several states in the interest of the public permits in every state legislation to secure the benefits of their public right in property to its own inhabitants. The rights, immunities, and privileges which are secured by the Constitution of the United States to the inhabitants of the several states do not include, in favor of the inhabitants of any state, rights in the common property of the inhabitants of the other states. *Com. v. Hilton*, 174 Mass. 29, 45 L. R. A. 475, 54 N. E. 362.

A body of water having well-defined shores and no current, lying entirely in the state of Iowa a quarter of a mile from the main channel of the Mississippi river and forming no part of that river for the purpose of navigation, is within the jurisdiction of Iowa, and within the provisions of a statute against the use of seines in the waters of that state, and not within an exception of boundary waters. *State v. Haug*, 95 Iowa, 413, 29 L. R. A. 390, 64 N. W. 398.

The state, by virtue of its sovereignty, has authority to regulate fisheries within its boundaries, and may prescribe the places as well as the times in which fish may be taken, and may make exclusive grants of fisheries in designated waters as far as the same do not impair private rights already vested. *Heckman v. Swett*, 107 Cal. 276, 40 Pac. 420.

The assumption by a state of control over the fisheries within the bays leading from the ocean upon its frontier is not in contravention of the authority possessed by the United States. *State v. Thompson*, 85 Me. 189, 27 Atl. 97.

A state statute regulating the use of the fisheries and oyster beds which are the common property of its citizens, and imposing penalties and forfeitures in relation thereto, does not interfere with the power granted to Congress to regulate commerce. *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230.

In the control of fisheries within a state, the state government is supreme. *United States v. Alaska Packers' Assn.* 79 Fed. 152.

The state of Maryland has jurisdiction over the waters of Chesapeake bay, which are within the state to such an extent that it may prohibit the taking of oysters therein in certain ways; and its law will apply to vessels from other states duly enrolled under the laws of the United States; and such vessels may be subjected to forfeiture for violating the law. *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269.

An act regulating the time and manner of taking fish in the sea within the territorial limits of a state is binding on citizens of other states, and upon vessels licensed as fishing vessels under the laws of the United States. *Dunham v. Lamphere*, 3 Gray, 268.

The legislature may discriminate between residents and nonresidents in the right to use the water of the state for planting and fishing for oysters. *People v. Lowndes*, 130 N. Y. 455, 29 N. E. 751, Reversing 55 Hun, 469, 8 N. Y. Supp. 908.

In one case it was held that the provision of Va. act. 1874, chap. 214, § 22, prohibiting any person not a citizen of the state from planting or taking oysters within the waters of the commonwealth, denies to the citizens of other states the equal privileges and immunities secured to them by the United States Constitution, art. 4, and is unconstitutional. *Ex parte McCready*, 1 Hughes, 598, Fed. Cas. No. 8,732.

But that ruling was overruled in *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248.

Regulation of commerce.

A state law does not conflict with the commerce clause of the Federal Constitution which is intended to prevent the destruction of oysters within the waters of that state, by the use of particular instruments in taking them. *Smith v. Maryland*, 18 How. 71, 15 L. ed. 269.

A state law abridging the right of citizens of other states to take oysters within its limits except in particular vessels is not a regulation of the external commerce of the state in conflict with the power conferred upon Congress. *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230.

The states, by surrendering to the Federal 60 L. R. A.

government the right to regulate commerce, did not part with the ownership of the fish in the tidal waters within their borders, or with the right to regulate and control their taking. *State v. Corson*, 87 N. J. L. 178, 50 Atl. 780.

Admiralty and maritime jurisdiction.

The power vested in the several states, before the adoption of the Constitution, to regulate the fisheries belonging to them, and to punish those who should transgress their regulations, was not surrendered to the United States by the mere grant of admiralty and maritime jurisdiction to the judicial branch of the government. *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230.

Other provisions.

The provision of the California act of April 23, 1880, making it a misdemeanor for aliens incapable of becoming electors to take fish from the waters of the state for purposes of sale, is a denial of the equal protection of the laws guaranteed to any person within the jurisdiction of a state, under the 14th Amendment to the United States Constitution, and is also in violation of arts. 5 and 6 of the treaty with China. *Re Ah Chong*, 6 Sawy. 451, 2 Fed. 733.

A state tax nominally upon a license to engage in the oyster industry is void if calculated according to the tonnage of the vessel. *Johnson v. Drummond*, 20 Gratt. 419.

But it was held that the act for better enforcement in Maurice cove and Delaware river of the act for the preservation of oysters and clams, which levies a fee on the boats in proportion to their tonnage, and requires them to be licensed, is not repugnant to the United States Constitution as a regulation of interstate commerce. *State, Johnson, Prosecutor, v. Loper*, 46 N. J. L. 321.

So, the provision of the Maryland act of 1880, chap. 296, that boats used in dredging for oysters shall pay to the state at the rate of \$3 per ton of the boat's measurement for such privilege, is not invalid as a tonnage tax within the prohibition of the Federal Constitution. *Dize v. Lloyd*, 36 Fed. 651.

A state's fish laws cannot be held to diminish the rights of Indians under a treaty with the Federal government to fish on their reservation. *Re Blackbird*, 109 Fed. 189.

Construction of statutes.

The statute of Rhode Island prohibiting the taking of oysters and other shell fish within the waters or on the shores of the state by any but persons who are citizens of the state is not repugnant to the Constitution of the United States, art. 4, § 2, which provides "that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." *State v. Medbury*, 3 R. I. 138.

Rhode Island Gen. Stat. chap. 132, § 10, which provides that "no person not a citizen of the state shall be allowed to fish for oysters or other shell fish within the waters of this state," applies only to the free and common oyster fisheries of Rhode Island, and does not apply to the taking of oysters from private beds on which oysters have been planted and propagated. *New England Oyster Co. v. McGarvey*, 12 R. I. 385.

The effect of a provision that "no person not a citizen of this state shall be allowed to fish for oysters or other shell fish within the waters of this state," prescribing a penalty for its violation, and a statute which relates to private and several oyster fisheries, and authorizes the shell fish commissioners to lease, in the name of the state, to any person, being an inhabitant

of the state, any piece of land within the state, covered by the tide waters at low tide, and not within any harbor line, to be used as a private and several oyster fishery,—is to secure the benefit of fisheries primarily to the people; but citizens of other states are not prohibited from acquiring and holding a derivative benefit and emolument from the fisheries. Hence, where an inhabitant of Rhode Island agreed with a citizen of Massachusetts that the former should lease oyster grounds in Narragansett bay, plant them with oysters, and ship them to the resident of Massachusetts, the latter furnishing the required capital, and directing the business, and paying the resident of Rhode Island a stated salary; and where it appeared that large investments were made, and the contract was executed for several years,—it was held that equity would require the Rhode Island resident to account where he failed to account for the property of the complainant, and that a demurrer to the bill on the ground of the illegality of the contract would be overruled. *Ibid.*

The statute of Rhode Island, prohibiting the taking of oysters and other shell fish within the waters or on the shores of the state by any but persons who are citizens of the state, is not repugnant to the charter of Charles II. to the colony of Rhode Island, which provided that the charter shall not in any manner hinder the trade of fishing on the coast of New England, and that all the subjects in the colony should have the right to continue to fish upon the said coast, and to build upon the waste land such wharves, stages, and workhouses as should be necessary for the salting, drying, and keeping of fish, as such charter did not give the right to fish upon the shores of the colony; but it was intended that it should not trench upon the right of fishery previously enjoyed, and as, by the terms of the charter, it is evident that the rights of fishing stated in the charter related to the cod fishery, and not to the oyster fishery. Neither is such act repugnant to R. I. Const. art. 1, § 17, by which it is declared that the people shall continue to enjoy all rights of fishery which have heretofore existed under the charter and usages of the state, and that no new right is intended to be granted, nor any existing right impaired. *State v. Medbury*, 3 R. I. 138.

The statute of Virginia which forbids non-residents to catch fish in the waters of the state for the manufacture of manure and oil, and to manufacture manure and oil from fish caught within the waters of the state, or to build or erect any machinery within the limits of the state for the purpose of manufacturing such oil or manure, does not violate the United States Constitution, art. 4, § 2. *Chambers Bros. v. Church*, 14 R. I. 398, 51 Am. Rep. 410.

The compact made in April, 1783, between the states of New Jersey and Pennsylvania authorizes the guarding of fisheries on the Delaware river annexed to the respective shores against interruption by persons fishing under claim of common right on the river. *Bennett v. Boggs, Baldwin*, 60, Fed. Cas. No. 1,319.

A condition providing that every vessel used by persons upon whom the state has conferred the privilege of engaging in catching, planting, and growing oysters upon lands of the state lying under its waters shall be licensed, the fee for which shall be graduated according to the tonnage of the vessel, is not a violation of the Federal Constitution, art. 1, § 8, which prohibits states from levying a duty of tonnage on ships for being allowed to enter or depart from a port; the license fee imposed not being laid upon the vessel as an instrument of commerce, but as a regulation of the business. *State v. Corson*, 67 N. J. L. 178, 50 Atl. 780. 60 L. R. A.

A Virginia statute restricting the use of oyster fisheries in the Potomac river to citizens of Virginia is valid as against all offenders including depredators from Maryland, though it has not the consent and approval of that state; the compact of 1785 not applying to the case. *Ex parte Marsh*, 57 Fed. 719.

A provision that leases of tide lands owned by the state shall be granted only to citizens of the state who have been such for a period of twelve months preceding is not open to objection as granting exclusive privileges to individuals. *State v. Corson*, 67 N. J. L. 178, 50 Atl. 780.

The license to use submerged land for the planting of oysters is, in Maryland, expressly restricted by statute to residents of the state. *Hess v. Muir*, 85 Md. 586, 5 Atl. 540, 6 Atl. 673.

By the 1785 compact between Maryland and Virginia, Virginia has the right to make such regulations, with the consent of Maryland, as may be necessary to protect its fisheries; and when the regulations are properly made and consented to, they may be enforced in Virginia against citizens of Maryland. *Hendricks v. Com.* 73 Va. 934.

But a statute of the state of Maryland prohibiting fishing with gill nets in the Potomac river is inoperative unless shown to have been assented to by the state of Virginia, in view of the compact between those states that all laws and regulations which may be necessary for the preservation of fish in the River Potomac shall be made with the mutual consent and approbation of both states. *State v. Hoofman*, 9 Md. 28.

Canadian regulations.

The Dominion Parliament in Canada has the right to legislate on the subject of fishery regulations. *Queen v. Robertson*, 6 Can. S. C. 52.

But the Dominion has no authority over the question of the right to take fish from particular waters. And it therefore has no right to lease private rights of fishery in the waters. This right belongs to the province. *Ibid.*

The Dominion Parliament has the right to control in such manner as, in its discretion, shall seem expedient all deep-sea fishing, the right to take all fish ordinarily caught either on the sea coast or in the great lakes or in the rivers of the Dominion, and such as are valuable for food within the Dominion, or for exportation for that purpose, or for any other purpose of trade and commerce; and must include as well the right to catch fish as the designation and control of the places where the fish may be caught and the times and manner of catching them. *Ibid.*

In the British North America act organizing the Canadian federation the Dominion was invested with the control of "inland and sea fisheries," while the provinces were given charge of "property and civil right." Since a right of fishery in a nontidal stream is a right of property incident to ownership of soil, the Dominion cannot grant rights of fishery in such waters. *Ibid.*

The fact that by the British North American act legislative jurisdiction over certain waters was reposed in the Dominion of Canada affords no evidence that the proprietary rights thereto were also transferred; and, while the Dominion has legislative supervision of the fisheries, it has or can create no proprietary interest therein. *Atty. Gen. v. Atty. Gen.* [1898] A. C. 700, 78 L. T. N. S. 697, 67 L. J. P. C. N. S. 90, *Reversing Re Provincial Fisheries*, 26 Can. S. C. 444.

Licenses.

Some of the states have assumed such control of the fisheries in public waters that they

forbid any one to exercise it except under the state's license, and they provide, not only for the granting of licenses, but for the manner in which they may be enjoyed.

The legislature has the power to license fishing within the waters of the state, and to give exclusive control of the waters within a reasonable distance for the period of one year for the operation of fixed appliances therefor; and such license does not come within the inhibition of a grant by the state of an exclusive privilege to such waters. *Walker v. Stone*, 17 Wash. 578, 50 Pac. 488.

In the regulation and preservation of a fishery on inland waters, the legislature may, if it so please, quicken and reward the diligence of persons appointed by the neighboring towns to effect those results by granting them exclusive rights; and those rights will not change their lawful acts in requiring a passage through another's dam into a taking of private property for private use. *Cottrill v. Myrick*, 12 Me. 222.

Under a Washington statute regulating the catching of salmon, and authorizing the issuing of licenses to fish anywhere in the waters of the Columbia river and Puget sound over which the state has jurisdiction, such licenses cannot be confined to any particular place designated in the application, but apply anywhere within the waters embraced within the statute, provided the limitation therein is observed as to keeping a certain distance from other fishing appliances. *State ex rel. Curry v. Crawford*, 14 Wash. 373, 44 Pac. 876.

No person will be permitted to obtain the sole benefit of fishing in any particular locality in navigable waters to the practical exclusion of others therefrom by the construction and maintenance of a trap or pound net; and a "roving" license granted by the state to fish anywhere within the waters embraced within the statute cannot be construed as authorizing the maintenance of such a trap at any designated point. *Morris v. Graham*, 18 Wash. 343, 47 Pac. 752.

Under a statute providing that if the location (i. e. the person who has indicated his location by driving piles and posting his license number thereon as specified in the law) of a fishing location fails to construct his appliance during the fishing season covered by his license, such location shall be deemed abandoned; the end of the actual fishing season, instead of the date of the expiration of the license, is the limit of time for which an indicated location could be held without the construction of a fishing appliance. *Legoe v. Chicago Fishing Co.* 24 Wash. 175, 64 Pac. 141; *DeMiers v. Sandy Spit Fish Co.* 24 Wash. 582, 64 Pac. 799.

A license to fish in the waters of the state, authorized to be issued by the fish commission, is a roving license which can never become an interest in real property; therefore, the issuance of such a license to a corporation, a majority of the capital stock of which is held by aliens is not a violation of the constitutional provision against alien ownership of lands. *Hastings v. Anacortes Packing Co.* (Wash.) 69 Pac. 776.

A party who first entered upon waters in controversy for the purpose of establishing a location for fish traps, and who gave notice to another of his intention so to locate, by word of mouth and by erecting piles and posting licenses which, although not strictly in accordance with the requirements of Laws 1899, p. 203, § 9, he afterwards, at his first opportunity, changed to conform to statutory requirements, is entitled to the location in preference to the other, although the latter was the first to conform to statutory requirements, on the ground that the acts of the former were notice to the
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other, and that such acts were followed up with due diligence. *Elwood v. Dickinson*, 26 Wash. 631, 67 Pac. 370.

While subsequent markings of a fishing location in deep waters may reasonably vary some 10 or 15 feet, a lateral encroachment of 60 to 200 feet is unwarranted. *Fall & S. Fish Co. v. Point Roberts Fishing & Canning Co.* 24 Wash. 630, 64 Pac. 792.

An attempted transfer of a fishing license and of the location and appliances in use thereunder without complying with the statute requiring notice thereof to be given the state fishing commissioners, a noncompliance with which requirement is made a misdemeanor, amounts to an abandonment of the location, and confers no rights thereto upon the assignee. *Gerhard v. Worrell*, 20 Wash. 492, 55 Pac. 625.

Under a statute providing for the manner of determining the location of fish nets, the legislature intended that a passageway of 600 feet should be left between the ends of all nets, whether located beyond previously located nets or inshore from them. *Fidaigo Island Canning Co. v. Womer* (Wash.) 89 Pac. 1121.

Under provisions for an end passageway between pound nets of at least 600 feet, and that a pound net may extend 2,500 feet, two nets may not be constructed with a passageway of less than 600 feet, on the ground that their combined length would be less than 2,500 feet. *Ibid.*

A statute providing that there shall be an end passageway of at least 600 feet, and a lateral passageway of at least 2,400 feet, between all pound nets constructed in the waters of Puget sound, and specifying the manner of determining such distances, is complied with where a locator, after ascertaining the general course the trap would point, ascertained where a line would intersect the shore if projected along that course from the trap to the shore; then, after ascertaining the general direction of the shore for half a mile on each side of the point of intersection, drew a line parallel with the general direction of the shore, causing such line to intersect the outer end of the next adjoining trap; and next, measured at a right angle from the last-mentioned line to the nearest point of the trap location and found the distance to be 610 feet. *Point Roberts Fishing Co. v. George & B. Co.* 28 Wash. 200, 68 Pac. 438.

An invalid fishing location, because made upon ground covered by a prior valid fishing location, does not become valid by the expiration of the prior license. *White Crest Canning Co. v. Sims* (Wash.) 70 Pac. 1003.

A valid fishing location cannot be made upon the same ground where one already exists. *Ibid.*

But when a fishing location is abandoned, the territory is open to location by others for fishing. *Ibid.*

Under the British North American act, the Dominion can only lease a fishery where a private several fishery does not already exist by law. *Queen v. Robertson*, 6 Can. S. C. 52.

A lessee from a town of the right of fishing in a brook cannot deny the right of the town to make the lease to avoid payment of the rent unless he is evicted. *Eastham v. Anderson*, 119 Mass. 526.

Under the Massachusetts law of 1869 the commissioners of inland fisheries may lease great ponds above 20 acres in area to the riparian proprietor for the "cultivation of useful fishes." *Com. v. Vincent*, 108 Mass. 441.

The state license to fish within certain waters for a specified period is a franchise which entitles the holder to maintain an action for injunction for any infringement of the rights

thereby secured him. *Walker v. Stone*, 17 Wash. 378, 50 Pac. 488.

VI. How exercised.

Conflict with other rights.

The right of fishery is one of the least important of all the rights connected with water. It may be exercised anywhere, not being confined to any particular place. Therefore, when it conflicts with rights the exercise of which is dependent on a particular place, the fishery right must give way.

A right of fishery must give way to the right of navigation. *Woolrych, Waters*, p. 165.

Since the right of navigation is paramount to the right of fishing in a public river, a license by commissioners appointed by the state to determine where weirs may be erected without injury to the rights of navigation will confer no estate which did not previously exist, but only determine where and by whom the previously existing right may be used consistently with public interest. *Van Auken v. Decker*, 2 N. J. L. 108.

The right of fishery in navigable waters is subordinate to the right of navigation, and a boat there may "take her course" and go to the bank when and where it is necessary to do so, doing no unnecessary damage, and acting without wantonness or malice, and need not stop or go out of her way or wait upon those managing a seine, which they are permitted to use by sufferance of the sovereign, and not as a right conferred by grant. *Lewis v. Keeling*, 46 N. C. (1 Jones L.) 299.

In the River Delaware there is a right of fishing which, though subordinate to the right of navigation, cannot be unnecessarily impeded by it. *Cobb v. Bennett*, 75 Pa. 326, 15 Am. Rep. 752.

A right of common fishery is always enjoyed in subordination to the right of navigation, and any erection of wharves or other structures which can be admitted by the latter right will not be prevented by the former. *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

The public right to fish always yields to any permanent improvement by the owner of the land on which the water rests. *Hogg v. Bearman*, 41 Ohio St. 81, 52 Am. Rep. 71.

The owners of shore or fishery rights in the Delaware river took and hold subject to the necessary transcendental power of the state to erect structures for the improvement of navigation, and any such loss is *damnum sine injuria*. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597.

The owner of a several fishery cannot restrain the owner of the adjoining shore from completing a landing place all the piles for which were driven before the issue of the preliminary injunction, where it appears that his rights or claim to relief will not be prejudicial on final hearing. *Hugg v. Fath*, 37 N. J. Eq. 46.

The owner of a right of fishery has no claim against one who, acting without license from the state, erects a wharf in the stream so as to interfere with the fishery, since that right is held subject to the paramount right of the public. *Tinicum Fishing Co. v. Carter*, 61 Pa. 29, 100 Am. Dec. 597.

The owner of a fishery cannot recover for an invasion thereof by the erection of a pier if it could no longer be fished to advantage or profit. The fact that a few stray shad could be caught there occasionally amounts to nothing. *Id.* 90 Pa. 85, 35 Am. Rep. 632.

The owner of a fishery in a navigable river with the privilege of drawing his seine on the shore cannot recover for any injury he may suffer from the erection of a stone wall along

the shore by a meadows company chartered thereto by the state without liability for such damages, or after the statute of limitations has run, if erected by a private person. *Ibid.*

The right to fish in a river must give way to the owner of the right to erect mills. *Vattel*, Book 1, chap. 22.

But one exercising the public right to take ice from public waters, occupying a part thereof for increasing the thickness of the ice by artificial means, has no complaint against one who enters thereon for the lawful purpose of fishing, and fishes in a reasonable manner through the ice, at a time when the actual operation of gathering the ice has been suspended for a day and two nights. *Rowell v. Doyle*, 181 Mass. 474.

Interference with other fishery rights.

From the very nature of a public fishery, everyone has an equal right in it; and yet, to be available to anyone, he must for a time have exclusive rights. In the absence of custom or statutory regulation, it is difficult to determine just how far the rights of an individual must be respected.

With respect to fisheries on a river, some principles are established.

As long ago as 46 Ass. 306, pl. 9, there is a writ on behalf of the Abbott of Bukfast against Robert, Dean of the Church of the Blessed Peter, for erecting a weir which prevented fish from coming to the Abbott's weir. And there never seems to have been a doubt that a lower proprietor had no right to interfere with the passage of fish to an upper one from that time to the present.

The owner of a sole and separate fishery has the right to a free passage of fish from the sea into his fishery, and the lower owner of a similar right of fishery is liable if, by the construction of fish traps and weirs, he prevents the passage of fish into the upper fishery. *Hamilton v. Donegall*, 3 Ridgeway, 267, 324.

Neither a right of several fishery nor to erect a milldam in a stream confers any right to erect constructions in a river to prevent the free passage of the fish up and down the stream at their accustomed seasons, as such obstructions would impair and ultimately destroy all such rights owned by other riparian proprietors on the stream. *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133.

In *Barker v. Faulkner*, 79 L. T. N. S. 24, which was an action to restrain a lower owner from maintaining weirs in a trout stream so as to prevent the passage of trout up the stream, the court held that the rule of law which made the construction of the weir in a salmon river so as to prevent the passage of salmon up the river an injury to upper owners for which they had an action might extend to other kinds of fish if damage were shown; and the court refused to hold against the plaintiff on the issue of law raised by the pleadings, and sent the action to trial that all the facts might be ascertained.

The construction and maintenance of a brushwood weir across a stream for a long period of time, through which it was possible for fish to escape into the upper part of the river, will not justify the construction of a stone weir entirely stopping the passage of fish up the stream except in flood times, when the fish might overleap it. *Weid v. Hornby*, 7 East, 199, 3 Smith, 244.

One having a license to fish in the upper waters of a tidal river may maintain an action against a person who, by unlawfully fishing in the lower waters of the river, caused damage to the plaintiff in the exercise of his right to fish, by intercepting and taking large

quantities of fish that would otherwise have gone into the upper waters. *Whelan v. Hewson*, Ir. Rep. 6 C. L. 283.

In a river not navigable the riparian owner has the exclusive right of fishing to the thread of the stream, except so far as this right has been qualified by legislative regulations. But this right does not include the right to prevent the passage of fish to the lakes and ponds for the multiplication of their species. *Com. v. Chapin*, 5 Pick. 199, 16 Am. Dec. 386.

The owner of a sole and separate fishery has a right of action against the owner of a lower fishery for building structures which prevent the passage of fish up the stream. *Hamilton v. Donegall*, 3 Ridgeway, 207.

When fish pass up or down streams for breeding purposes, not even the riparian proprietor of the bed of the stream owns the fish therein, or has the legal right to obstruct their passage up or down. *Parker v. People*, 111 Ill. 588, 53 Am. Rep. 643.

In *Murphy v. Ryan*, Ir. Rep. 2 C. L. 143, 16 Week. Rep. 678, it is said that the law precludes the riparian proprietors from preventing the passage of fish through the river.

But the owner of a weir has at common law no right of action against one who merely erects another weir in such a position as to prevent him from securing as many fish as he might have done. *Cheney v. Guptill*, 2 Hannay (N. B.) 379.

Any unlawful interruption of the passage of fish up a stream to an upper fishery is a violation of the common-law rights of the owner of the upper fishery entitling him to an action at law, and it is immaterial that the particular mode of interrupting the passage of the fish was made unlawful by an act of Parliament which provided a remedy for such unlawful interruption. *Maasy v. Cassidy*, Ir. L. R. 18 Eq. 97.

A riparian owner's right to take fish from the waters by or on his land is to be enjoyed subject to the rights of other proprietors above and below to have such waters remain a passageway for the fish, and of the state to regulate the seasons and the modes in which they may be taken. *State v. Theriault*, 70 Vt. 617, 43 L. R. A. 290, 41 Atl. 1030.

The riparian proprietor's right of exclusive fishery in his nonnavigable stream must be so exercised as not to injure others in the enjoyment of a similar right upon their lands upon the stream above and below. *Griffith v. Holman*, 23 Wash. 347, 54 L. R. A. 178, 63 Pac. 239.

A grant of a right to maintain a weir across a river for the purposes of a fishery does not include the right to exclude all fish from passing above the weir so as to exempt the owner from the operation of a legislative resolution requiring fishways in dams. *Stoughton v. Baker*, 4 Mass. 522, 3 Am. Dec. 236.

A riparian owner on a private stream cannot, by virtue of such proprietorship, obstruct the passage of fish up the stream under the maxim, *Sic utere*, etc. *State v. Glen*, 52 N. C. (7 Jones L.) 321.

No prescriptive right to maintain a fish dam to the injury of an upper proprietor can be established by an enjoyment of less than twenty years. *Weld v. Hornby*, 7 East, 195, 3 Smith, 244.

A private individual who with others was engaged in fishing in a river by means of trap or gill nets can maintain an action in behalf of himself and others similarly situated to enjoin the construction and maintenance of a permanent fish trap in such river creating a public nuisance which would render it impossible to drift nets through the channel on either side of 60 L. R. A.

the trap, as such individuals suffer special injury in which the general public do not share, and the fact that others would suffer in the same way if similarly engaged constitutes no bar to the maintenance of the action. *Morris v. Graham*, 16 Wash. 343, 47 Pac. 752.

A net stretched partially across a river by the proprietor of a lower fishery is not a nuisance to the upper fishery, where a space of 10 or 12 yards is left between it and the shore of sufficient depth to allow fish to pass up the river without obstruction. *Wilson v. Moy Fishery Co.* Ir. L. R. 19 Eq. 270.

A riparian owner's exclusive right to fish in the water upon his own land does not include the right to destroy the fish he does not take. *People v. Truckee Lumber Co.* 116 Cal. 297, 39 L. R. A. 531, 48 Pac. 374.

Where injury to a fishery in one county is caused by an obstruction erected in the stream of another county, the owners of the fishery may bring their action in either county. *Barden v. Crocker*, 10 Pick. 383.

The owner of a sole and separate fishery may maintain an action in one of the counties through which his fishery extends against a lower owner who obstructs the passage of fish up the stream. *Hamilton v. Donegall*, 3 Ridgeway, 207, 324.

Wilkes, J., raised the point in *Edgar v. English Fisheries*, 23 L. T. N. S. 732, which he was inclined to deny, whether one having a several fishery as appurtenant to a house or parcel of land could use it for taking all the fish in the river, for purposes of barter in distant parts.

The question whether or not the erection of a weir in a stream is a public nuisance which would prevent the acquisition of a prescriptive right to maintain it has been much debated.

In *Weld v. Hornby*, 7 East, 199, 3 Smith, 244, an action by the owner of a fishery against a lower proprietor for constructing a stone weir so as to prevent the passage of fish up the stream, Lord Ellenborough, Ch. J., said the erection of weirs across rivers was prohibited in the earliest periods of our law. They were considered as public nuisances. The words of *Magna Charta*, chap. 23, are that "all weirs from henceforth shall be utterly pulled down on the Thames and Medway, and through all England." And this was followed by subsequent acts, treating them as public nuisances, forbidding the erection of new ones, and the enhancing, strengthening, or enlarging of those which had aforetime existed.

And the fish commissioners in the opinion rendered in the case of *Leconfield v. Lonsdale*, L. R. 5 C. P. 663, 39 L. J. C. P. N. S. 305, 23 L. T. N. S. 155, 18 Week. Rep. 1165, after a most thorough examination of the statutes, hold that such erection is forbidden by *Magna Charta*. But the court does not agree with them, and holds that the provisions of *Magna Charta* and the statutes prohibiting the construction of weirs apply only to tidal rivers.

So that a coop weir which entirely prevents fish from passing it is not a public nuisance when not in a tidal river. *Ibid.*, Affirming *Rolle v. Whyte*, L. R. 3 Q. B. 286, 37 L. J. Q. B. N. S. 105, 17 L. T. N. S. 560, 16 Week. Rep. 593, 8 Best & S. 116.

How far the passage of fish may be interfered with by the erection of a dam is a question not free from doubt. In most states provision is made for the maintenance of fish ways through the dams, so that the question is not a vital one. See note to *People v. Truckee Lumber Co.* (Cal.) 39 L. R. A. 581.

As shown by the commissioners in *Leconfield v. Lonsdale*, L. R. 5 C. P. 663, 39 L. J. C. P. N. S. 305, 23 L. T. N. S. 155, 18 Week. Rep. 1165, there is no necessity of erecting a dam

without a fish way, and therefore, although Vattel states, as shown above, that fishery rights must give way to mill rights, yet, since both can exist so far as the passage of fish is concerned, it would seem that there is no right to prevent it, and such is the weight of authority.

The obstruction of the public right of fishery is a nuisance at common law, and extends to the construction of dams without fish ways in a stream which is the outlet of a large inland lake. *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513.

Judge Green, in *Crenshaw v. Slate River Co.* 6 Rand (Va.) 245, in discussing the power of the legislature to yield the public right of navigation to individuals for the sake of securing the public convenience of mills, remarks that they could not justly sacrifice to this object the individual rights in respect to the natural run of fish, and therefore have properly guarded against such obstruction to the passage of fish by imposing it as a condition upon the leave to build a dam that the owner should give free passage to them, and seem always to have considered it as a condition implied, even when it was not expressed. Immediately preceding this he says that the right of fishing in fresh-water streams, or within the bounds of any patent, is not public and common to all, but confined to the riparian owners; each of whom is entitled to the natural run of fish of passage upward, as he is to the natural flow of water downward.

The court, in *Woolever v. Stewart*, 36 Ohio St. 146, 38 Am. Rep. 569, while declining to determine whether there is an implied limitation upon the right of a riparian owner on non-navigable streams to the center of which he owns to construct a dam, that he shall keep open a sufficient passageway for fish to the waters above, says that, if there was such an implied obligation, it was for the benefit of the upper owners and for them only, which right could be lost by adverse use for a sufficient period to ripen into an adverse right.

The owner of a riparian fishery cannot sue in tort against one erecting a dam within tidal waters under legislative authority (whether or not he could at common law), the statute having duly safe-guarded his property rights. *Bristol v. Ousatonick Water Co.* 42 Conn. 403.

Where a dam is so constructed as to be a public nuisance by obstructing the migrations of fish, such adverse user, when known to have originated within living memory, will not alone legitimate its maintenance. *State v. Franklin Falls Co.* 49 N. H. 240, 6 Am. Rep. 513.

But in *Dunn v. Stone*, 4 N. C. (2 Car. Law Repos.) 261, it is held that the owner of a fishery cannot maintain an action for damage against a lower riparian proprietor for constructing a milldam the effect of which is to obstruct the passage of fish up the stream, as such use of the stream by the mill owner is a proper one.

And in *Shrunk v. Schuykill Nav. Co.* 14 Serg. & R. 71, it is held that a riparian owner cannot recover for damages to his land resulting from the erection of a dam whereby the ascent of fish from the sea is stopped, as he had no property in either the fish or the river, and all emoluments from such a fishery are precarious. No property has been taken from him.

The assertion that no property is taken by the prevention of the passage of fish up the stream is against the whole weight of authority from 46 Ass. 306, to the present time. The action given for the interference with the passage of fish is founded on a property right; so much so that the right to have fish pass up a 60 L. R. A.

stream may be taken by eminent domain for the purpose of establishing a dam for manufacturing purposes. *Com. v. Essex Co.* 13 Gray, 239.

Property rights of a riparian owner in a fishery in navigable waters under a license from the state must be compensated for so far as disturbed by a corporation taking the land under powers of eminent domain, as the license is not revoked *ipso facto* by the granting of the franchise. *Alexandria & F. R. Co. v. Faunce*, 31 Gratt. 761.

The only authorities upholding the assertion of the Pennsylvania court are those which have involved a mere regulation. It has been held that a law regulating the use of a "private" property in a fishery in tidal waters is not a "taking," nor does it impair the obligation of contracts. *Com. v. Bailey*, 13 Allen, 542.

So, a state does not take private property for public use by forbidding a landowner to take fish from a body of water partly upon his land by certain designated means of destruction. *State v. Blount*, 85 Mo. 543.

So, a statute for the preservation and protection of fish deprives no one of property, as they are not private property till caught. *Peters v. State*, 96 Tenn. 682, 33 L. R. A. 114, 36 S. W. 399. See also *infra*, XI.

Exercise of public right.

A fishery in a public water must be so used as not to injure other persons. *Woolrych, Waters*, p. 165.

A public right of fishery can be exercised only by such ordinary methods as will not interfere with private rights of the riparian proprietor, and will not include the use of the shore as a place to fasten weirs. *Matthews v. Treat*, 75 Me. 594.

The public right of fishery does not include the right to stand on the soil or rocks belonging to a riparian proprietor, although one may pass and fish over such place when covered with water. *Com. v. Shaw*, 14 Serg. & R. 9.

There is no common-law right in the public to use the beach above high-water mark for purposes of fishing when the beach (to high-water mark) has been conveyed by the Crown to a subject. *Parker v. Elliott*, 1 U. C. C. P. 470.

A public right of fishery does not include the right to place weirs or other permanent erections upon another's land, or to fasten them by grappings to the shore. That is an advantage peculiar to the owner of the shore, and of which he may avail himself if without any unreasonable exercise or unreasonable interference with the rights of others. *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400.

Where the user consisted in taking fish on a certain beach by drawing in a seine by hand it will not authorize the erection of a capstan and reel on such beach. *Hart v. Chalker*, 5 Conn. 311.

A landowner may, after notice to one who has placed a seine reel on his land to remove it, cut it down and shove it into the water, although the result is that it floats away and is lost. *Almy v. Grinnell*, 12 Met. 53, 45 Am. Dec. 238.

The public convenience of drawing nets from a public fishery over the adjoining lands of a private owner will not give a right to do so. *Brink v. Richtmyer*, 14 Johns. 255; *Sloan v. Biemiller*, 34 Ohio St. 492.

But while a riparian proprietor has the exclusive right of drawing a seine onto his shore, he cannot exclude the public from fishing in the navigable waters in front of his shore. *Skinner v. Hettrick*, 73 N. C. 53.

In a grant of flats with the fishery rights

thereon, a reservation to the public of the liberty of fishing and drying the nets and fish on the shore will not be held to be restricted to the taking of such fish as may be and are usually dried on the shore. *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

The owner of an exclusive fishing privilege on flats cannot recover for damages sustained because of another's weir erected below low-water line. *Matthews v. Treat*, 75 Me. 594.

Individual use of public right.

Every individual has a right to enjoy the public right. But, since no two individuals can enjoy precisely the same right at the same time, some rule must be observed as to the order of time in which the rights shall be exercised. In some instances this is regulated by custom.

No person can acquire a right of fishing in a public fishery superior to any other, unless he has gone into the common waters, and set up and established his pounds and stakes, and taken possession of the line which those pounds and stakes included, with which a stranger cannot directly interfere. *Dwelle v. Wilson*, 14 Ohio C. C. 551. The court was of opinion that no damages could be recovered in case such stranger established his lines clear around that first established, and thereby impaired its usefulness.

The use of the waters of the navigable rivers for fishing purposes is public to all the people of the state, so that in case one has cleared a fishing place in the bed, he is entitled to protection in its enjoyment so long as he continues in possession and occupation. *Pitkin v. Olmstead*, 1 Root, 217.

Where one by labor and expense makes a fishing place in navigable waters, without obstructing and infringing on previous existing rights, he should be protected in its enjoyment. *Lay v. King*, 5 Day, 72.

A custom on the part of inhabitants on the shores of a navigable river that any one of them who clears a place for seine fishing shall hold it against everybody during the fishing season, is void for uncertainty and unreasonableness. *Freary v. Cooke*, 14 Mass. 488.

A common understanding among fishermen to refrain from interference with one's use of a fishery established by clearing out the shores for the more convenient use of seines by the owner of the shore cannot impair the rights of the public in all navigable waters, although not exercised by upland owners because shut off from convenient access to the shore by distance. *Collins v. Benbury*, 27 N. C. (5 Ired. L.) 118, 43 Am. Dec. 155.

And it has been held that the owner of riparian land can acquire no right to an exclusive fishery in adjoining navigable waters by merely cleaning out the bottom for the more speedy and secure fishing by a seine to be hauled up on his own beach. *Ibid.*; *Fagan v. Armistead*, 33 N. C. (11 Ired. L.) 438.

Clearing out a fishing place in a river does not give an exclusive right of fishery there if the one doing so does not own the shore. *Westfall v. VanAuker*, 12 Johns. 425.

Under the Massachusetts ordinances of 1641 and 1647, a riparian proprietor may plant stakes in his flats for his own convenience in fishery, although the use of the public fishery in a particular manner is thereby interfered with, as the public right of free fishing is subordinate to the right of property in the soil belonging to an individual. *Locke v. Motley*, 2 Gray, 265.

The owner of soil between high and low water mark has the exclusive right to catch fish thereon by means of fixtures attached to the soil. *Matthews v. Treat*, 75 Me. 594.

Fishing with stake nets on the seacoast, near the mouth of a river, is not prohibited either by statute or the common law of Scotland. *Kintore v. Forbes*, 4 Bligh N. R. 485.

Stakes driven for the purpose of trap-net fishing in deep water cannot be wantonly removed by the owner of a neighboring island situated more than a mile from shore, within which distance the riparian owner's right is preserved by statute, where the stakes did not hinder navigation, and the owner does not suffer special damage on account of them. *Lincoln v. Davis*, 53 Mich. 375, 51 Am. Rep. 116, 19 N. W. 103.

Under a statute providing that when any person shall have been at the expense of clearing a fishing place in a river, and has used the right to take fish there in the season thereof, he shall have the right of enjoyment of the fishing place, the right cannot be assigned to another person. *Munson v. Baldwin*, 7 Conn. 168.

A flat within a river, cove, or harbor is a place covered with water too shallow for navigation with vessels ordinarily used for commercial purposes within the meaning of a statute securing to any persons who shall first make a weir for catching fish in any flat within a river, cove, or harbor the uninterrupted enjoyment of it. *Stannard v. Hubbard*, 34 Conn. 370.

A fishing trap which interferes with the common right of fishery as regulated by the laws is a public nuisance, and a private nuisance to one whose lawful location is injured and damaged thereby. *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55.

But where immemorial custom and legislative regulation recognize the erection of fish traps in navigable waters as a reasonable use, so long as they do not obstruct navigation, they are not indictable as a public nuisance. *Boatwright v. Bookman*, Rice L. 447.

Conflict between private rights.

The grantee of a riparian owner's several fishery has the right to use the adjoining shore above low-water mark only so far as necessary and as it has been used in the fishery; and the grantor may make any use thereof which does not injure or impede the use of the fishery. *Hart v. Hill*, 1 Whart. 124.

A right to take fish is a profit à prendre in alieno solo. It requires for its use and enjoyment exclusive occupancy during the period of fishing. It implies the right to fix stakes as capstans for the purpose of drawing the seine and the occupancy of the bank at high tide as well as the space between high and low water mark as far as may be necessary and usual. The grantee in the nature of things must have exclusive possession for the time he is fishing and for that purpose; the grantor for all other times and for all other purposes. *Tincum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 587.

The grant to the copy holder of the fee to his riparian lands with the appurtenant fishery extinguishes the right of the lord of the manor to exercise and grant the privilege of the said fishery, and is the enjoyment thereof to go along the bank of said stream. *Tilbury v. Silva*, L. R. 45 Ch. Div. 98, 63 L. T. N. S. 141.

When the owner of manor and fishery grants the former without an express reservation of the right of drawing his nets on the shore, the notorious, continued exercise of that privilege for more than twenty years will raise a presumption of such reservation grant. *Gray v. Bond*, 2 Brod. & B. 667, 5 J. B. Moore, 537.

The grant of a salmon fishery in Maine wa-

ters refers to the privilege of making grapplings for the weir or the permanent structures fast to the shore. *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400.

Salmon fishings being *inter regalia* of the Crown (Scottish), a prior grant of the shore does not preclude a grant of the said fishery in favor of one having no interest in any adjoining shore; and such subsequent grantee may draw his nets on the banks of the prior grantee's grounds without his consent, that being a pertinent right to the fishery. *Gammell v. Wood & Forest Comrs.* 3 Macq. H. L. Cas. 419.

Whales.

The effect of custom is well illustrated in the whale fishery.

A usage that whales shot in Massachusetts bay with bomb lances, and which when killed sink to the bottom and float in from one to three days thereafter, belong to the person killing them, is reasonable and valid, and entitles such person to recover the value of a whale so killed by him and appropriated by another. *Ghen v. Rich*, 5 Fed. 159.

The captors of a whale who anchor the body and attach to it a piddle and sail in token of ownership may maintain a libel for conversion against the owners of a vessel which found the whale adrift with the cable and anchor attached, and appropriated it. *Bartlett v. Budd*, 1 Low. Dec. 223, Fed. Cas. No. 1,075.

A whale killed and left anchored with marks of appropriation is the property of the captors, and their right is not lost, although it may have dragged the anchor. *Taber v. Jenny*, 1 Sprague, 315, Fed. Cas. No. 13,720.

A usage that a whale belongs to the vessel whose iron first remained in it, provided claim is made before any crew has taken possession of and cut in the animal, will be upheld in favor of a vessel which made fast to a whale, which escaped dragging the iron and line and was captured by the crew of another vessel, who did not know of the first attack and pursuit, but yielded the whale in conformity to such usage to the first pursuers who came up before cutting in. *Swift v. Gifford*, 2 Low. Dec. 110, Fed. Cas. No. 13,696.

By custom a whale belongs to the ship whose crew places the first iron in it. *Bourne v. Ashley*, Fed. Cas. No. 1,698.

In *Littledale v. Scalth*, 1 Taunt. 243, note, an action of trover for a whale, the counsel on both sides agreed the law to be, both by the custom of Greenland and as settled by former determinations at Guildhall, as follows: While the harpoon remains in the fish, and the line continues attached to it, and also continues in the power or management of the striker, the whale is a fast fish; and though during that time struck by a harpooner of another ship, and though she afterwards breaks from the first harpoon, but continues fast to the second, the second harpoon is called a friendly harpoon, and the fish is the property of the first striker. But if the first harpoon is not in the power of the striker the fish is a loose fish, and will become the property of any other person who strikes and obtains it. Approved in *Fennings v. Grenville*, 1 Taunt. 241.

In *Hogarth v. Jackson*, *Moody & M.* 58, 2 Car. & P. 595, the plaintiff gave evidence of the custom of the Greenland fishery varying from that stated in *Littledale v. Scalth*, 1 Taunt. 243, note, and contended that the custom was that the whale continued the property of the first striker, not merely while the harpoon continued in the fish, and the line attached to it, but although it came out of the fish, or had been detached from the line, if the fish were entangled

in the line, and the line continued in the power or management of the striker. This custom was to a certain extent proved in evidence and admitted on the part of the defendants.

In *Skinner v. Chapman*, *Moody & M.* 58, note, tried at York at the Lent assizes 1827, which was an action of trover for a whale, it appeared that while the fish was unquestionably fast the boat of the defendants came and the crew struck the fish with a lance, then afterwards struck it with a harpoon, and finally secured it. The blow with the lance was of no service towards securing the fish, but made it struggle violently, and in the struggle the harpoon of the plaintiffs was disengaged, but it did not clearly appear whether this took place before or after the harpoon was struck by the crew of the defendants. Bayley, J., left it to the jury to say whether the harpoon of the plaintiffs was fast when the harpoon of the defendants was struck; and, if they thought it was not, whether the plaintiffs could have secured the fish if the lance of the defendants had not been struck; saying that he was clearly of opinion that when one party has struck an animal, if another comes unsolicited, does an act which prevents the first striker from killing it, and then kills it himself, he does so, not for his own benefit, but for that of the first striker.

In a later case it is said: "There has prevailed in the northern whale fishery for a considerable period of time—probably ever since the time when these fisheries came into the possession of this country—the rule that the person who first harpoons a fish and retains his hold of that fish until it is finally captured is to be regarded as the proprietor of the fish, although the actual capture and killing of the whale may be accomplished by the assistance of other persons." This is technically known as the "fast and loose" rule, *prima facie* applicable in all that fishery, and was held to apply to a case where the harpooner fastened an inflated seal-skin as a "drag" to the line when the whale had sunk so deep as to involve either the cutting of the line or the sinking of the boat, the whale being held to be still in his possession. *Aberdeen Arctic Co. v. Sutter*, 4 Macq. H. L. Cas. 355, 6 L. T. N. S. 229, 10 Week. Rep. 516.

Interference with captured fish.

STATE V. SHAW has carried the doctrine with reference to captured fish a little further than it has before been carried. In it the fish had not been secured beyond a possibility of escape, which point has been emphasized in most of the other cases. But in it also was an element which does not appear in the other cases. That element consisted in the fact that a private net or trap which already contained the fish was made use of by defendants to secure them. So far as defendants were concerned, therefore, the means of escape were in fact cut off, and defendants were justly held liable for taking the fish from the trap.

Fish are *fera natura* before being caught, but if found in a weir constructed for no other purpose than to catch those named in a grant, they will be the taker's property, even though not included among the fish named. *Treat v. Parsons*, 84 Me. 520, 24 Atl. 946.

There is, however, no liability for merely disturbing a person in the exercise of his right to take fish from the open water.

A riparian proprietor has an exclusive right to stand upon his own soil and cast his lines or nets into the river; but he has no right in the fish until he captures them, and has no cause of action against one who frightens them away. *Slingerland v. International Contracting Co.* 48 App. Div. 215, 60 N. Y. Supp. 12.

In *Stevens v. Jeacocke*, 11 Q. B. 731, 17 L.

J. Q. B. N. S. 163, 12 Jur. 477, the court said: "In an ordinary case of fishing at sea, we are not aware of any [common law] action by one fisherman against another for anticipating him in the capture of fish which had not been appropriated," and where the subject has been regulated by statute, which imposes penalty for infringement, the penalty is confined to that.

Plaintiff was not in possession of a shoal of fish so as to entitle him to maintain trespass against another for taking them, where at the time of the taking he had cast a seine nearly around them, but had left a small space which the seine did not fill up, although he placed his fishermen around the opening and splashed and disturbed the water so that the fish could not escape, and through which opening the defendant's boats were rowed, they casting another seine and taking the fish. *Young v. Hichens*, Davison & M. 592, 6 Q. B. 606.

In a common fishery there can be no property in the fish before they are caught. *Yard v. Carman*, 3 N. J. L. 937.

The fish swimming in the water above as well as below low-water mark are the property of the first taker whether he has or has not an interest in the soil under the water where they are taken. This right, vesting in the public, can be conveyed only by the public or the sovereign power which represents the public, and can be exercised only by such ordinary methods as will not interfere with private rights. *Matthews v. Treat*, 75 Me. 594.

The holder of the title in fee of the land under the waters of a lake does not own the fish therein until they are taken and within his power, where they are able to pass out of the lake by both its inlet and outlet. *People v. Dextater*, 75 Hun, 472, 27 N. Y. Supp. 481.

The construction of a wire fence across the mouth of a cove does not give one such a possession of fish caught and placed in the water therein that he can retain title to them after they are thus restored to their natural elements. *Sollers v. Sollers*, 77 Md. 148, 20 L. R. A. 94, 26 Atl. 188.

In several fishery.

Even in a several or private fishery which is connected with other water, it would seem that there was no title to the fish, and that the remedy for illegal fishing was trespass, and not trover or other possessory action for the fish.

The occupant of a fishery has no property right to the fish therein until reduced to possession. *Bracton*, De Legibus, Lib. II., F. 9.

The owner of the land covered by and surrounding a pond or small lake has the exclusive right of taking fish therefrom, but his title to the fish is no different or greater because such pond has no regular outlet but connects with a stream only during periods of high water, at which times the fish are at liberty to pass from or into such pond from the stream, but his title is the same as if the pond or lake was a bayou having uninterrupted connection with the stream. *People v. Bridges*, 142 Ill. 30, 16 L. R. A. 684, 31 N. E. 115.

Although in *Smith v. Kemp*, 2 Salk. 637, Holt, 322, it is held that the owner of a free fishery hath a property in the fish, and may bring a possessory action for them without making any title.

Under statutory provisions for fish culture ponds are frequently constructed and stocked with fish which are prevented from escaping by netting across the outlet and inlet. As long as the fish are in such ponds the title is in the owner of the pond.

The public does not acquire a license to fish in private waters or unnavigable streams on 60 L. R. A.

private land through the stocking of such streams by a fish commissioner with trout raised at the expense of the state. *Beach v. Morgan*, 67 N. H. 529, 41 Atl. 349; *Albright v. Cortright*, 64 N. J. L. 380, 48 L. R. A. 616, 45 Atl. 634.

One may construct a fishpond without a privilege. *Anonymous*, 6 Mod. 183.

Stocking a great pond with a new species of fish, and closing the outlet with a wire screen establish an occupation of a pond for the purpose of artificially cultivating and maintaining fish. *Com. v. Weatherhead*, 110 Mass. 175.

The absolute ownership created by a statute to encourage the cultivation of useful fishes necessarily exists only where and so long as the propagator or cultivator keeps them within waters over which he has absolute control. *Com. v. Perley*, 130 Mass. 469.

In *Moyle v. Mayle*, Owen, 66, an action against a lessee for waste, the court expressed the opinion that the breaking of a weir or the bank of a fish pond, so that the water and fish ran out, is waste.

A statute for the protection of fish in a private stream, spring, or pond can refer only to such waters as are so far private property as to confine the fish with which it is stocked to waters on land belonging to the person establishing the fishery. *Reynolds v. Com.* 93 Pa. 458; *Benscoter v. Long*, 157 Pa. 208, 27 Atl. 674.

The act of 1871 gives the proprietor of an unnavigable tidal stream where it emptied into salt water, who encloses it for the purpose of cultivating fishes, control of the stream within his own premises and around the mouth of the stream. *Eastham v. Anderson*, 119 Mass. 526.

The lessee of a great pond has an exclusive fishery therein as provided by statute when the pond is "occupied" effectively, although not in the manner or by the appliances expected by the legislature. *Com. v. Weatherhead*, 110 Mass. 175.

A notice adjacent to a private pond or stream forbidding trespassers of every kind in the waters and upon the shores of said pond or stream is not sufficient to give notice that the waters are private and used for the propagation of fish, and which will bring him within a statute punishing a trespasser in such private preserves. *Com. ex rel. Glenburn Fish & Game Protective Asso. v. Singer*, 3 Lack. Legal News, 230.

VII. Rights in lakes and ponds.

In public lakes.

Since the right to fish follows the title to the soil, there is no public fishery in inland lakes where the title is not in the public.

The Crown has no *de jure* right to soil or fisheries in an inland lake like Lough Neagh in Ireland ("the longest inland lake in the United Kingdom and one of the largest in Europe"), and can grant no several fishery therein unless its right to the soil or fisheries is established. *Bristow v. Cormican*, L. R. 3 App. Cas. 641.

The soil of an inland sea, together with the water and right of fishing therein, may be specially appropriated to an individual whether or not he has land adjacent thereto. *Johnston v. Bloomfield*, Ir. Rep. 8 C. L. 68.

The public has not, as of common right, a fishery in large inland lakes in which the tide does not flow or reflow, although they are public navigable waters. *Ibid.*

The public has no right of fishery in the

waters of an inland, nontidal lake. *Pery v. Thornton*, 1r. L. R. 23 Eq. 402.

Riparian owners have a right of fishery in the waters of a nontidal, inland lake. *Ibid.* This lake was 8 miles long and 1 to 4 miles wide.

But where the public has title to the bed of the lake, it also has the right of fishery.

Any citizen of the state has a lawful right, in common with all other citizens, to fish in the waters of Lake Michigan. Such waters are a common fishery, and the right is common to the whole public. *Kuehn v. Milwaukee*, 83 Wis. 583, 18 L. R. A. 553, 53 N. W. 912.

In *Dwelle v. Wilson*, 14 Ohio C. C. 551, it is said that the right of fishing in Lake Erie is public and common to all, in which no man can acquire a right superior to another, except that bounds and stakes once set in such common water cannot be interfered with by another.

And in *Sloan v. Blemliller*, 84 Ohio St. 492, 8 Rep. 566, it is decided that riparian owners do not own the soil or control the fisheries to the center of Lake Erie or Sandusky bay, but that the right of fishery is a public one as much as if those waters were subject to the ebb and flow of tide. The court said that it is obviously just that the fishery in such waters as Lake Erie and its bays should be as free and common as upon tide waters, and alike subject to control by public authority. The reason for regarding the right as public is as great there as in the seas, and we have no hesitation in saying that the right of fishing in these waters is as open to the public as if they were subject to the ebb and flow of the tide.

And that case was followed and approved in *Bodi v. Winous Point Shooting Club*, 57 Ohio St. 226, 48 N. E. 944.

It is common law in Maine that the fish in great ponds may lawfully be taken by anyone who can and does obtain access to the pond in the manner recognized as lawful in the colonial ordinance of 1641, such "great ponds" being natural ponds exceeding 10 acres in extent, and which have not been devoted by the proprietor to the artificial cultivation or maintenance of useful fishes as provided by statute. *Barrows v. McDermott*, 73 Me. 441.

Fishing is lawful and free upon every great pond to all persons who own land adjoining it, or can obtain access thereto without trespass, so far as they do not interfere with the reasonable use of the ponds by others, or with the public right, unless in cases where the legislature have otherwise directed. *West Roxbury v. Stoddard*, 7 Allen, 158.

An owner of a governmental grant of land surrounding a large pond cannot obtain an injunction to restrain an individual from fishing therein. *Percy Summer Club v. Welch*, 66 N. H. 180, 28 Atl. 22.

No notice to the city or town within which the pond lies of an intention to lease the pond, lying wholly within said township, need be given where the application is made by the town and the lease is made to it. *Com. v. Elliot*, 146 Mass. 5, 15 N. E. 81.

The right of hunting and fishing upon a small inland lake, the title to the bed of which is in the state, is in the public, and riparian owners have no greater rights therein than other members of the public. *Ne-pee-nauk Club v. Wilson*, 96 Wis. 290, 71 N. W. 661.

But where waters are private property, although superficially larger than great ponds, the fishery therein is private, and the owner may maintain trespass against one who enters and takes fish therein which the owner propagates. *New England Trout & Salmon Club v. Mather*, 68 Vt. 336, 33 L. R. A. 569, 35 Atl. 323. 60 L. R. A.

The right of fishing in the fresh-water lakes of the state is *prima facie* a private right resting exclusively in the owner of the soil covered by the water, but it is a right subject to a taking by eminent domain for a public use. *State, Albright, Prosecutor, v. Sussex County Lake & Park Commission* (N. J. L.) 53 Atl. 612.

The owner of land entirely surrounding a small lake, including the land covered thereby, is also the owner of the fish in such lake, and has the exclusive right of fishing therein. *Beckman v. Kreamer*, 43 Ill. 447, 92 Am. Dec. 146.

In all the Canadian provinces except Quebec, riparian proprietors have the common-law right of an exclusive fishery in (in fact) nonnavigable lakes, rivers, streams, and waters, the beds of which have been granted to them by the Crown. *Re Provincial Fisheries*, 26 Can. S. C. 444.

Where the bed of a lake or pond is private property the public is presumed to have no right to fish in, and boat upon, the waters. *Lembeck v. Nye*, 47 Ohio St. 336, 8 L. R. A. 578, 24 N. E. 686.

A private lake or pond or waters within the Michigan statute relating to fishing rights of owners of such waters are those which are not navigable, and where the soil under and on their borders is owned exclusively by persons who claim the waters as their private property, and which have no connection with other streams of waters which are public and through which fish may pass. *Re Water Rights*, 5 Det. L. N. No. 14.

Ownership of a part of the shore of a pond will give no right to fish therein, or to license others so to do, if it is the property of another. *Baylor v. Decker*, 133 Pa. 168, 19 Atl. 351.

A pond the bed of which is held in trust for the public use, situated wholly within land conveyed by a governmental grant of township lots, is not "wholly within the control" of the littoral proprietor within the terms of the statute forbidding the taking of fish from waters "wholly within the control of the owner of the land around it." *State v. Welch*, 66 N. H. 178, 28 Atl. 21.

Where it has always been a public custom to take fish from a pond, trespass will not lie against one who, in the absence of any notification to the contrary, may understand that he is licensed thereto, although the pond is in fact private. *Marsh v. Colby*, 39 Mich. 628, 23 Am. Rep. 439.

Each of the owners of adjoining tracts of land over which a reservoir was constructed has only a several right of fishery in the water over his land, and upon the drawing off of the water they do not become tenants in common in the fish, under a statute authorizing them to take the water out of the reservoir once in seven years for the purpose of taking the fish therein, but each is entitled to the fish left on his soil. *Snape v. Dobbs*, 8 J. B. Moore, 23, 1 Bing. 202.

Mill ponds.

A grant of *totam partem meam piscaria*, saving to me and my heirs *stagno molendini mei*, is good. *Rivaux v. Fauch*, 34 Ass. pl. 11.

The owner of a milldam acquires no further right over the lands of an upper proprietor flowed thereby than to maintain the flowage for his water power. *Paine v. Woods*, 108 Mass. 160.

A release and discharge by the owner of a part of the land covered by an artificial pond created by the owner of the remaining land of all claims, easements, privileges, and rights except the use of the water for milling pur-

poses, releases his right to fish in the water over his own land as well as that of the other owner, secured by a former agreement between them conferring upon the person executing the release the use of the water for fishing and boating purposes. *Sidwell v. Greig*, 17 Misc. 165, 40 N. Y. Supp. 968.

A mill owner, being possessed of a mill and having a sole fishery in the waters of the mill, granted the mill with all water necessary for working the same, "except and always reserving the right and privilege of fishing in the waters of the said mill." It was held that this was an exception of the sole fishery, and not a reservation of a new easement. *Paget v. Milles*, 3 Dougl. 43.

The owner of the soil under an unnavigable stream does not create a public fishery by ponding the water. *Waters v. Lilley*, 4 Pick. 145, 16 Am. Dec. 333.

An exclusive fishery in nonnavigable waters has its source in ownership of the soil, and is not devested by a legislative act condemning the land to the use of another for mill purposes. *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133.

But in one case it was held that a lease conveying all the land which might be flowed from a certain dam passes the water and the fish therein as incidents to the principal grant. *Smith v. Miller*, 5 Mason, 191, Fed. Cas. No. 13,080.

Under fish culture acts.

The Massachusetts statute of 1869 for encouraging the cultivation of useful fishes, entirely prohibits fishing for any fish, migratory or not, in a great pond lawfully appropriated, without the riparian proprietor having the right thereto. *Com. v. Vincent*, 108 Mass. 441.

When a statute to encourage the cultivation of useful fish has vested in a lessee all the right of fishery in a public pond subject to the provision that his structure must not debar ingress and egress "at proper times" for the enjoyment of other consistent public rights, the statute affirms what would otherwise have been implied, for the statute could not be construed to secure a right of ingress and egress at unreasonable times. *Ibid.*

The mere fact that one who cultivates fish in a pond does not own the whole pond, and there is nothing to prevent the fish from going over land of another person, will not give strangers a right to fish over the land of the one cultivating the fish, without his permission. *Com. v. Skatt*, 162 Mass. 219, 38 N. E. 409.

A statute to protect private waters "used or improved by the owners or lessees for the propagation of fish or game fish" does not apply to waters into which a few fish have been put without further effort made to effect an increase by artificial and natural means. *Benscoter v. Long*, 157 Pa. 208, 27 Atl. 674.

A stream of water is not within inclosed lands within the meaning of a statute prescribing a penalty for fishing in inclosed grounds where the stream passes between parcels of land owned by different persons, although they are inclosed on every side except on that towards the river. *Lisle v. Brown*, 1 Marsh. 127, 5 Taunt. 440.

One who owns the land surrounding a pond is not entitled to take trout therefrom during the prohibited season, unless the water is so inclosed as to be absolutely within his control, and the free passage of fish to and from it is entirely and rightfully obstructed. *State v. Roberts*, 59 N. H. 484.

Public waters lawfully assigned therefor under 60 L. R. A.

der the Massachusetts law of 1869 for the cultivation of fish, until abandoned, are "a place in which fishes are lawfully artificially cultivated or maintained" within the statute, the question whether any particular means should be taken to carry out that purpose being for the commissioners to determine in framing the lease. *Com. v. Vincent*, 108 Mass. 441.

Under § 9, Mass. act 1869, to encourage the cultivation of useful fishes, the whole of a great pond may be leased subject to the restrictions that the appliances and inclosures for the purpose shall not occupy more than one tenth of the pond, and shall be so placed as not to debar reasonable ingress to and egress from it, and that any public right in the pond, other than the right of fishing, shall not be affected. *Ibid.*

The owner of premises used for fish culture, having stood by and seen large expenditures made in the construction of a meadow stream on adjoining premises for the purpose of fish culture, is not entitled to an injunction restraining diversion on premises of water from a natural water course into a meadow stream, where the water is restored to its natural channel on such adjoining premises in substantially the same condition as to quantity and quality as before such diversion. *Castalia Trout Club Co. v. Castalia Sporting Club*, 8 Ohio C. C. 194.

In the statute providing that "the fish and game warden of the state may take from any of the public waters of the state at any time and in any manner any fish for the purpose of propagating or restocking other waters," other waters means public waters, and not private ponds. *State v. Sears*, 115 Iowa, 28, 87 N. W. 735.

A provision that the lessee of a privilege of cultivating fish in a part of a public pond may occupy the whole of the part so assigned with appliances and inclosures "for the taking" as well as the cultivation of the fish, is valid under a provision of the law authorizing the taking from such waters when and where said lessee pleases. *Com. v. Vincent*, 108 Mass. 441.

VIII. Other rights.

Of municipal corporation.

By the common law of Massachusetts a municipal corporation may appropriate the fish in tidal waters within its limits if they have not been appropriated by the legislature. *Coolidge v. Williams*, 4 Mass. 140.

A legislative grant to a town of soil under tidal waters does not convey by implication the right of fishery to the town as its own property, since the fishery is not an incident to the right of property in the soil, but a public right to take the fish. *Proctor v. Wells*, 103 Mass. 216.

The statute of 1855, chap. 401, regulating fisheries in Taunton great river and dividing the whole fishery into shares that belong to the towns so far as they were valuable to sell at auction, was not affected by the statute of 1856, chap. 50, giving the proper authorities of a city lying on tide water the right to license weirs in the water within its limits so far as they would not encroach upon the rights of others, since the taking of fish by weirs would, of necessity, encroach upon the rights of proprietors under the prior act. *Hathaway v. Thomas*, 16 Gray, 290.

Where a town holds fisheries in trust for the use of its inhabitants, the legislature, upon dividing the territory, may provide that the original town shall continue to hold the fishery in

trust for the inhabitants of both towns. *North Yarmouth v. Skillings*, 45 Me. 133, 71 Am. Dec. 530.

A provision in a statute separating certain territory from a town and creating it into a separate township, that it shall pay its proportion of the debts of the former town and be entitled to its share of the property of said town, does not give it a right to share in the profits of a fishery in the former town. This is upon the ground that the right of fishery is not property. *Randolph v. Braintree*, 4 Mass. 315.

The exercise, by a municipal corporation, for sixty years, of the right of exclusively controlling and regulating fisheries in tidal waters in front of said municipality, establishes a presumption in favor of a grant thereof. *Mannall v. Fisher*, 5 Jur. N. S. 389, 5 C. B. N. S. 856.

A town owning land covered by tide water may regulate the fisheries therein, although the state has also made regulations applicable to the place. *Rogers v. Jones*, 1 Wend. 237, 19 Am. Dec. 493.

Because public fisheries are regulated by statute, this will not prevent the adoption of additional regulations by a town authorized thereto, under its general powers. *Ibid.*

A law authorizing a municipal corporation to direct the use and management, and the times and manner of using, its common lands and meadows and the other commons will support an ordinance restricting the fishery to the inhabitants of the town, and then only during a certain open season. *Ibid.*

A statute giving a town the right to regulate the times and manner of taking fish within its limits, and to sell the right of taking them, applies only to shore used for that purpose, and not to the tidal water adjacent to the shore, although it may be within the limits of the town. *Coolidge v. Williams*, 4 Mass. 140.

A municipal corporation can only assume to regulate a fishery in tidal waters when it can show a right of property to the lands below low-water mark, and such a title can only be supported by grant or long possession to support a presumption of grant; but the fact that such waters are included within its bounds for the purpose of jurisdiction will afford no such presumption. *Palmer v. Hicks*, 6 Johns. 133.

The exclusive right of fishing within its boundaries was granted to the inhabitants of the city of St. John by its charter. *Wilson v. Codyre*, 27 N. B. 820.

Under the Connecticut statute, towns having clams and oysters within their respective limits, or in the waters and flats to them adjoining and belonging, have powers to make by-laws to regulate the fishing of said clams and oysters, and to preserve the same. *Hayden v. Noyes*, 5 Conn. 391.

But the power of a town to regulate fisheries within its limits does not authorize it to prohibit all persons, except its inhabitants, from taking shell fish in a navigable river. *Ibid.*

A town having title to the land under a tidal bay may lease the land for the purpose of cultivation of oysters, and the fact that natural oysters are growing there is immaterial. *Hand v. Newton*, 92 N. Y. 88.

A vote of a township authorizing the staking out of oyster grounds in a designated river includes a cove that is mainly formed by the tide waters of the river. *Gallup v. Tracy*, 25 Conn. 10.

Under the New York act of 1871 the board of audit of the respective towns upon Hempstead and Jamaica bays are vested with the power to award licenses for oyster grants in such bays, and the exercise of their discretion

will not be interfered with by the courts. *Abraham v. Hempstead*, 45 Hun. 272.

A town in its corporate capacity has no authority to transfer the right of taking oysters within its limits. *Pill v. Wareham*, 7 Met. 438.

A grant by the sovereign to the inhabitants of a town of a tract of land including the waters of a tidal bay, "together with all rivers, waters, beaches, creeks, harbors, fishing, and all other franchises to said tract appertaining," will give such inhabitants the exclusive right to the oyster fisheries within the limits of the grant. *Brookhaven v. Strong*, 60 N. Y. 56.

A by-law of a borough prohibiting the taking of oysters from waters within the borough during a certain period of the year is abrogated by a general statute prohibiting the same acts during a period covered by that designated in the by-law, whether passed before or after the making of the by-law. *Southport v. Ogden*, 23 Conn. 123.

A state may grant to a town bordering on tide water the power to grant exclusive privileges to individuals to plant and remove oysters from the waters. *People v. Thompson*, 30 Hun. 457.

The inhabitants of Oyster bay have, under the decisions and statutes of the state of New York, an exclusive right to take oysters in that bay; and the town may enact or enforce ordinances or by-laws for the protection of that right. *The Martha Anne, Olcott*, 18, Fed. Cas. No. 9,146.

Of opposite proprietors.

In a nontidal river flowing between two manors one moiety of the river and fishery belongeth to one lord, and the other moiety to the other. *Royal Fishery of the Banne, Davies*, 149.

A riparian proprietor *ad medium flum* of a private stream has a several fishery in the waters over his own land, and not a common fishery in the stream. *Snape v. Dobbs*, 1 Bing. 202, 8 J. B. Moore, 23.

The common-law presumption is that, where land is possessed by different parties on either side of a river, the right of fishing in the river belongs to each *ad medium flum aquæ*, and, if the lord of the manor has that right, it must be shown. *Lamb v. Newbiggin*, 1 Car. & K. 549.

The opposite proprietors on the banks of a river have a right of salmon fishery in it; the fishery right of each extends to the middle of the stream. *Zetland v. Glover Incorporation of Perth*, L. R. 2 H. L. Sc. App. Cas. 70.

The possessor of a *prima facie* right to fish for salmon on one side of a river has the right of challenging a claim to fish from the opposite side of the river. *Stuart v. McBarnet*, L. R. 1 H. L. Sc. App. Cas. 387.

Where a sand bank has formed in a tidal river, in which the opposite proprietors have a salmon fishery extending to the center of the river, and such sand bank divides the river at low water into two equal streams, a line drawn down the middle of the river at low water, taking the two channels together, is to be regarded as the limit or dividing line between the respective fisheries. *Wadderburn v. Paterson*, 2 Sc. Sess. Cas. 3d series, 902.

The right of fishery possessed by opposite owners on a fresh-water stream, being in the nature of a tenancy in common, the act of either in spreading his nets across the river and using the whole fishery, coupled with non-user of the opposite tenant, is not sufficient to raise a presumption of a grant from the non-using tenant to the other, as such acts are consistent with the nature of the tenancy in the absence of an actual ouster. *Bauman v. Kin-*

sella, 8 Ir. C. L. Rep. 299, Affirmed in 11 Ir. C. L. Rep. 249, as far as this point was involved; but the judgment was reversed on the ground that the court, in setting aside the verdict found for the plaintiff at the trial, and directing a verdict to be entered for the defendant, erred in so directing the verdict, and should have granted a new trial, which was accordingly done.

When, in disposing of its eminent domain, the state grants a private fishery as appurtenant to property on one side of a stream, those who subsequently accept deeds of land on the other side can claim no interest therein. *Nickerson v. Brackett*, 10 Mass. 212.

Contract rights.

An heir who contracts with a widow for her dower right in a fishery which has been set off without specifying the days upon which she can fish is estopped to deny her right to the fishery to avoid compliance with his contract. *Russell v. Russell*, 15 Gray, 159.

A riparian owner who has granted a license to a third person to fish in the water in front of his property is not thereby precluded from acting upon the license of the state to erect a wharf. *Tinicum Fishing Co. v. Carter*, 61 Pa. 29, 100 Am. Dec. 597.

If a town sells a right of fishing to one upon condition that it will sell no other rights, the buyer cannot be compelled to pay the consideration if a sale is afterwards made to a third person. *Taunton v. Caswell*, 4 Pick. 275.

A condition that the vendors of a fishing plant will not become interested in a similar business "upon, along, or off the Atlantic seaboard" refers to all the waters adjacent to the eastern coast of the United States, including all the indentations along the coast. *American Fisheries Co. v. Lennen*, 118 Fed. 869.

A lessee of oyster ground from a town cannot, in the absence of statute authorizing it, recover against the town damages sustained by his alleged eviction due to the construction of a bridge across the leased land with the consent of the town, which assumed the management and control of the structure, since the erection of the bridge is an act of sovereign power. *Hall v. Oyster Bay*, 61 App. Div. 508, 70 N. Y. Supp. 710.

Of cotenants.

If a grant of land is made to certain persons as trustees for settlers on it who have a right to take fish in the adjoining waters, the fishery is common to all the settlers, and cannot be exclusively claimed by the trustees; and regulations may be made for the taking of fish which will exclude the trustees, although they have the title to the land bordering on the fishing place. *Nickerson v. Brackett*, 10 Mass. 212.

One tenant in common in a fishery can maintain an action on the case in the nature of waste against the other only where a permanent injury has been done to the fishery; and hence, he cannot maintain such action against the other for digging a deposit of marl out of a small strip of land on the river bank attached to the fishery, but which did not injure it, his proper remedy being to compel such cotenant to account. *Smith v. Sharpe*, 44 N. C. (Busbee L.) 91.

One of two tenants in common of oyster beds cannot deprive his cotenant of the right to take any of the natural oysters by scattering seed oysters over the premises in such a manner as to make it impossible to remove the natural ones without disturbing those planted. *Mott v. Underwood*, 143 N. Y. 463, 32 L. R. A. 270, 69 L. R. A.

42 N. E. 1048, Affirming 78 Hun, 509, 26 N. Y. Supp. 307.

Conflict with navigation.

The right of navigation, though superior, does not take away the right of fishery in tidal waters. It only limits it so far as it interferes with its own fair, useful, and legitimate exercise. *Post v. Munn*, 4 N. J. L. 61, 7 Am. Dec. 570.

IX. Shell fisheries.

a. Public rights.

For the most part, the shell fisheries exist on land the title to which is in the public, and the public has, therefore, a prima facie right to enjoy them. This right is subject to regulation by the public itself, or to grants from the public which have placed the title to the beds in private ownership. *Peck v. Lockwood*, 5 Day, 22; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Parker v. Cutler Milldam Co.* 20 Me. 353, 37 Am. Dec. 56; *Bagott v. Orr*, 2 Bos. & P. 472; *Paul v. Hazleton*, 37 N. J. L. 106; *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764; *Proctor v. Wells*, 103 Mass. 216.

The title to the oyster beds and oysters in the tide waters of a state is absolutely in the people, and is a property right as complete and perfect as that held to any other property, which the state alone can regulate and dispose of. *State v. Harrub*, 95 Ala. 176, 15 L. R. A. 761, 4 Inters. Com. Rep. 99, 10 So. 752.

The public right of fishery includes the right to take shell fish below high-water mark from natural beds in the tide waters of the state. *Brown v. De Groff*, 50 N. J. L. 409, 14 Atl. 219.

The public right of fishery for shell fish may be exercised at will, except so far as it is restrained by positive law, or by grants from the state to individuals. *Ibid.*

Any inhabitant may take shell fish anywhere in the waters of the state and on the shores below high-water mark as it exists from time to time, in the absence of any express restriction on such right. *Allen v. Allen*, 19 R. I. 114, 30 L. R. A. 497, 32 Atl. 166.

Oysters are a species of fish, and a right to take them in the sea and its arms is included in the right of "fishing therein." *Caswell v. Johnson*, 58 Me. 164.

The public right of fishing throughout Massachusetts, as in other parts of the United States and in Great Britain, includes fishing for shell fish as well as floating or swimming fish. *Com. v. Bailey*, 13 Allen, 542.

The right of taking clams from the flats under tide waters is a public right, and is not impaired by a grant of the flats to a town, or from the town to individuals. *Proctor v. Wells*, 103 Mass. 216.

Where the title to the bed of navigable streams is absolutely in the state, the fishing for oysters in such navigable waters is a right common to all citizens of the state, which may be exercised by them at will, except so far as it is restrained by positive law. *Paul v. Hazleton*, 37 N. J. L. 106.

The prima facie right of the public to take shell fish between high and low tide remains during reflux of the tide. *Peck v. Lockwood*, 5 Day, 28.

The general right of fishery in public waters includes all fishing, even the digging of clams from the flats. *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

When the legislature provides for a private ownership in oyster beds, there ceases to be any public or common right to take oysters from such beds. *Com. v. Manimon*, 136 Mass. 456.

And one has no private right to dig quahaugs where his enjoyment is as one of the public in pursuance of a common right. *Ibid.*

The rights of the public to natural oyster beds in tidal waters cannot be destroyed under guise of regulating and encouraging fisheries, without right of hearing and appeal. *Averill v. Hull*, 37 Conn. 320.

But the right of the public to take shell fish from the shore does not include the right to take the soil or dead shell fish imbedded therein. *Porter v. Shehan*, 7 Gray, 435.

Protection and regulation.

A state may pass and enforce regulations for the preservation of oysters, although it may have no absolute right of property therein. *Kean v. Rice*, 12 Serg. & R. 203.

The legislature has the undoubted right to regulate oyster fisheries upon tidal waters, whether the oysters grow there naturally or are planted upon the land belonging to the state lying under the water. *Smith v. Levinus*, 8 N. Y. 472.

The act entitled "An Act for the Preservation of Oysters and Other Shell Fish," which provides that no oysters shall be taken from the common fisheries between specified dates, and no person shall take from a public oyster bed more than 8 bushels in twenty-four hours, nor shall plant on a private bed oysters taken from a public bed, and prohibits the use of dredges in taking oysters; and which also provides for the appointment of commissioners for the leasing of land covered by public waters for private oyster beds,—is not repugnant to a Constitutional provision that "the people shall continue to enjoy and freely exercise all the rights of fishery and the privileges of the shore to which they have been heretofore entitled under the charter and the usages of this state." The object of this law is not to benefit the lessees of oyster beds, but, by holding out motives to them and encouraging them in the cultivation of oysters, to secure to the public a more abundant supply. *State v. Cozzens*, 2 R. I. 561.

A statute prohibiting persons from wilfully taking, destroying, or spoiling a spawn, fry, or brood of sea fish in any weir or other engine or device, whatsoever, seems not to comprehend shell fish; and, if it does, it means a taking for destruction, and not a taking of oyster spawn for the purpose of removing it to beds, for further growth and maturity to make it marketable. *Bridger v. Richardson*, 2 Maule & S. 568.

The legislature has power to prescribe regulations for the taking of clams from their beds, with a penalty for their violation, notwithstanding the colony ordinance provided free fishing for all the inhabitants of the commonwealth. *Com. v. Bailey*, 13 Allen, 541.

The state may impose such limitations and restrictions upon the mode and manner of taking fish, oysters, etc., in the navigable waters of the state as it may deem wise and just and conducive to the public good. *State v. Conner*, 107 N. C. 931, 11 S. E. 992.

In *State v. Insley*, 64 Md. 28, 20 Atl. 1031, the court, in refusing to pass on the constitutionality of a statute for the protection of oysters, said: We have no doubt whatever of the right and power of a state to pass a law that, if properly executed, would perfectly protect our oyster interest. In framing such a law, however, care should be taken that no part of it interfere with the paramount right of navigation and interstate commerce, as control over those subjects has been delegated to the general government.

Where a statute authorizing a town to des-

ignate places within its limits for oyster planting refers to a line between the navigable waters of two towns as a line running southerly, it is to be taken as meaning due south, in the absence of word or monument defecting the line either east or west. *Rowe v. Smith*, 48 Conn. 444.

Where a statute gave exclusive control of all shell fisheries lying south of high-water mark in Long Island sound to the state commissioners of shell fisheries, another section of the same statute providing for the appointment of a committee to designate natural oyster beds in a town did not empower the committee to designate beds in waters lying south of high-water mark. *Re Darien Oyster Ground Committee*, 52 Conn. 61.

A vessel cannot be seized and condemned for being used to interfere with oysters or shell fish belonging to another person, without giving the owner a jury trial, under the New York Constitution. *Colon v. Lisk*, 153 N. Y. 188, 47 N. E. 302, Affirming 13 App. Div. 195, 48 N. Y. Supp. 364.

The forfeiture and sale upon nonpayment of the fine imposed, of a vessel taken while dredging without a license for oysters in violation of the Maryland act of 1880, chap. 198, does not deprive the owner of his property without due process of law contrary to the 14th Amendment of the United States Constitution because no notice was given to him, where the act confers a right of appeal from the decree of forfeiture, and since seizure is constructive notice to everyone having any interest in the thing seized. *The Ann*, 8 Fed. 923.

A statute protecting the rights of persons who have planted oysters upon state land between certain specified dates is not a general law. *State v. Post*, 55 N. J. L. 264, 26 Atl. 683.

Oysters taken by one in the exercise of his common right of free fishery thereby become the property of the taker; and the legislature uses a reasonable discretion when it grants a license to use portions of the state lands covered by navigable waters as places of deposit, where the title and possession of the property thus acquired may be continued and protected, the public right of fishery suffering no derogation thereby. *Phipps v. State*, 22 Md. 380, 85 Am. Dec. 654.

Licenses.

It has been held that the right to take oysters in the public waters of a state is a privilege which a state cannot bestow as it pleases, but is a right belonging to all citizens. *Gustafson v. State*, 40 Tex. Crim. Rep. 67, 43 L. R. A. 615, 45 S. W. 717, 48 S. W. 518.

But the custom is quite general for the various state legislatures, for the protection and cultivation of oysters, to grant licenses of limited tracts of tide land to persons who will engage in the business of oyster culture.

But a statute authorizing the granting of a license for taking oysters in public waters is altogether invalid when it limits the privilege to taxpayers, and cannot be enforced to the extent of requiring a license from those within its benefits and privileges. *Ibid.*

A statute authorizing the location and appropriation within the waters of the state of limited areas for the purpose of depositing and bedding oysters is a mere license to use the state lands covered by navigable waters as places of deposit for the protection of private property in oysters taken in the exercise of the common right of free fishery; and, although several and exclusive privileges are thereby contemplated, it is not unconstitutional as confer-

ring such privileges in derogation of the common right of free fishery. *Phipps v. State*, 22 Md. 380, 85 Am. Dec. 634. (It is suggested in the opinion that, at most, the argument that the common right to fish for and take them is impaired by the artificial deposits here authorized would hold good only on proof that a natural bed or deposit is appropriated to artificial uses.)

A licensee of the statutory right to plant, grow, and dig oysters is entitled to the exclusive use of the flats described in his lease to the exclusion of any use of the land by another for the purpose of digging quahaugs, thereby necessarily disturbing the oysters. *Griffith v. Savary*, 181 Mass. 227, 68 N. E. 426.

The express limitation of areas of 5 acres for the planting of oysters, contained in the Maryland statutes, was intended to limit individual holdings, and cannot be indirectly evaded by procuring others to locate them in their own names and then transfer them so as to aggregate in the same person more lots than any one person is in terms allowed to hold. *Hess v. Muir*, 65 Md. 586, 5 Atl. 540, 6 Atl. 673.

No irrevocable contract can be construed from a grant of an exclusive right of a location for an oyster bed so long as grantee shall pay a certain amount annually, but subject to a right of revocation by the general assembly. *Woonum v. Mills*, 17 Va. L. J. 195.

An implied license from the state to use land under water for oyster cultivation is subject to repeal, and is revoked by notice served upon the licensee by one to whom the state has ceded all its rights. *Lowndes v. Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758.

One having the exclusive right to the oyster grounds opposite his property cannot insist that a statute providing for the licensing of such rights is unconstitutional, after he has taken advantage of it. *Purcell v. Conrad*, 84 Va. 557, 5 S. E. 545.

Where one relies upon an implied license to plant and cultivate oyster beds to the exclusion of the owner, he must show his continued occupation of such lands, and cannot abandon them and afterwards exclude the owner simply because at one time he may have had a right thereto. *Riddell v. Brown*, 25 Wash. 514, 65 Pac. 758.

The right of planting oysters on state land for the exclusive use of the one planting them is an exclusive privilege within the meaning of a constitutional provision forbidding the granting of such privileges by private or special laws. *State v. Post*, 55 N. J. L. 264, 26 Atl. 683.

One who knowingly takes oysters from a tract which has been leased from the state is guilty of a misdemeanor, even though the statute declares that all natural oyster beds shall remain open to the public, and the tract was a natural oyster bed in fact, where the statute also declares that the designations on a certain map as to which tracts are natural oyster beds and which are not shall be conclusive evidence. *Fraser v. State*, 112 Ga. 13, 37 S. E. 114.

One who stakes out land under the public waters of the state for the purpose of raising oysters thereon does not acquire, by virtue of N. Y. Laws 1866, chap. 404, any interest in the land independent of its occupation for the purpose of oyster planting, and by parting with his ownership of the oysters he surrenders all right to the possession of the land. *Housman v. Welr*, 15 Abb. N. C. 415.

The restricted privilege of locating oyster lots, given by the Maryland statute, has no 60 L. R. A.

element of a grant by patent, but is simply a license, revocable at the pleasure of the legislature, and not inheritable; nor is it assignable, since no power of assignment is given by statute, and, if permitted, it would defeat the purpose of the act to restrict individual holdings, and would increase the facilities of nonresidents to get possession of oyster lots in contravention of the statute. *Hess v. Muir*, 65 Md. 586, 5 Atl. 540, 6 Atl. 673.

In the statute of Texas, passed for the preservation of oysters and oyster beds, and for protecting the rights of persons to the same, the words, "stream made navigable by the laws of the state or of the United States," do not refer to legislative enactments with reference to particular waters, but to the body of the law as declared both by statute and the decisions of the courts. *Jones v. Johnson*, 6 Tex. Civ. App. 262, 25 S. W. 650.

A statute providing for the ascertaining and location of natural oyster beds by a committee did not authorize the committee to include beds which had previously been designated to individuals pursuant to the provisions of prior statutes. *Re Clinton Oyster Ground Committee*, 52 Conn. 5.

The act for the preservation of oysters and other shell fish, requiring that one part of the lease executed by the lessee and the commissioners shall be transmitted forthwith to the general treasurer, is directory to the commissioners, and a compliance therewith need not be proved by the state in an indictment for stealing oysters from a private bed granted by such lease. *State v. Sutton*, 2 R. I. 434.

Under a statute authorizing the staking out of oyster grounds with the consent of a committee appointed for that purpose, the consent of a majority of the committee is sufficient; and where the licensee is a member of the committee, the consent of a majority of the remaining members is sufficient. *Gallup v. Tracy*, 25 Conn. 10.

It is not necessary that the committee be actually assembled when it grants the license, but a majority of the committee may act at any time. *Ibid*.

The assignment of a lease of a private oyster fishery in the public waters of the state, given by the commissioners under the "Act for the Preservation of Oysters and Other Shell Fish within This State," if made with the assent of the commissioners, will pass to the assignee the legal title of such fishery. *State v. Sutton*, 2 R. I. 434.

Under a statute giving a committee power to designate places for planting oysters within the navigable waters of a town, the committee's jurisdiction is not limited to the territorial proprietorship of the town, which extends only to high-water mark, except in case of bays and harbors, but extends to the state boundary by meridional lines from the termini of the lines separating the territorial lines of the towns. *Rowe v. Smith*, 48 Conn. 444.

Where a committee designated ground for oyster cultivation in waters which were not included in a statute authorizing the committee to designate oyster grounds in a specified portion of the navigable waters of the town, such designation was validated by a subsequent statute confirming and validating all designations made in the navigable waters of any town by its committee. *State v. Bassett*, 64 Conn. 217, 29 Atl. 471.

A statute regulating the proceedings for the leasing of territory upon which to plant and cultivate oysters does not confer upon any private citizen the right to object to the granting of a lease on the ground that the applicant has not taken the proper preliminary steps for ob-

taining the same; neither does it confer upon the board of commissioners who are given the power to lease such territory any jurisdiction over questions involving title thereto. *Parsons v. Frey*, 115 Ga. 955, 42 S. E. 234.

The purpose of a statute which provides that the oysters planted or growing on any private oyster ground under lease shall, during the continuance of the lease, be the private personal property of the lessee, is to make it clear that the oysters are personal property, and to throw over them the protection which is appropriate to such property. It was not intended to restrict the right of disposing of them by contract or otherwise. At most it merely confines the legal title in the oysters to the lessee while they are in his grounds. It does not prevent his disposing of rights which can be protected in equity. *New England Oyster Co. v. McGarvey*, 12 R. I. 385.

A constitutional provision that "the people shall continue to enjoy and exercise freely all the rights of fishery and the privilege of the shore to which they have been heretofore entitled under the charter and usages of the state," does not confine the fisheries so exclusively to the people of the state that lessees of private oyster beds are prohibited from giving persons other than citizens of Rhode Island an interest in the oysters taken in return for investment of capital. *Ibid.*

A person who holds a valid lease from the state to lands on which he has planted oyster beds may enjoin others from trespassing thereon and taking oysters therefrom. *Jones v. Oemler*, 110 Ga. 202, 35 S. E. 375.

One who has planted oysters in tide water under a license issued under provisions of the statute has no right to remove them after he has neglected to obtain a renewal, and a license for the particular bed in which they lie has been issued to another. *Keene v. Gifford*, 158 Mass. 120, 82 N. E. 946.

Natural beds.

The statutes providing for leases usually except natural beds, leaving them for the benefit of the general public, and confining private enterprise to localities where oysters do not naturally exist.

A natural, as distinguished from an artificial, oyster bed, is one not planted by man, and is any shoal, reef, or bottom where oysters are to be found growing, not sparsely or at intervals, but in a mass, or stratum, and in sufficient quantities to be valuable to the public. *State v. Willis*, 104 N. C. 769, 10 S. E. 764.

One planting oysters in navigable waters where common beds of oysters exist has no cause of action against another for taking oysters from the beds. *Shepard v. Leverson*, 2 N. J. L. 391.

Those parts of bottoms that have always been regarded and recognized as natural rock, and have been used by the people as such, will continue to be so regarded until they shall become worthless to the public, or shall be declared by the legislature as open for planting. *Woonum v. Mills*, 17 Va. L. J. 195.

The designation by an authorized committee of a place for planting oysters is invalid where such committee, in violation of the statute, designate a natural oyster bed; and persons, gathering oysters therein will not be subjected to the forfeitures imposed by the statute upon persons taking oysters from a place designated by the committee. *Averill v. Hull*, 37 Conn. 320.

By the statute for the preservation of clams and oysters, the owners of flats and coves only within low-water mark may stake out beds and 60 L. R. A.

plant shell fish provided natural beds are not inclosed nor navigation interfered with; hence, an oyster planter on staked-out flats beyond low-water mark where there are natural beds cannot prevent a stranger from taking oysters therefrom. *Townsend v. Brown*, 24 N. J. L. 80.

Ground will not be treated as the *locus* of a shell fishery when the alleged fishery has ceased to exist, or becomes of no value. *Clark v. Providence*, 16 R. I. 337, 1 L. R. A. 725, 15 Atl. 763.

In a direct attack on the designation of land for oyster culture, it may be shown that the land designated was a natural oyster bed, although it was not mentioned in the statute determining and enumerating the natural oyster beds of the state, such statute having been adopted subsequent to the designation of the land. *Cook v. Raymond*, 66 Conn. 285, 33 Atl. 1006. The case is distinguishable from *State v. Nash*, 62 Conn. 47, 25 Atl. 451, as that case was a collateral, and not a direct, attack upon the designation, and for the further reason that the designation was made after the adoption of the statute.

The fact that oysters grow naturally at the mouth of a stream emptying into tide water, and upon the harder portions of the bed of a pond formed at the outlet, and have immemorially existed in great abundance and been openly and constantly taken by the public, furnishes very high, if not conclusive, evidence of the existence of a natural oyster bed, and of a public and common right to the enjoyment of it as such. *Gulf Pond Oyster Co. v. Baldwin*, 42 Conn. 255.

One digging clams from a natural clam bed in navigable tide waters beyond high-water mark, and acting in good faith, who incidentally disturbs and fatally injures oysters planted there by another who has no state grant to the bed, is not liable to the oyster planter for the damage suffered by him. *Brown v. De Groff*, 50 N. J. L. 409, 14 Atl. 219.

A statute validating and confirming all previous designations of places for planting oysters made by authority of the town does not validate a previous designation of an unauthorized place, such as a natural oyster bed. *Clinton v. Bacon*, 58 Conn. 508, 16 Atl. 548.

A statute providing that the designation of oyster grounds shall be valid, although such places may have been natural oyster beds, if in other respects valid, applies to a designation made without authority, where such unauthorized designation was afterwards validated by legislative enactment. *State v. Bassett*, 64 Conn. 217, 29 Atl. 471.

When lessees of tracts of navigable tide waters duly staked off to them under the terms of a statute plant oysters therein, and there are at the time a few other oysters naturally growing there, a trespasser thereon cannot escape liability upon the principle that by mixing the planted with the natural oysters there was an abandonment of property in them,—at least so as to require proof that those taken were the planted ones, to justify a recovery. *Wooley v. Campbell*, 37 N. J. L. 163.

Though planting oysters in a public clam fishery constitutes a nuisance, it cannot be abated summarily by one injured thereby, but without special private injuries. *Brown v. De Groff*, 50 N. J. L. 409, 14 Atl. 219.

Where the natural oyster beds of the state had been determined and enumerated in a statute enacted for that purpose, a person charged with having taken oysters from a bed designated for oyster planting cannot defend on the ground that the bed was a natural oyster bed, and that, therefore, the designation was invalid, unless such place was one of those men-

tioned in such statute enumerating the natural oyster beds. *State v. Naah*, 62 Conn. 47, 25 Atl. 451.

b. Private rights.

Of riparian owner.

The right to an oyster fishery depends on the right to the soil upon which the oysters are planted and grown. *Den ex dem. Russell v. Jersey Co.* 15 How. 432, 14 L. ed. 760.

Where a grant of land adjoining an arm of the sea includes that lying between high and low water mark, the grantee has the exclusive right to take oysters therefrom, and another removing them is liable as a trespasser. *McKenzie v. Hulet*, 4 N. C. (Term. Rep.) 181.

But ownership of flats by tidal waters does not include a shell fishery thereon which cannot be interfered with, since the fishery yields when the flats are used for a wharf. *Lakeman v. Burnham*, 7 Gray, 437; *Weston v. Sampson*, 8 Cush. 347, 54 Am. Dec. 764.

The owner of land adjoining a tidal river may have by prescription, as appurtenant to the land, an exclusive right of dredging for oysters. *Hayes v. Bridges, Ridgeway L. & S.* 390.

The bedding of oysters is not an "improvement" within the contemplation of the act of 1862 giving riparian owners the exclusive right to make improvements in the water in front of their own land, but the improvements thereby intended are such structural ones, like wharfs, piers, and landings, as are subservient to the land, and while used in connection therewith enhance its value or enlarge its commercial or agricultural facilities or other utility to the extent to which the land alone would not be capable. *Hess v. Muir*, 65 Md. 586, 5 Atl. 540, 6 Atl. 673.

One who plants oysters in tidal water opposite another's land cannot maintain trespass against the latter for taking them away. *Brinckerhoff v. Starkins*, 11 Barb. 248.

Entering upon land under claim of right to take clams thereon will establish no right as against the owner of the upland, since it is not an inconsistent user. *Peck v. Lockwood*, 5 Day, 28.

Lands bounded on navigable waters in New Jersey extend to the edge of the water, namely to low-water mark when the tide is at ebb and to high-water mark when it is at flood, and no farther; hence, a riparian owner, staking out in front of his land a bed in a navigable river beyond low-water mark, and planting oysters therein, cannot recover of a poacher thereon. *Arnold v. Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356.

But later it was held that one who has staked off an area of navigable waters adjoining his uplands for the purpose of planting oysters therein acquires an exclusive right, and may maintain trespass against another who invades the territory thus pre-empted and plants oysters therein in advance of him, which the trespasser afterwards gathers for himself. *Paul v. Hazleton*, 37 N. J. L. 106.

Under Tex. act March 8, 1879, for the preservation of oysters and oyster beds, and for protecting the rights of persons to the same, etc., the owner of land bordering on any unnavigable creek, lake, bayou, or cove is also the true and legal owner of the oyster beds along the entire front of his land, from low-water mark to the center of such creek, lake, bayou, or cove; or, if the lake, bayou, or cove, upon which his land borders, is public, navigable water, then the owner of the land is the owner of the oyster beds along the entire front of the land, and extending out from low-water mark 60 L. R. A.

into such lake, bayou, or cove, for the distance of 100 yards. *Holt v. Follett*, 65 Tex. 530.

So long as the owner of the land along a navigable stream is content with what the law gives him by virtue of his riparian ownership, he is protected by the imaginary line running at a distance of 100 yards from low-water mark along the entire front of his shore; and, to constitute one a trespasser in the meaning of the law, who, without the consent of the owner of the land, takes oysters within such space, it is not necessary that the owner shall have first designated it by staking it off. The provision of such act which requires one's location to be designated by stakes planted at its four corners, applies only to those cases where the riparian owner, or other person, wishes to secure a right beyond these limits. *Ibid.*

Riparian owners into whose land a creek makes, are entitled to the exclusive use of such creek for oyster beds on its becoming less than 100 yards in width at its mouth at low water, as against a locator of oyster beds therein by virtue of the general statutory right of citizens of the state while it exceeded that width, under a provision of the statute giving an exclusive right to riparian owners for oyster-bed purposes in case of a creek making into their land of less than that width or upon its becoming less; since the prior location in such a creek is subject to the contingency that the mouth of the creek might thereafter become less than the specified width. *Powell v. Wilson*, 65 Md. 347, 37 Atl. 216.

A contract to sell land lying on the side of a river in which are oyster beds must be subject to the law of the state as to the ownership of the beds; and the fact that they are, under the law of the state, leased by the state to third persons, will not absolve the purchaser from complying with his contract. *Bigler v. Morgan*, 77 N. Y. 312.

In *Rogers v. Allen*, 1 Campb. 309, in discussing the claim that a fishery must be entire, and that, if the public has a right to fish for all kinds of floating fish the lord of the manor cannot claim the right of an oyster fishery, *Heath, J.*, said: "Part of a fishery may be abandoned, and another part of more value may be preserved. The public may be entitled to catch floating fish in the river; but it by no means follows that they are justified in dredging for oysters, which may still remain private property."

A devise of a privilege of "digging 10 barrels of clams yearly at the southern end of my farm, to a person, his heirs and assigns," creates an assignable estate of inheritance. *Lakeman v. Butler*, 17 Pick. 436, 28 Am. Dec. 811.

By planting and cultivation.

Oysters are not *feræ naturæ*, as they do not stray away nor require taming; hence, private ownership in them may be acquired. *State v. Taylor*, 27 N. J. L. 117, 72 Am. Dec. 347.

An individual may be the owner of oysters in tide waters if they were planted by him or his grantors in a bed clearly marked out and defined, where no oysters were growing spontaneously at the time. *People v. Hazen*, 121 N. Y. 313, 24 N. E. 484; *Lowndes v. Dickerson*, 34 Barb. 586.

But a person creating a private oyster bed in tidal waters can have no property therein if located upon land the title to which is in another. *Ibid.*

One who stakes out and plants an oyster bed in tide water, where no oysters were naturally growing, and takes measures to save and protect the young oysters, has the title to them, and may maintain an action against one who

takes them away, and converts them to his own use. *McCarty v. Holman*, 22 Hun, 53.

In Texas one claiming oysters as his property because planted by him must have complied with all the regulations of the statute of the state regulating the acquisition of private right to oysters in navigable waters. It is not sufficient for him merely to file in the record of deed a notice of his claim to the body of water where the oysters were planted. *Jones v. Johnson*, 6 Tex. Civ. App. 262, 25 S. W. 650.

Oysters planted where they did not naturally grow, in navigable waters, in a place staked off, so that there is no interference with navigation or common rights of public fishing, remain private property, and do not constitute a special appropriation of the waters; hence they are the subject of larceny, and one indicted for stealing them cannot justify the asportation on the ground that they constituted a public nuisance and encroachment upon the common rights. *State v. Taylor*, 27 N. J. L. 117, 72 Am. Dec. 347.

The owner of oysters planted in an oyster lot in a creek under a location thereof which is thereafter defeated by the subsequent narrowing of the creek so as to give riparian owners the exclusive right to its use under the terms of the statute is entitled to remove them within a reasonable time. *Powell v. Wilson*, 85 Md. 347, 37 Atl. 218.

One who sets up claim to an exclusive oyster bed in tidal waters, founded upon staking it off, planting, and sometimes taking oysters there, if otherwise capable of private property, does not prove a possession so complete, so exclusive, or so continued, as to establish a right against those having an equal claim with himself. *Arnold v. Mundy*, 6 N. J. L. 4, 10 Am. Dec. 356.

A riparian owner on both sides of a navigable creek cannot, under the act of March 9, 1855, acquire exclusive rights in the bed thereof by merely staking it off; he must plant, or at least intend forthwith to plant, oysters or clams therein. *Birdsall v. Rose*, 46 N. J. L. 361.

Under the act for the preservation of oysters and other shell fish in the state, the lessees of oyster fisheries in public waters are obliged to set up stakes, buoys, and marks only in case the commissioners require this to be done. *State v. Sutton*, 2 R. I. 434.

A person in possession of oyster grounds in public waters under claim of right cannot be ousted therefrom on the suit of one who can show no right acquired under the formalities of the law by virtue of which he could have acquired such right, although the statutory rental to the state had been paid. *West v. Adams*, 2 Va. Dec. 517, 27 S. E. 496.

Prescriptive rights.

Exclusive right to take oysters from a navigable bay cannot be acquired by prescription, although the state may grant such right. *Jones v. Johnson*, 6 Tex. Civ. App. 262, 25 S. W. 650.

The state's title to bottoms cannot be disturbed by a use thereof for oyster beds, as time runs not against the state. *Hurst v. Dulany*, 84 Va. 701, 5 S. E. 802.

No title can be acquired by an individual to natural oyster beds located in the waters on the Gulf of Mexico within the jurisdiction of Louisiana, since their sale is forbidden by La. act 110 of 1892, declaring them the property of the state, and permitting them to be used as a common by its citizens. *Louisiana Land & Fisheries Co. v. Gasquet*, 45 La. Ann. 759, 13 So. 171.

A prescriptive right to take clams from certain flats cannot be established by evidence that the claimant has been accustomed to do 60 L. R. A.

so for the preceding sixty years at his free will and pleasure; and that privilege may be barred at any time by the state. *Moulton v. Libbey*, 37 Me. 472, 59 Am. Dec. 57.

The presumption of a grant from the Crown of a several oyster fishery in a tidal river, arising from user, is not affected by evidence that the inhabitants of a borough had from time immemorial exercised the right of dredging for oysters in the river during lent. *Saltsash v. Goodman*, L. R. 7 Q. B. Div. 108.

Where the user of a several oyster fishery in a tidal river is sufficient to raise a presumption of a grant from the Crown, the fact that the inhabitants of a borough from time immemorial had exercised the privilege of dredging for oysters at the same place during lent will not raise a presumption that this period was excepted from the grant. *Ibid.*

Where a committee authorized to designate for oyster planting places other than natural oyster beds, designated as such place a natural oyster bed, the grantee taking possession thereunder cannot acquire any rights therein by adverse possession, as the title to the natural oyster beds is in the state, against which title by adverse possession cannot be acquired. *Clinton v. Bacon*, 56 Conn. 508, 16 Atl. 548.

Rights, if any, acquired by a citizen of the state of New York under the common law by long possession and user of an oyster bed in any of the common or public lands of the state are yielded up by removal from the state. *Huntington v. Lowndes*, 40 Fed. 625.

A custom among oyster men to assert or acknowledge between themselves an exclusive right to the possession of land under public waters staked out for the planting of oysters cannot, in the absence of color of title, give rise to any prescriptive right as against the state, or create or vest any title in, or right of possession to, the land in any person. *Housman v. Weir*, 15 Abb. N. C. 415.

Interference with.

Oysters planted by an individual in a bed clearly designated and marked out in tidal waters which are free for all inhabitants of the state belong to him, and he may maintain trespass against another for removing them. But, if oysters previously existed there in their natural state, he cannot deprive the public of the right to take them. *Decker v. Fisher*, 4 Barb. 582.

One depositing oyster shells from which by natural growth oysters develop in the course of about two years, in navigable tide waters beyond high-water mark, where natural beds do not exist, may maintain an action against a stranger who removes and converts the matured oysters. *Grace v. Willets*, 50 N. J. L. 414, 14 Atl. 559.

Although the act of a person in planting oysters in tide water is criminal under the laws of the state, it does not authorize a third person to confiscate them. *Sutter v. Van Derveer*, 47 Hun, 366.

When one has planted clams in tidal waters in a designated place where they do not naturally grow, the law does not impute an abandonment thereof; and when they do not interfere with the public right of fishery one who wantonly and deliberately takes them under color of his right to participate in a common fishery in those waters, and knowing of their private ownership, is liable in trespass. *Fleet v. Hegeman*, 14 Wend. 42.

One who, in digging quahaugs upon a licensed oyster bed without the consent of the licensee, destroys oysters, is liable to indictment under the Massachusetts statutes, although he has no

intent to take the oysters. *Com. v. Manlmon*, 186 Mass. 456.

While one who plants his clams on a bed previously leased to another might have been compelled to remove them, and the lessee might have removed them himself, the fact that they were placed on the *locus* by one who neither knew of the lease nor was chargeable with any knowledge of it by reason of absence of buoys or stakes does not forfeit his property in the shell fish, nor justify the lessee in appropriating the clams to his own use. *Davis v. Davis*, 72 App. Div. 593, 76 N. Y. Supp. 539.

Where one statute provided that the taking and carrying away of oysters should be larceny, under all circumstances in which the taking and carrying away of any other personal property would be larceny, and shall be punished accordingly; and an amendment provided that "every person who shall wrongfully take and carry away oysters from a private oyster bed shall for the first offense be fined \$50, and be imprisoned for thirty days, and for any subsequent offense shall be fined \$100, and be imprisoned for six months,—two distinct offenses were created by such statutes, by the former the offense of larceny, and by the latter the offense of wrongfully taking. *State v. Tayler*, 13 R. I. 541.

Where a person is indicted for stealing oysters from a private oyster bed under the act for the preservation of oysters and other shell fish in the state, it is no defense, where it appears that the oysters were taken from a private bed, that the place from which the oysters were taken had been used as a common and public fishery; and it is no defense that the place where the private bed was located had been a common quahaug fishery, and this fishery was interrupted and destroyed by the planting of the oyster bed. *State v. Cozzens*, 2 R. I. 561.

A right of action against a trespasser for taking oysters from a planting ground staked out by the plaintiff is not abated by the repeal, pending the action, of the statute in pursuance of which the planting ground was staked out. *Gallup v. Tracy*, 25 Conn. 10.

Equity will restrain concerted action to appropriate the benefits of oyster fields during the pendency of a suit to determine whether the public have a right of fishery upon oyster grounds alleged to be private property, when it appears that, if private property is destroyed, no adequate remedy can be obtained, owing to the pecuniary irresponsibility of the defendants, or that a multiplicity of suits would have to be brought, owing to the large number of defendants. *Britton v. Hill*, 27 N. J. Eq. 389.

The joint lessees of adjoining tracts of navigable tide waters, who have by agreement planted them in common with oysters, may properly join in prosecuting for damages a trespasser thereon. *Wooley v. Campbell*, 37 N. J. L. 163.

The right to proceed criminally against one taking clams from a private clam bed in public waters, under a section of the statute forbidding such act, is not affected by the alternate enactment and repeal of another section authorizing the granting of licenses to make oyster and clam beds in the waters of the state, when the latest repealing act on the subject applies only to oyster beds, so that the maintenance of private clam beds may be regarded as lawful. *State v. Goulding*, 131 N. C. 715, 42 S. E. 563.

The assignee, from the state, of oyster beds may maintain an action of unlawful entry and detainer against one depriving him thereof. *Power v. Taxewell*, 25 Gratt. 786.

The lord of the manor cannot maintain an

equitable action against the lord of another manor to quiet his right to an oyster fishery until such right shall have been first determined at law, as he is not entitled to an equitable remedy where there is a controversy with but one person, which may be determined in a single action at law. *Tenham v. Herbert*, 2 Atk. 483.

An action by the owner lies against one who converts to his own use oysters by dredging through the bed lying under navigable tide waters upon grounds so marked that he knows they are held as private property. *Metzger v. Post*, 44 N. J. L. 74, 43 Am. Rep. 841.

An indictment for wrongfully taking oysters, under R. I. Pub. Laws, chap. 71, § 1, is sufficient where it charges the offense in the words of the statute, designating the bed as the bed of the lessee, who is named. It is not necessary to allege the ownership of the oysters, for it matters not whose they were, so long as they were wrongfully taken. Nor is it material that another was proved to have been interested with the lessee, for, as ownership was not alleged, there could be no variance by reason of such proof. *State v. Tayler*, 13 R. I. 541.

A witness cannot give his opinion as to the damages caused by dredging across a bed planted with young oysters. *Newton v. Fordham*, 7 Hun, 58.

X. Estimation.

The forfeiture of a several fishery is not shown by evidence that the owners of the fishery had forfeited their liberties and free usages, as these words are not sufficient to include a several fishery. *Northumberland v. Houghton*, L. R. 5 Exch. 127, 39 L. J. Exch. N. S. 66, 22 L. T. N. S. 491, 18 Week. Rep. 495.

The fact that the owner of a several fishery and his predecessors in title have for a long period of years permitted the public without molestation to fish there does not raise a presumption that the fishery has been abandoned or dedicated to the public. So held in a case relating to a fishery located in the Thames at a point above the action of the tide. *Smith v. Andrews* [1891] 2 Ch. 678, 65 L. T. N. S. 175.

A right of fishery, unlike a right of free warren, is divisible, so that, though the right to take floating fish may be abandoned, the right of dredging may still remain private property. *Rogers v. Allen*, 1 Campb. 309.

The right of fishing in private waters is a right to profit in lands, not a subjection to public servitude, like a right of way; hence, it cannot be acquired, as can the latter, by implied dedication of the owner to public use, but only by grant or prescription. *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718.

Dedication of a private fishery to the public depends upon the intention of the owner so to devote it. *Lembeck v. Nye*, 47 Ohio St. 337, 8 L. R. A. 578, 24 N. E. 686.

Where the owner of a fishery does not himself work it for profit, but suffers the public to fish in it without objection, a user by an individual which is not distinguished from that of the public will be considered permissive, unless there is evidence that it was under a claim of right in himself, and that the owner, knowing of such right, acquiesced in it. *Cobb v. Davenport*, 32 N. J. L. 369.

The grant by the ecclesiastical commission of lands adjoining a river in which a right of fishery had previously been granted by its predecessor, without any reservation of such right, does not, therefore, extinguish it. *Hamilton v. Musgrove*, Ir. Rep. 6 C. L. 129, 19 Week. Rep. 443.

XI. Protection of.

Trespass.

Trespass will lie for a direct interruption of an exclusive fishery. *Hart v. Hill*, 1 Whart. 181.

Trespass will lie for disturbing a several fishery in the soil of another, though no fish are taken. *Holford v. Bailey*, 8 Q. B. 1000, affirmed in 13 Q. B. 426.

A writ of trespass *quod cepit piscem* is good although the charge is for taking divers fishes from diverse places. 4 Hen. VI., 11, pl. 7.

One having a free fishery may maintain trespass against one fishing there and taking fish. *Smith v. Kemp*, Carth. 285, Holt, 822, 2 Salk. 687.

Where the owner of the soil covered with water has a right to fish with others, he may have an action of trespass, though Holt, Ch. J., said that it would not lie for one who had but a liberty to fish. *Gipps v. Woollicot*, Holt, 823, Skinner, 677, Comb. 433, 464.

But in an action for trespass for taking fish from plaintiff's free fishery, judgment was rendered for defendant because the declaration did not allege that the defendant took *salmones suos*. *Gibbs v. Woollicott*, 3 Salk. 291, 360.

The owner of a private lake or pond may prevent any other person from taking fish therefrom, and may bring an action of trespass. If, after proper notice, anyone insists on taking such fish, and may make criminal complaint against him under How. Anno. Stat. § 2197k, if he himself has first complied with the statute. *Re Water Rights*, 5 Det. L. N. No. 14.

The owner of a fishery can maintain trespass against anyone, even the several owner of the underlying soil, for taking his fish. *Turner v. Hebron*, 61 Conn. 175, 187, 14 L. R. A. 386, 22 Atl. 951.

Trespass may be maintained by one in actual physical or mechanical possession of a fishery. *Bristow v. Cormican*, L. R. 3 App. Cas. 641.

The right to fish is what is commonly called a profit à prendre; it is of such a nature that a person who enjoys that right has such possessory rights that he can bring an action for trespass at common law for the infringement of those rights, as, e. g., the pollution of the stream. *Fitzgerald v. Firbank* [1897] 2 Ch. 96, 76 L. T. N. S. 584, 66 L. J. Ch. N. S. 529.

The owner of a several fishery has such a property in the fish therein that he may maintain an action of trespass against one taking them, alleging in his declaration that it is for taking *pieces suas*. *Child v. Greenhill*, Cro. Car. 553.

Trespass *quare clausum* lies against one who breaks down weirs on his own land, causing the water to overflow another's fishery on adjoining land; and the fact that the fish thereby escape is but an aggravation of damages, and does not change the nature of the action. *Courtney v. Collet*, 1 Ld. Raym. 272, 12 Mod. 164.

The possessory title of one occupying land containing a trout stream under an unrecorded, but valid, lease is sufficient to enable him to maintain trespass against one fishing in the stream under no better title. *Beach v. Morgan*, 87 N. H. 529, 41 Atl. 349.

An action of trespass can be maintained by the owner of lands upon which a lake is exclusively situated against persons entering upon such lake and taking fish therefrom without the consent and against the will of such owner. *Beckman v. Kremer*, 43 Ill. 447, 92 Am. Dec. 146.

The lessee of lands occupied by him for fishing purposes may maintain trespass against one who unlawfully enters and fishes upon them. 60 L. R. A.

Solomon v. Grosbeck, 65 Mich. 540, 36 N. W. 163.

In trespass for fishing in plaintiff's several fishery it is no defense that defendant caught no fish, for the act of fishing was not an infringement of plaintiff's right, but would afterwards be evidence of a using and exercising of the right by the defendant if such an act were overlooked. *Patrick v. Greenway*, cited in *Mellor v. Spateman*, 1 Wms. Saund. 346b.

But case, and not trespass *vi et armis*, is the remedy to be pursued by the owner of a sole and separate fishery against a lower owner of a similar fishery who, by the construction of fish traps and weirs, prevents the passage of fish up the stream to plaintiff's fishery. *Hamilton v. Donegall*, 3 Ridgeway, 267, 324.

So, a grantee of a right of fishery on grantor's flats can maintain case, and not trespass *quare clausum*, for an injury to his easement. *Matthews v. Treat*, 75 Me. 594.

Ejectment will not lie to recover a fishery. *Waddy v. Newton*, 8 Mod. 275; *Herbert v. Laughluy*, Cro. Car. 492.

Extraordinary remedies.

The owners of an exclusive fishery in a non-tidal lake will be protected in their property by extraordinary remedy. *Pery v. Thornton*, Ir. L. R. 23 Eq. 402.

Where one claims a sole fishery in a navigable river by grant from the King, quo warranto will issue to try the title of the grantee. *Warren v. Matthews*, 1 Salk. 357.

Equity may restrain interference with a several fishery where no adequate remedy exists by tort or statutory process or seizure of boats, seines, etc. *Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1097.

Equity will restrain trespass on a private fishery in tidal waters when, by reason of the trespasser's impecuniosity, the remedy at law is inadequate. *Ibid*.

One claiming an exclusive right of fishing in an arm of the sea may have relief by injunction, as his common-law remedy of proceeding separately against each trespasser is insufficient. *Allen v. Donnelly*, 5 Ir. Ch. Rep. 229.

Making the unlawful destruction of fish a misdemeanor and punishable as such does not preclude a civil proceeding to enjoin it as a nuisance. *People v. Truckee Lumber Co.* 116 Cal. 397, 39 L. R. A. 581, 48 Pac. 374.

A man in actual possession of a sole right of fishery may maintain a bill against one threatening to disturb him in his right, for a commission to examine his witnesses and perpetuate their testimony, without first bringing an action at law; though it would be otherwise had he been actually disturbed in his fishing, thereby giving him a remedy at law. *Dorset v. Girdler*, Prec. in Ch. 531.

The grantee of an exclusive right of fishing in a nonnavigable river may maintain an action for injunction and damages against a person who, by discharging water polluted with sand and gravel into the river, has driven away the fish and injured the spawning beds. *Fitzgerald v. Firbank*, 66 L. J. Ch. N. S. 529 [1897] 2 Ch. 96, 76 L. T. N. S. 584.

When a claim to an exclusive fishery, set up against the common right of the public, has been established in point of fact, interference therewith will be restrained by injunction. *Allen v. Donnelly*, 5 Ir. Ch. 229.

An injunction will be granted to restrain apprehended injury to fish ponds. *Bathurst v. Burden*, 2 Bro. Ch. 64.

The owner of premises used for fish culture, whose pond is supplied by water from an underground channel of a stream, and not merely by

percolation, is entitled to an injunction requiring the erection of a barrier or dam on the premises of an adjoining owner, so as to restore to a spring on his premises the water diverted from the pond supplied thereby and from a natural water course which is the outlet thereof, by the digging of a well on such other premises. *Castalia Trout Club Co. v. Castalia Sporting Club*, 8 Ohio C. C. 194.

One who has been in possession of a sole fishery for a considerable length of time may bring a bill to be quieted in possession, although he has not established his right at law; and it is no objection to such relief that the different defendants have separate defenses, as the question whether the plaintiff has a right to the sole fishery extends to all the defendants. *York v. Pilkington*, 1 Atk. 282.

One not occupying, or intending to occupy, his alleged private fishery cannot be so injured in respect thereto as to give him any claim to protection by an injunction against an interference with any technical right he may have. *Stannard v. Hubbard*, 34 Conn. 375.

Equity will not restrain the removal of stakes from a fishing ground when they will not be needed for immediate use, can be easily replaced in ample time for use, and at a price easily ascertained and measurable in damages. *Hettrick v. Page*, 82 N. C. 65.

Injunction will not lie to restrain interference with a public fishery, upon the suit of one who shows no special injuries arising from the violation of private right. *Delaware & M. R. Co. v. Stump*, 8 Gill & J. 479, 29 Am. Dec. 561; *Reyburn v. Sawyer*, 128 N. C. 8, 37 S. E. 954.

But equity will restrain the maintenance of a fishing trap in violation of law upon the suit of one who suffers special damage thereby. *Cherry Point Fish Co. v. Nelson*, 25 Wash. 558, 66 Pac. 55.

An injunction restraining the drawing of nets in a public fishery adjoining private lands in violation of statutory rights cannot be broader than is justified by the statute. *Heckman v. Swett*, 107 Cal. 276, 40 Pac. 420.

Penalties.

A penal statute forbidding any person to enter upon the land of another without the permission of the owner, for the purpose of fishing, applies to every such act; and failure to take care that the statutory direction is observed supplies the criminal intent. *State v. Turner*, 60 Conn. 222, 22 Atl. 542.

Under the English act of 1878, forbidding the fishing for trout with rod and line without a license, a person licensed to fish with rod and line will be subject to the penalty if he attempts to use three rods and lines at the same time while having only one license. *Combridge v. Harrison*, 64 L. J. M. C. N. S. 175, 15 Reports, 327, 72 L. T. N. S. 592, 59 J. P. 198.

In a criminal prosecution against one in charge of a vessel for taking fish in violation of a statute, a decree forfeiting the vessel violates the owner's constitutional right to a trial by jury, where he is not a party to the proceeding, which was criminal in its nature, and not *in rem*. *The J. W. French*, 13 Fed. 916.

A statutory provision that any person taking fish in violation of its terms shall forfeit his vessel does not authorize the forfeiture and sale of the vessel of another of which the offender had possession at the time. *Ibid.*

An information, to be sufficient to charge the offense defined by an act entitled, "An Act to Prevent Fishing and Hunting on the Inclosed Lands of Another," must expressly allege, not only want of consent of the owner to the entry upon the land, but also the want of the like con-

sent of the "proprietor and the agent in charge," owner, proprietor, and agent being all named in the statute. *Holtgraft v. State*, 23 Tex. App. 104, 5 S. W. 117.

One who owns the land on but two sides of a pond of water, the other sides of which are owned by other persons whose title extends to low-water mark, is not entitled to maintain a proceeding under N. Y. Laws 1887, chap. 623, to recover the prescribed penalties for taking fish from a pond laid out as a private park for propagating and protecting fish, since he has no such exclusive ownership or control over the waters or the land underneath as is required by the act. *Hill v. Bishop*, 48 N. Y. S. R. 736, 17 N. Y. Supp. 297.

One who paddles a boat in which another is illegally fishing may be convicted for participating in the offense. *Com. v. Richardson*, 142 Mass. 71, 7 N. E. 26.

One not the owner or lessee of all the land under or around and adjoining a pond is not entitled to maintain an action to recover the penalty prescribed by Gen. Laws, chap. 179, § 1, for catching fish in the pond of another. *Chase v. Baker*, 59 N. H. 347.

Under a statute against killing fish in a private river without the consent of the owner, such killing must have occurred in an inclosed ground. *Rex v. Sadler*, 2 Chitty, 519.

Under a penal statute prohibiting the erection of a fish weir in tide waters below low-water mark in front of the shore or flats of another, without the owner's consent, if "the rights of others" would thereby be interfered with, it was held that the owner has acquired no such fishing right as to be protected by equity, unless he actually uses such privilege. *Perry v. Carleton*, 91 Me. 349, 40 Atl. 134.

An indictment at common law for a nuisance does not lie for obstructing the passage of fish by a dam built across a river not navigable, but recourse must be had to the remedy provided by statute, where the statute has changed the common law on the subject. *Com. v. Chapin*, 5 Pick. 190, 16 Am. Dec. 386.

An indictment will lie for fishing in another's pond and carrying away the fish, being the goods and chattels of the prosecutor. *Reg. v. Steer*, 6 Mod. 183.

That a weir is placed on land from which the tide wholly ebbs does not prevent its being within the terms of a statute forbidding the placing of a weir below low-water mark in front of the shore of a third person without his consent. It is sufficient if the weir is erected beyond or nearer the middle of the channel than the low-water line of the flats intended to be protected. *Donnell v. Joy*, 85 Me. 118, 26 Atl. 1017.

A statute protecting the fishery of the owner of a "private" stream, spring, or pond relates only to a stream, spring, or pond the waters of which are entirely controlled in every part by the person claiming the fishery. *Benscoter v. Long*, 157 Pa. 208, 27 Atl. 674.

Abatement.

While the right to abate a public nuisance created by the interruption of the public right of navigation or of fishery belongs to every citizen, such right cannot be exercised lawfully if its exercise involves a breach of the peace; but in such case the one erecting the nuisance must be proceeded against legally. *Day v. Day*, 4 Md. 262.

A right to remove engines placed in a tidal river for catching salmon is not limited to the conservators or overseers under a statute providing that any engine placed or used in contravention of the statute may be taken posses-

sion of or destroyed. *Williams v. Blackwall*, 32 L. J. Exch. N. S. 174, 2 Hurlst. & C. 33, 9 Jur. N. S. 579, 8 L. T. N. S. 252, 11 Week. Rep. 621.

One has no right to interfere (trespass) with the weir of another, even though as against the Crown it is a purpresture. *Wilson v. Codyre*, 27 N. B. 320.

The owner of a several fishery may detain the nets and oars of persons unlawfully fishing as security for his damages; but, if he destroys them, he is liable in trespass. *Leynell v. Champennoon*, Cro. Car. 228.

Any act which interferes with the enjoyment of the right of fishery in Lake Michigan in any particular locality, if it affects all alike who fish in that locality, is a public, and not a private, nuisance; and no private individual may maintain an action in equity to enjoin its continuance. *Kuehn v. Milwaukee*, 83 Wis. 583, 18 L. R. A. 553, 53 N. W. 912.

Procedure.

Claimants of rights in a fishing privilege may be joined as defendants in an action to quiet title thereto by the owner of the land to which such right is by statute appurtenant, although claiming and exercising such rights severally and separately, each at a distinct part of the shore, where their claims, though under different patents, were from the same source, and the injury to the plaintiff, as well as their defenses to the action, depend as to each upon the same facts. *Heckman v. Swett*, 99 Cal. 303, 33 Pac. 1099.

A cause of action for wrongfully entering upon plaintiff's lands under water and taking and carrying away fish therefrom may be united with a cause of action for an entry upon the same land at another time and catching and killing muskrats there. *Whattling v. Nash*, 41 Hun, 579.

Damages.

Prospective profits of a fishing business are of too speculative a nature to be allowed in an action for damages for negligent injury to nets. *Wright v. Mulvaney*, 78 Wis. 89, 9 L. R. A. 807, 46 N. W. 1043.

What plaintiff must show.

One claiming an exclusive fishery in tide water must establish his right by satisfactory proof. *Gould v. James*, 6 Cow. 369; *Yard v. Carman*, 8 N. J. L. 937; *Fitzwalter's Case*, 1 Mod. 105.

A several or exclusive fishery in tidal waters must be strictly established by either grant or prescription. *Preble v. Brown*, 47 Me. 284.

A several fishery in a tidal river is not a common right, and therefore prima facie does not belong to any person until some evidence is given. *Paley v. Birch*, 8 Best & S. 336, 16 L. T. N. S. 410.

No right to an exclusive fishing privilege in a navigable river is established without proving a compliance with the statutory requirements. *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 100 Am. Dec. 597; *Benscoter v. Long*, 157 Pa. 208, 27 Atl. 674; *Keynolds v. Com.* 93 Pa. 458.

One cannot recover a verdict in an action of trespass for fishing in his fishery unless he shows either possession or right. *Richardson v. Orford*, 2 H. Bl. 182, 4 T. R. 437, 1 Anstr. 281.

One claiming trespass on a several fishery in *brachium maris*, pleaded in confession and avoidance, must establish his title. *Crichton v. Colliery*, 19 Week. Rep. 107.

One claiming a right to abridge the common-law right of any subject to take sea fish must 60 L. R. A.

plead that matter specially; it cannot be presumed. *Baggott v. Orr*, 2 Bos. & P. 472.

It is not necessary to show that one's own weir is within his defined limits to maintain an action for infringing his exclusive right of fishing on certain flats, although its position might have a material effect upon the amount of damages to be recovered. *Matthews v. Treat*, 75 Me. 594.

Evidence.

An inhabitant of a particular place cannot be sworn to prove a prescriptive fishery in all the inhabitants. *Gould v. James*, 6 Cow. 369; *Jacobson v. Fountain*, 2 Johns. 175.

But, upon the question of the right of the proprietor of a certain neck of land to an exclusive shell fishery upon the shore, a neighboring proprietor similarly situated is a competent witness to establish the right. *Gould v. James*, 6 Cow. 369.

And an inhabitant of an adjoining town is admissible as a witness on behalf of another inhabitant sued for trespassing on a private shell fishery to prove a free fishery in the *locus in quo* on behalf of all the inhabitants of the state, even though he is liable to prosecution for a similar trespass in case the right does not exist. *Ibid.* H. P. F.

CHICAGO & ERIE RAILROAD COMPANY, *Plff. in Err.*,

v.

Priscilla KEITH *et al.*

(.....Ohio.....)

*1. Section 3342, Rev. Stat., requiring railroad companies to construct and keep open ditches of sufficient depth, width, and grade to conduct to some proper outlet the water which accumulates along the sides of such roadbed from the construction or operation of such road, is a valid statute in so far as the accumulation of water is injurious to the contiguous lands or detrimental to the public, but invalid where such water is not injurious to such lands or the public.

2. In so far as §§ 16 and 19 of article 1 of the Constitution conflict with the common law, these sections must prevail over that law; and this is so whether the conflict is as to the right or remedy.

3. It is necessary to the validity of an assessment on real estate, other than general taxes, that somewhere along the line of the proceedings notice be given to the owner and an opportunity afforded him to be heard in opposition or defense.

4. Sections 3343-3346, Rev. Stat., are in

*Headnotes by the COURT.

NOTE.—As to necessity of notice and opportunity to be heard, to parties subject to assessment, see also, in this series, *Poulsen v. Portland (Or.)* 1 L. R. A. 673; *Scott v. Toledo (C. C. N. D. Ohio)* 1 L. R. A. 688; *Ulman v. Baltimore (Md.)* 11 L. R. A. 224, and cases in note thereto; *Kelly v. Minneapolis (Minn.)* 26 L. R. A. 92; *Hayes v. Douglas County (Wis.)* 31 L. R. A. 213; *Violet v. Alexandria (Va.)* 31 L. R. A. 382; *Norfolk v. Young (Va.)* 47 L. R. A. 374; *Carson v. Brockton Sewerage Commr. (Mass.)* 48 L. R. A. 277; *Adams v. Shelbyville (Ind.)* 49 L. R. A. 797; and *King v. Portland (Or.)* 55 L. R. A. 812.

conflict with §§ 16 and 19 of article 1 of the Constitution, and are void, for the reason that they attempt to authorize the taking of private property for private purposes and without due course of law.

(December 2, 1902.)

ERROR to the Circuit Court for Allen County to review a judgment affirming a judgment of the Court of Common Pleas in defendants' favor in a suit to enjoin the enforcement of an order for the construction of a drainage ditch. *Reversed.*

Statement by **Burket, Ch. J.:**

The Chicago & Erie Railroad Company, plaintiff in error and also plaintiff below, filed the following petition in the court of common pleas against Priscilla Keith and Theo. D. Robb, as probate judge of Allen county:

"Now comes the plaintiff, the Chicago & Erie Railroad Company, and says that it is a corporation duly organized under the laws of the state of Indiana, and for cause of action against the defendants, Priscilla Keith and Theo. D. Robb, as judge of the probate court of Allen county, Ohio, avers as follows, *viz.*: That on May 9, A. D. 1899, there was served by the sheriff of Allen county, Ohio, upon one F. C. McCoy, the agent of plaintiff at the city of Lima, Ohio, a notice, signed by Theo. D. Robb, as probate judge for Allen county, Ohio, and bearing the seal of the probate court of said county, and purporting to be the copy of an order, judgment, or decree entered in case No. 7,442 of said court, entitled '*Priscilla Keith, Plaintiff, v. The Chicago & Erie Railway Co., a Corporation, Defendant*,' the said defendant in said cause No. 7,442 of said probate court of Allen county, Ohio, being the plaintiff in this proceeding; and by the terms of said judgment, order, or decree this plaintiff, as said defendant, was directed to construct a drain, or drains and ditches, of sufficient capacity to conduct to some proper outlet the water accumulated along the side of plaintiff's roadbed, by reason of the construction and operation of said roadbed, situate within the limits of section thirty-five (35) of said roadbed, and adjoining lands owned or occupied by Priscilla Keith, said lands being in section twelve (12), township four (4) south, range four (4) east, in Allen county, Ohio; and said notice further declared that unless said defendant (the plaintiff herein) should comply with the requirements thereof within thirty days from said May 9, 1899, then that said Theo. D. Robb, as said probate judge of Allen county, Ohio, would forthwith proceed and advertise for the letting, and proceed and let the contract for draining said accumulated water from the side of said roadbed along the points and places above described to the lowest bidder, in accordance with law. That prior to said May 9, A. D. 1899, this plaintiff, as defendant in said proceedings in case No. 7,442 of the probate court of Allen county, Ohio, had no notice or summons of any kind directed to it, 60 L. R. A.

requiring it to appear before said probate court and have judicially determined whether or not the land described in said proceedings could be properly drained and the costs thereof assessed against plaintiff herein as said defendant, or whether or not the roadbed of the defendant was constructed and maintained at said points and places through swamp lands, so as to exempt plaintiff, under the statute, from the cost and expense of draining said lands; and plaintiff, without fault on its part, was prevented from tendering any issue that might have been tried or determined in said cause. That the time named within the notice served by the sheriff upon the agent of plaintiff on May 9, A. D. 1899, has expired, and the defendant, Theo. D. Robb, as probate judge of Allen county, Ohio, is threatening to proceed and advertise for the letting of a contract for draining the lands above described at the points and places above described; and, unless restrained by an order of this court, said Theo. D. Robb, as said probate judge, will advertise and let said contract, and thereafter will charge the cost and expense of the same against the property of plaintiff, and will thereby deprive plaintiff of its property without due process of law; and for all of which wrongs and injuries plaintiff has not an adequate remedy at law. That said plaintiff in said cause No. 7,442 of the probate court of Allen county, Ohio, is proceeding under the alleged authority of an act of the legislature of Ohio, passed May 7, 1869, entitled '*An Act to Require Railroad Companies to Drain Water from the Sides of Their Roadbeds in Certain Cases*,' and which alleged law is now designated as Ohio Rev. Stat. §§ 3342-3346, and is (as plaintiff herein believes) contrary to the provisions of section nineteen (19), art. one (1), of the Constitution of Ohio. That said probate court of Allen county, Ohio (as plaintiff believes), has no authority in law to enter the order and notice served upon plaintiff as herein alleged, or, upon failure of plaintiff to comply with said order, to advertise for the opening of said ditches and drains and let the contract therefor, or to certify the cost and expense thereof and place the same upon the tax duplicate against plaintiff, for that thereby plaintiff is deprived of its property without due process of law and without any judicial determination that the same is for the public welfare. Wherefore, plaintiff prays that a temporary injunction may issue directing said Theo. D. Robb, as said judge of the probate court of Allen county, Ohio, and his successors in office, to refrain from advertising the letting, and to refrain from the letting, of a contract to dig said ditches and drains described in these proceedings, and to refrain from certifying the cost and expense of said proceedings, so that the same may be placed against the property of plaintiff on the tax duplicate of Allen county, Ohio, for collection, until the legality of said acts of said probate court may be inquired into, and until the constitutionality of said act of the legislature of Ohio may

be judicially determined; that plaintiff may have any other and further orders necessary to fully protect its rights and give adequate relief in equity; and that upon the final hearing of this cause said injunction may be made perpetual."

To this petition the defendants filed a general demurrer, which was sustained by the court of common pleas; and, the plaintiff not desiring to further plead, the court dismissed the petition and rendered final judgment against the plaintiff, to which the plaintiff excepted. The circuit court affirmed the judgment, and thereupon the railroad company filed its petition in error in this court, seeking to reverse the judgments of the courts below.

Messrs. W. O. Johnson and Ridenour & Halfhill, for plaintiff in error:

The statute being void, the ordinary principles of equity would permit the filing of a bill to enjoin a tax or assessment.

1 High, Inj. § 502; *Simpkins v. Ward*, 45 Mich. 559, 8 N. W. 507; *Jones v. Davis*, 35 Ohio St. 474; *Wyacover v. Atkinson*, 37 Ohio St. 80; *Counterman v. Dublin Twp.* 38 Ohio St. 517; *Stephan v. Daniels*, 27 Ohio St. 527; *South Ottawa v. Perkins*, 94 U. S. 260-267, 24 L. ed. 154-157; *State v. Little Rock, M. R. & T. R. Co.* 31 Ark. 701; *State ex rel. Moberly Bd. of Edu. v. St. Louis, K. C. & N. R. Co.* 74 Mo. 163; *Post v. Kendall County*, 105 U. S. 667, 26 L. ed. 1204; Ohio Rev. Stat. § 6708; *Moody v. George*, 37 Ohio L. J. 189.

The Constitution gives no power of local taxation to a probate judge for police purposes.

Scioto Bd. of Edu. v. McLandsborough, 36 Ohio St. 232, 38 Am. Rep. 582; *Lima v. McBride*, 34 Ohio St. 338; *Cooley, Taxn.* p. 41; *Cooley, Const. Lim.* pp. 593-596; 13 Montesquieu, Spirit of Laws, chap. 1; *M'Culloch v. Maryland*, 4 Wheat. 316-428, 4 L. ed. 579-606; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *People ex rel. Butler v. Saginaw County*, 26 Mich. 27; *Lewis v. Webb*, 3 Me. 326; *Lane v. Doe ex dem. Dorman*, 4 Ill. 242; *Campbell v. Mississippi Union Bank*, 6 How. (Miss.) 661; *Ervine's Appeal*, 16 Pa. 266, 55 Am. Dec. 499; *Re Cash*, 6 Mich. 193; *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 587; *Denny v. Mattoon*, 2 Allen, 361, 79 Am. Dec. 784; *Budd v. State*, 3 Humph. 483, 39 Am. Dec. 189; *Wally v. Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Re Picquet*, 5 Pick. 64; *Sessions v. Crunkilton*, 20 Ohio St. 349.

When the Chicago & Erie Railroad Company acquired its right of way it did it either by contract with the landowners or by the exercise of eminent domain, and in either instance it is presumed to have paid the value of the property that it actually occupies, as well as the damages to the remainder of the property.

In requiring the drainage for the benefit of such property the statutes subserve a private interest.

Reenes v. Wood County, 8 Ohio St. 333.

The power to levy such charges is neces-

sarily limited to property which is actually benefited by the improvement, and to the extent only of the benefits received.

Chamberlain v. Cleveland, 34 Ohio St. 551; *Harvard v. St. Claire & M. Leves & Drainage Co.* 51 Ill. 130; *Lee v. Ruggles*, 62 Ill. 427; *Tide-water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *State, Hoboken Land & Improv. Co., Prosecutor, v. Hoboken*, 36 N. J. L. 291; *State, Agens, Prosecutor, v. Newark*, 37 N. J. L. 422, 18 Am. Rep. 729.

In relation to assessments or taxes levied on property, not specifically but according to its value, notice and hearing are necessary.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 709, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; *Scott v. Toledo*, 1 L. R. A. 696, 36 Fed. 385.

What one pays for taxes and assessments is taken for the public good, and can be justified upon no other theory, and private property cannot be taken for private purposes, even under the legislative power of taxation.

Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586.

Taxation and assessment imply apportionment.

Baltimore v. Horn, 26 Md. 194; *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; *Kirby v. Shaw*, 19 Pa. 258; *Schenley v. Com.* 36 Pa. 29, 78 Am. Dec. 359; *McGonigle v. Allegheny*, 44 Pa. 118; *Re Washington Avenue*, 69 Pa. 360, 8 Am. Rep. 255; *Pater-son v. Society for Establishing Useful Manu-factures*, 24 N. J. L. 385; *Tide-water Co. v. Coster*, 18 N. J. Eq. 519, 90 Am. Dec. 634; *Re Drainage between Lower Chatham and Little Falls*, 35 N. J. L. 497; *St. John v. East St. Louis*, 50 Ill. 92; *Lee v. Ruggles*, 62 Ill. 427; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Litchfield v. Vernon*, 41 N. Y. 123; *Cooley, Const. Lim.* p. 355; *People ex rel. Butler v. Saginaw County*, 26 Mich. 22; *Patten v. Green*, 13 Cal. 325; *Philadel-phia v. Miller*, 49 Pa. 440; *Ireland v. Roch-ester*, 51 Barb. 414; *Re Ford*, 6 Lans. 92.

Assessors act judicially.

Barhyte v. Shepherd, 35 N. Y. 238; *Weav-er v. Derendorf*, 3 Denio, 117; *Brown v. Smith*, 24 Barb. 419; *Chegaray v. Jenkins*, 5 N. Y. 376; *Clark v. Norton*, 49 N. Y. 243; *Overing v. Foote*, 65 N. Y. 263.

The provision as to "due process of law" is a restraint on the legislative, as well as the executive and judicial, powers of the government.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; *Baltimore & O. & C. R. Co. v. Wagner*, 43 Ohio St. 75, 1 N. E. 91; *Sessions v. Crunkil-ton*, 20 Ohio St. 349; *French v. Edwards*, 13 Wall. 506, 20 L. ed. 702.

The statutes complained of in this case do not provide due process of law.

Davidson v. New Orleans, 96 U. S. 97-108, 24 L. ed. 616-621; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372.

While generally it is for the legislature to determine what laws are required to protect and secure the public health, comfort, and

safety, it may not arbitrarily infringe upon personal or property rights, under the guise of police regulations; and its determination as to what is a proper exercise of the power is not final or conclusive, but is subject to the scrutiny of the courts.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *Wynehamer v. People*, 13 N. Y. 378; *People ex rel. Manhattan Sav. Inst. v. Otis*, 90 N. Y. 48; *Coe v. Schultz*, 47 Barb. 64; *Re Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Groven v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Slaughter-House Cases*, 10 Wall. 36, 21 L. ed. 394; *Hepburn v. Griswold*, 8 Wall. 603, 19 L. ed. 513; *Austin v. Murray*, 72 N. Y. 1, 28 Am. Rep. 88; *Rockwell v. Nearing*, 35 N. Y. 302; *Re Townsend*, 39 N. Y. 171; *Re Deansville Cemetery Assn.* 66 N. Y. 509, 23 Am. Rep. 86; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Lauton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, 23 N. E. 878; *McCulloch v. Maryland*, 4 Wheat. 437, 4 L. ed. 609; 2 Tiedeman, State & Federal Control, § 146, p. 734; *Hutton v. Camden*, 39 N. J. L. 122, 23 Am. Rep. 203; *Yates v. Milwaukee*, 10 Wall. 505, 19 L. ed. 986; *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650; *State, New Jersey R. & Transp. Co., Prosecutors, v. Jersey City*, 20 N. J. L. 170; *Chicago v. Laflin*, 49 Ill. 172; *Babcock v. Buffalo*, 56 N. Y. 268; *Mujler v. Kansas*, 123 U. S. 623-661, 31 L. ed. 205-210, 8 Sup. Ct. Rep. 273; *Wreford v. People*, 14 Mich. 41.

Messrs. Hoagland & Lippincott, for defendants in error:

It is within the powers and right of the Ohio legislature to enact this statute.

*Cooley, Const. Lim. *573; Thorpe v. Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625.

The legislature has the power to prescribe what sort of notice or process shall be given.

The plaintiff in error is not deprived of any property by the rendition of the order in probate court.

York v. Texas, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9; *Kauffman v. Wooters*, 138 U. S. 285, 34 L. ed. 962, 11 Sup. Ct. Rep. 298.

The notice was due process. The legislative act, when clearly within legislative authority, is of itself the law of the land, and any notice which may be prescribed therein is sufficient, and is due process of law.

Cooley, Taxn. pp. 48, 49; Anderson v. Brewster, 44 Ohio St. 582, 9 N. E. 683.

Burket, Ch. J., delivered the opinion of the court:

The object of the action is to test the constitutionality of the sections of the statute mentioned in the petition. The original statute was passed in the year 1869, and its provisions have been carried into the Revised Statutes. The sections are as follows:
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"Sec. 3342. There shall be constructed and kept open, along the roadbed of every railroad, except where the road extends through or by swamp land, by the company or person operating the road, ditches or drains of sufficient depth, width, and grade to conduct to some proper outlet the water which accumulates along the sides of such roadbed from the construction or operation of such road.

"Sec. 3343. If, after ten days' notice or request to any ticket or other agent of the company or person operating a railroad, to provide such drain or ditch, preferred by the person authorized to institute the proceedings hereinafter provided for, the provisions of the foregoing section be not complied with, any owner or tenant of land contiguous to such railroad feeling aggrieved by such neglect may give notice of the fact, in writing, to the probate judge of the county in which such neglect occurs, designating in such notice the place or places on such road where such drains or ditches have not been made; and upon the receipt of such notice the probate judge shall appoint a commission of three disinterested freeholders of such county, who, together with the county surveyor, shall proceed to the place designated in the notice, and if, upon inspection, it is found that the provisions of the preceding section are not complied with, the commission, or a majority thereof, shall report the same to such probate judge, who shall keep a record of such proceedings; and the probate judge shall designate a time within which such ditches or drains shall be made or opened, and shall forthwith notify the company or person operating such road, in writing, whose duty it shall be to make or open such ditches or drains within the time specified.

"Sec. 3344. If such company or person neglect to comply with the notification of the probate judge, he shall forthwith, by advertisement for three consecutive weeks, in one or more of the weekly newspapers published in such county, give notice that the work of making or opening the ditches or drains will be let to the lowest bidder at such time and place as shall be designated in the advertisement.

"Sec. 3345. The probate judge shall, at the time and place specified in the advertisement, sell the job or jobs of making or opening such ditches or drains to the lowest bidder, and take from such bidder a sufficient bond, with surety, for the performance thereof, and upon the completion thereof to the satisfaction of the probate judge, he shall give the bidder a certificate therefor, stating the amount due for the work; and upon presentation of the certificate to the auditor of the county, he shall place the amount so certified forthwith upon the tax duplicate of the county, against the company, together with all the costs and expenses for inspection by the commission and surveyor, notices, advertisements, sale of work, making contract therefor, approval of the work, and other costs, and interest on the amount certified to be due for the work

from the time the work is approved until the amount can be collected by the treasurer of the county; and such tax shall be collected as other taxes, and be paid to the persons entitled thereto on the warrant of the county auditor on the county treasurer.

"Sec. 3346. The probate judge, commissioners, and surveyor shall be entitled to receive for their services such costs, fees, and expenses as are provided by law for costs, fees, and expenses of county commissioners and others under proceedings relating to ditches."

That a duty may rest upon a railroad company to remove such water as accumulates along the sides of its roadbed from the construction or operation of its road, to the injury of contiguous lands, or to the detriment of the public health, convenience, and welfare, seems clear, and that such railroad company may be compelled by statute and upon proper proceedings to discharge such duty and remove such water is equally clear; but where such water so accumulates on the right of way and along the sides of such roadbed, and does no injury to contiguous lands, and is not detrimental to the public health, convenience, and welfare, the railroad company cannot be compelled by statute to remove the same, because it has the right to use its right of way, its property, as it pleases, so long as such use does no injury to the public or to private persons. The right to store water on the right of way may in certain cases be a valuable right, and when no injury results from such storage the right cannot be curtailed. Where an accumulation of water along the sides of such roadbed is not detrimental to the public health, convenience, or welfare, but is injurious to contiguous lands, the injury arising from such accumulation is not an injury to the public, to be by it redressed or prevented, but is a private injury to the contiguous lands, to be redressed by the owners by an action for damages, or other proper action, in the court of common pleas; the probate court not having jurisdiction of such actions.

The ditch act of May 1, 1854, was held unconstitutional for the reason that it authorized the entry upon lands of others, and the construction of drains, when demanded by private interest merely, without reference to public interests, convenience, or welfare. *Reeves v. Wood County Treasurer*, 8 Ohio St. 333, 346. And in *McQuillen v. Batton*, 42 Ohio St. 202, this court again held that ditches could be constructed only in the interest of the public, and that the fact that larger crops could be raised on lands to be benefited by a ditch was a private, and not a public, interest, and would not warrant the establishment of the proposed ditch. The sections in question do not in the least provide for the protection of the public health, convenience, or welfare, but are solely for the redress of grievances of private persons, the owners of lands contiguous to the railroad; and said sections are so broad that under them railroads might be compelled by the owner or

tenant of contiguous lands to drain off all such accumulations of water, even though not injurious to such lands or the public, and accumulated and stored on the right of way for the use of such railroad. The general assembly has not the power to impose or enforce such a duty. By these sections authority is attempted to be given for the lowest bidder to enter upon the right of way of the railroad and construct a ditch for the sole benefit of a private individual, without reference to the interests of the public. The costs of such ditch and all costs of the proceedings are to be assessed against the railroad, placed upon the tax duplicate, collected by the county treasurer as other taxes, and paid over to such bidder upon the warrant of the county auditor; and all this is done, not in the interest of the public, but in the interest of private persons. It is not so much a case in which private property is taken for public use for which compensation must be first made in money, as it is a taking of private property for private use, and therefore in violation of that part of § 19 of the Bill of Rights which says: "Private property shall ever be held inviolate, but subservient to the public welfare." The money required to pay the assessment is the private property of the railroad company, and cannot be taken from it for the private welfare of another. The sections in question provide solely for the relief of the lands of private individuals in their private interests, and seek to impose a burden by way of assessment, to be collected as taxes from the railroad company for the private benefit of such individuals, and for that reason are unconstitutional. Assessments and taxes can be levied and collected only for public purposes.

There is another reason why these sections are unconstitutional: An assessment is attempted to be authorized upon the railroad company without an opportunity to be heard. The owner or tenant of land contiguous to the railroad may give ten days' notice to any ticket or other agent of such company to provide such ditch, and upon failure to do so he may give notice in writing to the probate judge of the county, and the judge thereupon appoints a commission to inspect the part of the road in question and report to him. Thereupon the judge notifies the railroad company in writing to open such ditch within a time specified. If not opened, the probate judge, upon three weeks' notice by advertisement, lets the work of opening such ditch to the lowest bidder. After the work is completed, the cost thereof and all costs of the proceeding are to be certified to the auditor, placed on the duplicate, collected as other taxes, and paid over to the person who did the work. The railroad company is notified by the owner or tenant to open the ditch, and is also notified by the probate judge to open it, but no notice is given to it of any hearing, and no provision whatever is made for a hearing at any stage of the proceeding. It may be that the railroad extends through or by swamp land, in which case the statute by

its terms is not applicable. It may be that the ditches already provided are of sufficient depth, width, and grade to conduct the water to a proper outlet. It may be that the accumulation of water does not arise from the construction or operation of the road, but from the natural lay of the land. It may be that no public interest is to be conserved, for which alone an assessment can be made. It may be that the accumulation of water is not injurious to contiguous lands or the public. As to all these, and other material matters, the railroad company has a right to be heard before it is condemned to suffer and pay an assessment. Reasonable notice, and an opportunity to be heard in defense or opposition, are prerequisites to jurisdiction; and an assessment made without such notice and opportunity to be so heard is void, not only for want of jurisdiction, but also because there was not due process of law. While taxes are laid without notice, the statutes being regarded as sufficient notice, and § 4859 as sufficient remedy, special burdens by way of special assessments cannot be laid on property without notice and an opportunity, somewhere along the line, to be heard in opposition or defense. Special assessments cannot exceed the special benefits. *Walsh v. Barron*, 61 Ohio St. 15, 55 N. E. 164. And if there is nothing else available to the landowner, this question may arise in every case, and therefore the landowner is entitled to notice before any burden by way of special assessment is laid on his property. The rule in such cases is well stated in *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289, as follows: "A law imposing an assessment for a local improvement, without notice to and a hearing or an opportunity to be heard on the part of the owner of the property to be assessed, has the effect to deprive him of his property without 'due process of law,' and is unconstitutional. The law may prescribe the kind of notice and the mode in which it may be given, but it cannot dispense with all notice. It is not enough that the owner may by chance have notice, or that he may as a matter of favor have a hearing. The law must require notice and give a right to a hearing."

It is urged by counsel for defendants in error that the sections in question are enacted under the police power, and do no more than to require the railroad company to so use its property as not to injure that of another, and cite *Cooley*, Const. Lim. *573. While the general assembly under the police power may restrict and regulate the conduct of persons and the use of property within reasonable bounds, it must do so under the limitations of the Constitution, and cannot, under the guise of that power, take the private property of one person and bestow it upon another for his private use and benefit. Neither can it lay an extra burden on property without notice to the owner and an opportunity to be heard. The regulation and restriction under the police power in behalf of the public may be enforced by taxation or assessment, but in be-

half of a private individual it can only be enforced by action in a court of competent jurisdiction.

It is also urged by counsel for defendants in error that the accumulation of water along the roadbed is a nuisance, and that the proceedings authorized by said sections are not more than the abatement of such nuisance at the expense of the party creating it, and this seems to have been the view taken by the courts below. *Chicago & E. R. Co. v. Keith*, 21 Ohio C. C. 669, and *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, 23 N. E. 878, are cited and relied upon to support this contention. The law of nuisance has no application to the subject-matter of these sections. Nothing is said in them as to nuisances, and there is no declaration in the statute making such accumulation of water a nuisance and no authority given to abate any such pretended nuisance. The whole object of the statute is to conduct the accumulated water to a proper outlet, so as to protect lands contiguous to the railroad, and for the private benefit of the owners of such lands. There is nothing in the statute looking to the protection of the public health, convenience, or welfare. So that, if the law of nuisance were to be applied to this case, it could not avail, because the nuisance would be to private individuals, and not to the public. Even *Lawton v. Steele*, 119 N. Y. 226, 7 L. R. A. 134, 23 N. E. 878, concedes that a private nuisance cannot be abated by the party inconvenienced, without process of law. In *Lawton v. Steele* the statute declared and made the fish nets a public nuisance, and authorized their destruction by any person, and required the game and fish protectors to destroy them. Under that statute the destruction of the nets was upheld as not being a taking of private property for public use without compensation, and also as not being a taking without due process of law. That case was affirmed by the Supreme Court of the United States in 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, the court holding that the statute came within the police power, and as to the value of the nets, in effect, applied the maxim of *De minimis non curat lex*. The exact question has never been passed upon by this court, but from the general trend of our decisions, and the construction of our Constitution, it may well be doubted whether the summary destruction of such nets under such a statute would be upheld by this court. In *Edson v. Crangle*, 62 Ohio St. 49, 56 N. E. 647, the statute forbade the use of the nets, and provided that nets set or placed contrary to the act should be confiscated, sold, and proceeds placed in the public treasury; and this court held the seizure of such nets without process of law to be in violation of the constitutional rights of the owners, and compelled the game warden to make compensation. In that statute there was no provision declaring the nets a nuisance, as in the sections under consideration here there is no provision making the accumulated water a nuisance. That which the general assembly has

not declared a public nuisance, and authorized its summary abatement in the interest of the public, cannot be construed by a court to be such nuisance and liable to be summarily abated without process of law, even in the interest of the public, and certainly not in the interest of private individuals. This is conceded in *Lawton v. Steele*, *supra*.

It is also urged that at common law nuisances might be abated, and that our Constitution has made no change in this regard. If at common law private property might be taken for private use, or taken for public use without compensation, or taken or destroyed without due course of law, then our Constitution has rendered inoperative the common law in that regard, because under our Constitution private property shall ever be held inviolate, and where taken for public use compensation therefor must be first made in money, and every person for an injury done him in his land, goods, or person shall have remedy by due course of law. The common law, in so far as it conflicts with these provisions of the Constitution, is inoperative. There is nothing so sacred in the common law that it should override a constitution or statute. Much of our Constitution was adopted, and many of our statutes enacted, to get rid of the imperfections and injustice of the common law. While, therefore, said § 3342 is valid as to the duty imposed on such railroad company to construct and keep open ditches as therein provided, where the accumulation of such water is to the injury of contiguous lands, or detrimental to the public, it is invalid when such water is not injurious to such lands or the public, because, if no injury is done by such accumulated water, the railroad company can use its right of way for the storage of such water or other purpose as to it may seem proper. The remedy provided in said §§ 3343, 3344, 3345, and 3346 for the enforcement of said duty so imposed by § 3342 is in conflict with § 19 of article 1 of the Constitution, and § 16 of the same article, because the private property of the railroad company, the money to pay the assessment, is taken, not for a public, but private, purpose, and thereby the constitutional right of the company to hold its private property inviolate is invaded; and this is done without due course of law, because done without notice and an opportunity to be heard in defense, and because, further, that the right of the owner of contiguous lands for redress against the company for failure to construct and keep open such ditches is a private right, to be enforced by proper action in a court of competent jurisdiction, and not by the paternal remedy of assessment and taxation for the protection and benefit of private persons. The power of assessment and taxation can be enforced by the state in the interest of the public only, and not for the redress of private wrongs.

The judgments of the courts below will be reversed, the demurrer to the petition overruled, and the cause remanded to the Court 60 L. R. A.

of Common Pleas for further proceedings according to law.

Spear, Davis, Shauck, and Crew, JJ., concur. **Price, J.,** not sitting.

HAMILTON, GLENDALE, & CINCINNATI
TRACTION COMPANY, *Pf. in Err.*,

v.
O. V. PARRISH.

(.....Ohio.....)

- *1. The consents of owners of lots abutting on a street to the construction and operation of a street railroad on such street are not property rights that can be appropriated under the power of eminent domain.
2. Such consents are not property rights, but rights in their nature personal to each owner of an abutting lot.
3. Such personal rights were bestowed by the general assembly on owners of abutting lots as a check upon the power of municipal authorities to authorize street railroads to be constructed and operated against the wishes of the owners of lots on such street.
4. The owners of abutting lots are free to give or withhold such consent, upon such terms as to them severally may seem proper, and there is no public policy in this state against giving such consent for a valuable consideration moving from the street railroad company to such lot owner.

(November 18, 1902.)

ERROR to the Circuit Court for Butler County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in a suit to enjoin the placing of tracks in the street in front of plaintiff's property. *Reversed.*

Statement by **Burket, Ch. J.:**

Said defendant in error, as plaintiff below, filed his petition in the court of common pleas against said plaintiff in error, and after the proper preliminary averments as to the incorporation of said company, his ownership of a lot on Third street, along which said company was about to build its street railroad under an ordinance passed by the board of control of the city of Hamilton, averred as follows: "Plaintiff says that said ordinance is void, and never went into operation, for the reason that the written consents of the owners of more than one half of the feet front of the lots and lands abutting on said Third street from High street to Maple avenue, for the construction of said railroad, were never obtained or filed with said board of control, and that, therefore, said board of control

*Headnotes by the Court.

NOTE.—As to legality of purchasing consent of property owner to the laying of street-railway tracks in street, see also, in this series, *Doane v. Chicago City R. Co.* (Ill.) 35 L. R. A. 588.

had no jurisdiction to pass said ordinance, and the franchise granted thereby is void. Plaintiff further says that the written consents of the abutting property owners that were procured and filed by said defendant to the construction of said street railroad on said Third street were procured by purchase for money or other valuable consideration, which inured to the exclusive benefit of the said abutting property owners, and that said written consents so purchased by money or other valuable consideration were the consents of owners of lots and lands abutting on said Third street, along which it is proposed to construct said railroad under said pretended ordinance, and that said owners immediately before and at the time they so signed said written consents were opposed to the construction of said street railroad along and over said route and in said street, and that they did not believe that the same so constructed over said route and on said street would be in the interest of themselves as property owners and of the public; that said abutters so signing for a consideration would not have signed said consent but for said consideration so paid, or things furnished them for so consenting; that said considerations were substantial, and in most instances large, sums of money paid to obtain said consents; that said payments and promises were made by and on behalf of said defendant's company to said property owners, and plaintiff says that without the consents of said property owners, so obtained by purchase and other substantial considerations and promises, the consents of the owners of one half of the feet front of the lots and lands abutting on said Third street, along which it is proposed to construct said railroad, could not have been obtained and presented to said board of control; that the opposition of said abutting property owners so receiving said consideration to the construction of said street railroad was conscientious, and in good faith. Plaintiff further says that, before said ordinance was passed by said board of control granting said franchise, that members of said board of control who voted in favor of said ordinance, to wit, Joseph J. Pater, C. E. Mason, Conrad Semler, and Joseph Strategier, had knowledge of the fact that, in order to secure the written consents of a majority of the feet front abutting on said Third street, that said defendant had procured the same by purchase or other valuable consideration. Plaintiff therefore says that by reason of the premises that said ordinance is illegal, null, and void." Plaintiff below prayed that the construction and operation of said street railroad be perpetually enjoined.

The traction company answered, denying the material allegations of the petition, and, after pleading the expenditure of over \$35,000, justified as follows: "Defendant further admits and alleges the fact to be that the said board of control of the city of Hamilton duly passed an ordinance granting and giving to this defendant the right to build said road along said route on said streets, 60 L. R. A.

and in pursuance of said grant made by the said city of Hamilton it is now engaged in constructing its said route, and was so engaged when enjoined therein. Defendant further says that the action of plaintiff is not brought in good faith as an abutting property holder, and for the benefit and protection of his said property, but is brought solely in the interest of rival street railroad companies, known as the Hamilton & Lindenwald Electric Transit Co. and the Southern Ohio Traction Co., of which said plaintiff is a stockholder and director, and for the purpose of preventing defendant from constructing its said track, and thereby preventing it from entering into competition with the said Hamilton & Lindenwald Electric Transit Co. and the Southern Ohio Traction Co., and solely in the interest and at the expense of said rival street railroad plaintiff is maintaining this action, and for no other purpose whatsoever. Defendant further says that the citizens of Hamilton and the public in general are desirous for said road to be constructed; that the same will be of great public advantage and benefit to the citizens and business men of the city of Hamilton; and that, if said plaintiff should prevail in this action, the same will be detrimental to the public interest, prevent defendant from constructing said road, and thereby deprive the citizens and people of Hamilton of the advantages and benefits of said street railroad line, and in addition thereto will cause a loss to this defendant of not less than \$—— by reason of the purchases as aforesaid made, the work done, obligations incurred, and defendant would be required to restore streets to their original condition. Defendant further says it has constructed a line and has the same completed from the village of Glendale, in Hamilton county, to the north corporation line of the city of Hamilton, on East avenue, and that with the construction of the present line now proposed it will be able to carry passengers direct from Third and High streets, in said city of Hamilton, to Fifth and Walnut, in the city of Cincinnati, without change of cars, and at a greatly reduced rate in fare, and in a much shorter time than is now charged or consumed by the other company; and the same will be the only route by which passengers can travel directly from Third and High streets, in Hamilton, to Fifth and Walnut, in the city of Cincinnati, without transfer or change of cars."

The substance of the reply is as follows:

"He denies that this action is not brought in good faith. He denies that it is brought solely in the interest of rival street railroad companies known as the Hamilton & Lindenwald Electric Transit Co. and the Southern Ohio Traction Co., and for the purpose of preventing defendant from constructing its track, and thereby preventing it from entering into competition with said street railroad companies; but avers that the action is brought in good faith by him as an abutting property holder, and for the benefit and protection of his property. He ad-

mits that he is one of the stockholders and directors of the Hamilton & Lindenwald Electric Transit Co. and the Southern Ohio Traction Co."

Upon trial in the circuit court on appeal that court, after finding that said O. V. Parrish is the owner of an improved lot on Third street, and that he commenced and prosecuted the action in good faith as an abutting property owner, found the further facts as follows:

"The total frontage on Third street from High to Canal street, now called 'Maple Avenue,' is 760.50 feet. A majority of the feet front is 381 feet. Of this number property owners representing 232.90 feet voluntarily signed their consent to the construction of the road in Third street. That the consent of 39 feet was signed 'Alexander Gordon, by J. L. Blair, His Agent,' subject to Alexander Gordon's approval; and that said Alexander Gordon never, although duly notified, disapproved of said written consent, and is therefore deemed to have approved the same. That the following written consents were procured by purchase for money consideration, to wit:

George Herold	30.00 ft.	\$400
Clement Snider	20.00 ft.	
Caroline Snider	25.00 ft.	
Pauline Schwartz	18.50 ft.	50
Margaret Schwartz	75.00 ft.	250
Fred Fries	52.00 ft.	100
	<hr/> 220.50 ft.	

"And that when said written consents were filed with the board of control, to wit, August 10, 1901, said board of control knew that the same had been procured by purchase. The court also find that at the time of the commencement of this improvement up until August 9 and 10, 1901, when said consents were procured by purchase, the said George Herold, Clement Snider, Caroline Snider, Pauline Schwartz, Margaret Schwartz, and Fred Fries had been opposed to the construction and operation of said street railroad in and along and upon said Third street. The court finds that at the time said ordinance was passed there was not on file with the city clerk, nor was there presented to the board of control, the valid written consents of the owners of a majority of the feet front of the property abutting upon said Third street from High to said Maple avenue, because of said consents so purchased."

As its conclusions of law upon the above facts the court found: "First. That the plaintiff was entitled, as an abutting property owner, to maintain this action. Second. The court finds as a conclusion of law that the said written consents procured by purchase of the abutting property owners are invalid, null, and void, and against public policy, and that the same cannot be counted to determine the majority of the feet front on said street, and that, therefore, at the time said ordinance was passed, there was not produced and filed with said 60 L. R. A.

board of control the written consents of the owners of the majority of the front feet on said part of said Third street, and that said board of control never acquired jurisdiction to pass said ordinance making said grant."

Proper exceptions were preserved throughout. The circuit court rendered judgment in favor of the plaintiff below against the traction company perpetually enjoining the construction of said street railroad on said part of Third street, and for costs. Thereupon the traction company came here seeking to reverse the judgment of the circuit court.

Messrs. Burch & Johnson, M. O. Burns, and J. W. Warrington for plaintiff in error.

Messrs. Shepherd & Shaffer, for defendant in error:

The written consent of the owners of abutting property is a condition precedent to the passage of an ordinance granting the right to construct a street railroad in the streets of a municipality.

Roberts v. Easton, 19 Ohio St. 78; *State ex rel. Henderson v. Bell*, 34 Ohio St. 197.

If it is illegal to buy the council to pass the ordinance, how can it be legal to buy the property holders to give the council jurisdiction.

Property is defined as the sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe.

2 Bl. Com. p. 2.

The right to possess, use, enjoy, and dispose of things.

Babcock v. Buffalo, 56 N. Y. 268.

It embraces every species of valuable right and interest, including real and personal property, easements, franchises, and hereditaments.

Madison Ave. Baptist Church v. Baptist Church in Oliver Street, 46 N. Y. 138.

If the statute confers upon the abutting property holders a property right incident to their land, then the nonconsenting abutter has the same property right as the consenting abutter, and the effect of this construction of the law is to take away from the nonconsenting abutter his property without due compensation, as the law requires only a majority of the abutting property owners, as measured by the feet front, to consent, and the law would be unconstitutional and void.

Ohio Const. art. 1, § 19.

The consents, by whomsoever obtained, inure to the benefit of the lowest bidder.

State ex rel. Henderson v. Bell, 34 Ohio St. 104.

The use of streets by street railways is within the original use for which the highway is dedicated.

Cincinnati & S. G. Ave. Street R. Co. v. Cummins, 14 Ohio St. 523.

The courts do not speak of the written consents as a property right, or as a species of property.

Roberts v. Easton, 19 Ohio St. 87; *State*

ex rel. Henderson v. Bell, 34 Ohio St. 197; *Simmons v. Toledo*, 8 Ohio C. C. 535; *Neare v. Mt. Auburn Cable R. Co.* 4 Ohio S. & C. P. Dec. 476; *Glidden v. Cincinnati*, 4 Ohio S. & C. P. Dec. 423.

The written consent of a property owner to the laying down of a street railroad in a street upon which his property abuts cannot be purchased for money.

Doane v. Chicago City R. Co. 160 Ill. 22, 35 L. R. A. 588, 45 N. E. 507; *McCartney v. Chicago & E. R. Co.* 112 Ill. 611; *Hunt v. Chicago Horse & Dummy R. Co.* 121 Ill. 939, 13 N. E. 176; *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953; *Liness v. Hesing*, 44 Ill. 113, 92 Am. Dec. 153; *Trist v. Child*, 21 Wall. 441, *sub nom.* *Burke v. Child*, 22 L. ed. 623; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Howard v. First Independent Church*, 18 Md. 451; *Maguire v. Smock*, 42 Ind. 1, 13 Am. Rep. 353; *Chicago, M. & St. P. R. Co. v. Shea*, 67 Iowa, 728, 25 N. W. 901; *State, Kean, Prosecutor, v. Elizabeth*, 35 N. J. L. 351; *Smith v. Applegate*, 23 N. J. L. 352; *Mt. Clair Military Academy v. North Jersey Street R. Co.* 65 N. J. L. 328, 47 Atl. 890; *Currie v. Atlantic City*, 66 N. J. L. 140, 48 Atl. 615; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L. R. A. 678, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 628.

Messrs. Shotts & Millikin and H. R. Probascio also for defendant in error.

Burket, Ch. J., delivered the opinion of the court:

The contention in the pleadings and finding of facts as to whether Mr. Parrish brought and prosecuted the action in good faith is of no importance, because, if he had a legal right which he sought to protect by an action in a court of justice, the motive which induced him to bring the action cannot be inquired into. To sustain his action, if brought in good faith, and defeat it if brought in bad faith, would be to control his morals by means of a lawsuit. That cannot be done. Unless restrained by statute, a man may direct his moral conduct as he pleases. In *State ex rel. Flowers v. Columbus Bd. of Edu.* 35 Ohio St. 368, the following appears on page 382: "If it is apparent that the relator is legally capable of prosecuting this proceeding, and that he has a clear legal right to the remedy he is seeking, we cannot stop to inquire whether he is moving of his own volition or at the request of some third party." To the same effect are *Lewis v. White*, 16 Ohio St. 444; *Frazier v. Brown*, 12 Ohio St. 294, and *Letts v. Kessler*, 54 Ohio St. 73, 40 L. R. A. 177, 42 N. E. 765. And it can make no difference whether his right is clear or not, only so that it exists. The fee of the land occupied by highways outside of municipalities is in the owner of the adjoining lands. *Lawrence R. Co. v. Williams*, 35 Ohio St. 168; *Daily v. State*, 51 Ohio St. 348, 24 L. R. A. 724, 37 N. E. 710; *Phifer v. Coz*, 21 Ohio St. 248, 8 Am. Rep. 58; and *Callen v. Columbus Edison Electric Light Co.* 66 60 L. R. A.

Ohio St. 166, 58 L. R. A. 782, 64 N. E. 141. But in municipalities the fee of the streets is in the city or village, in trust, however, for street purposes. Rev. Stat. § 2601, Swan & C. Rev. Stat. p. 1483; *Cincinnati & S. G. Ave. Street R. Co. v. Cumminsville*, 14 Ohio St. 523; *Columbus v. Agler*, 44 Ohio St. 485, 8 N. E. 302, and *Callen v. Columbus Edison Electric Light Co.* 66 Ohio St. 166, 58 L. R. A. 782, 64 N. E. 141. The fee being in the municipality in trust for street purposes, the abutting lot owner, in addition to his easement in the street for passage and repassage in common with the general public, has a special easement in the street appendant and appurtenant to his lot for ingress and egress; and when the street becomes vacated the public thereby surrenders, or, more properly speaking, legally abandons, the public use thereof for travel, but the private or special use or easement adheres to the abutting lots, and becomes part and parcel of them as by accretion, so as to preserve the right of ingress and egress to the lots over the land that formerly formed the street or part thereof. The reason that a street, when vacated, becomes a part of the abutting lots, is not because the owner of the lot owned the fee of the street, but because it must go there by necessity, to preserve his easement of ingress and egress, which in many cases is a valuable property right, and without which the lots might be of little value. The street being vacated and abandoned, the public no longer owns it, and it must either revert to the original owner, or adhere to the abutting lots as by accretion. As the original owner is presumed to have received full value for the street when he sold the lots, there is no just reason why he should have the street, when vacated, restored to him. And as the lot owners and those in the line of title have paid an increased price for lots by reason of the easement in the street, it is only just that when the street becomes vacated the easement should be preserved to them by adding the vacated street to the lots; and therefore this doctrine of accretion in such cases has been adopted in this state, and generally elsewhere. While the abutting lot owner has this right of public travel on the street, and the right of ingress and egress from the street to his lots, the public authorities retain the right to improve the street, and place such means of travel thereon as, in their judgment, shall best conserve the public welfare. And so long as his easement of ingress and egress is not materially injured, he is without remedy, because he is not wronged, said easement—all the property right he has in the street—not being interfered with. If, however, his easement of ingress and egress should be materially injured by the building and operation of the street railroad, then he must be first fully compensated for such injury. This, in substance, is the holding of this court in *Cincinnati & S. G. Ave. Street R. Co. v. Cumminsville*, 14 Ohio St. 523, and subsequent cases on this subject. His easement of ingress and egress being the only property

right he has in the street, the city authorities had the power, under the Constitution, to construct and operate a street railroad on and along the street without his consent and against his will, unless restrained by statute, provided they cause no material interference with his easement of ingress and egress.

The general assembly at an early day foresaw that the public authorities, in the exercise of the power to grant franchises for street railroads, with a liability to make compensation only in cases of interference with the property right of ingress and egress, might act oppressively, or against the wishes of the abutting lot owners, and therefore imposed a further check upon that power, and required that the consent in writing of the owners of a majority of the feet front on the street should be obtained and produced to the proper officer. This was done, as held by this court in *Roberts v. Easton*, 19 Ohio St. 86, "to protect the owners of property on the streets of cities . . . from the exercise of an arbitrary power on the part of the city authorities in permitting the streets to be used for street railroads." But this additional check did not have the effect to vest the fee of the street in the abutting lot owner, nor to give him a right to compensation, unless his easement of ingress and egress should be injured. It therefore gave him no more property rights than he had before the statute as to such consents was enacted. Such consent is, therefore, not a property right adhering to the lot, but is a personal right in the owner of the lot, a power or sword in his hands with which to protect his lot against the arbitrary powers of the city authorities. A majority of consents by the feet front is a condition precedent to jurisdiction to pass a street railway ordinance, and each abutting lot owner is free to aid in conferring such jurisdiction, and free to withhold such aid. His actions cannot be controlled in that regard by others on the street, nor by courts of justice in their behalf. Such a condition, such consent, in the nature of things, cannot be appropriated under the power of eminent domain. The consent must be given or withheld at the option of the lot owner. He cannot be forced to give it, nor forced to withhold it. Rev. Stat., § 3439, provides for this written consent, and it imposes no conditions or restrictions, but leaves the lot owner free to give or withhold his consent. And § 3440 goes further, and provides that "nothing herein contained shall affect the rights of property owners to give or withhold their consent." So that our statutes, while granting this power of consent, and providing for the giving or withholding of the same, impose no conditions or limitations on such power, but expressly provide that the statutes shall not affect the rights of property owners to give or withhold such consent. We cannot approve the Illinois cases on this question, but regard the New York and New Jersey cases on the question as stating the correct rule. As the general assembly, while having the

subject before it, imposed no conditions or limitations upon the exercise of this power, can this court amend the statute by construction, and add conditions or limitations not imposed by the legislature? We think not. In some other like statutes the general assembly has imposed conditions and limitations, and, if it had regarded them necessary in this statute, it would have inserted them into the act, as was done in the two-mile pike act, now Rev. Stat., § 4836. It is, therefore, clear that the general assembly did not regard it wise or necessary to impose conditions or limitations upon the exercise of the power of consent in such cases.

But it is urged that outside of the statute, and independent of it, the purchase of such consents for value is against public policy, and this seems to be the ground upon which the circuit court based its judgment; because that court found, as a conclusion of law, that the "consents procured by purchase are invalid, null, and void, and against public policy." As they are not shown to be defective in form or substance, and are not prohibited by statute, there can be no reason for holding them "invalid, null, and void," unless they are against public policy. We will therefore address ourselves to the matter of public policy, as the case was argued here upon that ground. In *Probasco v. Raine*, 50 Ohio St. 378, 34 N. E. 536, this court held: "If a statute is constitutional, it is valid, and cannot be set aside by a court as being against public policy or natural right. There can be no public policy or right in conflict with a constitutional statute." In the case at bar the effort is, not to invoke public policy to override a valid statute, as was attempted in the *Probasco Case*, but rather to bring forward a public policy to supply a rule of decision as to a statutory matter as to which the general assembly has been purposely silent. In *Vidal v. Philadelphia*, 2 How. 127, 11 L. ed. 205,—a case from Pennsylvania,—the Supreme Court of the United States laid down the rule as to public policy in such cases as follows: "Nor are we at liberty to look at general considerations of the supposed public interests and policy of Pennsylvania upon this subject, beyond what its Constitution and laws and judicial decisions make known to us. The question, What is the public policy of a state, and what is contrary to it? if inquired into beyond these limits, will be found to be one of great vagueness and uncertainty, and to involve discussions which scarcely come within the range of judicial duty and functions, and upon which men may and will complexionally differ. . . . We disclaim any right to enter upon such examinations beyond what the state constitutions, laws, and decisions necessarily bring before us." No decision of this court is cited, and we know of none, recognizing or establishing the public policy contended for in this case, and we think it safe to hold that there is none. Under a system like ours, where the fundamental rights of the people are defined and guarded

by a written constitution, where all crimes are statutory, and our civil rights and procedure also regulated by statutes, there is but little room for public policy outside of our statutes and Constitution. In this regard our system is very different from that of England, where the doctrine of public policy in earlier days had a wide scope, and from which it was brought to this country, and has often been indiscriminately applied by courts here without observing the distinction between the systems of the two countries. The Supreme Court of the United States in the *Girard Will Case*, 2 How. 127, 11 L. ed. 205, states the rule as to public policy correctly, and, tested by that rule, we find nothing in our Constitution, statutes, or decisions sustaining the public policy contended for.

It is urged that to purchase consents for value is a species of bribery, and an expression to that effect in *Makemson v. Kauffman*, 35 Ohio St. 444, is cited, and relied upon. But upon turning to our bribery statute we do not find it to cover the case, and, as we have no common-law crimes, but all defined by statute, we must conclude that such purchase of consents is not a species of bribery, because under our system what is not prohibited is tolerated. Again, title 1, chap. 8, of our Penal Code, from §§ 6929 to 7017, is devoted to "Offenses against Public Policy," and it is only fair to presume that, if the general assembly had intended to prohibit the purchase of such consents, it would have done so in this chapter 8, or in the street railroad sections.

It is also urged that the abutting lot owners, as to these consents, act in a public capacity, or perform a public function, and that they must, therefore, act from pure motives for the benefit of the public, or, at least, for the good of all on the street, and that their action for or against the street railroad cannot be influenced by considerations of gain; and some cases are cited supporting this view. But here again we are asked to amend the statutes by construction, and to create a public policy which is not deducible from our Constitution and statutes. This court cannot control the morals of litigants, unless so provided by statute. And when the evil results flowing from a given course of conduct have not been of a grave enough character to attract the attention of the general assembly, this court cannot, by construction, provide a new remedy under the plea of public policy.

The cases cited by counsel on both sides have been fully considered, but their review has not been found necessary in this opinion.

With this view as to such written consents, the questions growing out of 95 Ohio Laws, § 3439a, p. 475, are immaterial, and are not here decided. The judgment of the circuit court will be reversed, and judgment entered upon the finding of facts in favor of the plaintiff in error.

Judgment reversed, and judgment for plaintiff in error.

Spear, Davis, Shauk, Price, and Crew, JJ., concur.

CONNECTICUT SUPREME COURT OF ERRORS.

Adam SCHMAEJZLE

v.

LONDON & LANCASHIRE FIRE INSURANCE COMPANY *et al.*

(75 Conn. 397.)

In distributing the loss upon a building, machinery, and stock between insurance policies covering all the items for a gross sum and those specifically liable on each item, all of which provided that the liability shall not be greater "than the amount hereby insured shall bear to the whole insurance," the blanket policies should be regarded as insuring each item to the entire amount unappropriated when it is reached, making the adjustment item by item in the order of greatest loss, if that will work substantial equity and justice to all concerned, and deducting the sums appropriated to the respective items as they are adjusted and passed.

(January 7, 1903.)

NOTE.—As to proportioning loss between blanket policy and one covering specific property only, see also, in this series, *Page v. Sun Ins. Office* (C. C. App. 8th C.) 33 L. R. A. 249. 60 L. R. A.

RESERVATION by the Superior Court for New Haven County for the opinion of the Supreme Court of Errors of an action brought to recover the amount alleged to be due on certain policies of fire insurance in which the question was as to the amounts which the respective policies should contribute toward the loss. *Judgment in favor of specific policies.*

The facts are stated in the opinion.

Messrs. William B. Stoddard and George R. Cooley for plaintiff.

Messrs. Fay & Bennett, for defendants:

The clause which provides for an apportionment of the loss in case of other insurance on the property is a part of the contract, and must receive a reasonable construction. It must be construed as any other stipulation between the insurer and the insured.

Ogden v. East River Ins. Co. 50 N. Y. 388, 10 Am. Rep. 492; *Page v. Sun Ins. Office*, 64 Fed. 194, 33 L. R. A. 249, 20 C. C. A. 397, 36 U. S. App. 672, 74 Fed. 203.

The compound policies cover to the full amount every item of property described in them.

Leisure Lumber Co. v. Mutual F. Ins. Co.

101 Iowa, 514, 70 N. W. 761; *Page v. Sun Ins. Office*, 33 L. R. A. 249, 20 C. C. A. 397, 36 U. S. App. 672, 74 Fed. 203.

The blanket policy should not be allowed to claim any benefits because of the incidental fact that it finds a specific policy on some portion of the property, where, in the absence of such other insurance, it would properly be obliged to follow and pay the whole loss, up to the full amount for which it is written.

Ostrander, Fire Ins. p. 495; *Page v. Sun Ins. Office*, 33 L. R. A. 249, 20 C. C. A. 397, 36 U. S. App. 672, 74 Fed. 203, 64 Fed. 194; *Sherman v. Madison Mut. Ins. Co.* 39 Wis. 104; *Cromie v. Kentucky & L. Mut. Ins. Co.* 15 B. Mon. 432; *Angelrodt v. Delaware Mut. Ins. Co.* 31 Mo. 593.

Messrs. Alling, Webb, & Morehouse also for defendants.

Prentice, J., delivered the opinion of the court:

The plaintiff is the owner of premises upon which stood a brewery and shed. In the brewery were machinery and stock. Upon the buildings, machinery, and stock the plaintiff carried in some thirty-four companies insurance against fire aggregating \$60,000 in amount. These policies were all of the standard form, and contained the following provision: "This company shall not be liable under this policy for a greater proportion of any loss on the described property . . . than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property. . . ." Thirty-one of the policies, covering insurance for \$55,000, were of the kind known as "blanket" or "compound" policies; that is, they insured said buildings, machinery, and stock as a whole, and without distributing the amount of the insurance among the several items. The remaining policies, containing insurance for \$5,000, were of the kind known as "specific;" that is, the amounts insured thereby were distributed among the several items of property, a specified amount to each item. Each of these specific policies covered in the whole precisely the same property as did the compound insurance, but distributively. The manner of distribution was uniform among the specific policies, and was among four separate items, to wit, the main or brewery building, stock, machinery, and shed, as follows: \$1,634.88 on the brewery, \$1,839.21 on the stock, \$1,498.64 on the machinery, and \$27.24 on the shed. A fire damaged the brewery, stock, and machinery. The sound value of the property insured was \$59,982, divided as follows: Brewery, \$20,586; stock, \$11,085; machinery, \$28,111; and shed, \$200. The loss by the fire was mutually adjusted at \$42,953, distributed as follows: Brewery, \$15,115; stock, \$11,085; machinery, \$16,753; and shed 0.

It is conceded that the assured is entitled to receive from the defendants the amount of his loss above stated. The only question in the case is one between the several de-

fendants as to the sums which each should pay. Between the blanket insurers there is no dispute, and between the specific there is none. The contention is between the two classes of insurers, and is as to the method to be employed in the apportionment of the loss in view of the provision as to prorating which appears alike in all the policies and which has been quoted. It is clear that the compound and the specific insurance must be brought together in the prorating. This necessarily involves an adjustment by separate items, and the application in some way of the blanket insurance to each item covered by specific insurance. The question is as to how this shall be done. The claim of the blanket insurers is that their policies should, for the purpose of the distribution of the loss, be converted into specific ones; specific amounts under the policies being set out to each item upon which there is specific insurance, so that, for the purpose of determining the amount that any blanket policy shall contribute towards any item of loss upon which there is specific insurance the amount of the blanket policy's insurance upon such item and the total amount of insurance thereon shall be computed upon the basis thus ascertained. The methods suggested for making this conversion from compound to specific are two, both of which are claimed as having the approval of authority and experience. One method is to distribute the amount of the blanket policy over the property insured by it so that the items bearing specific insurance shall be credited with insurance to such a proportionate amount of the whole as the sound value of the specific item bears to the sound value of the whole. The other is to make this conversion upon the basis of the respective losses upon the property insured. The specific insurers, upon the other hand, contend that there should be no such conversion, but that in adjusting each item of loss the total amount of insurance thereon and the amount insured by each blanket policy be determined by including the entire amount of the compound insurance which has not been previously exhausted in adjusting some other item. The widely differing results to which the two claims might lead are apparent. In making these claims, and others which are incidental to them, all the parties concede that, whatever general rule of apportionment of loss may be adopted, it must, in so far as it is not directly prescribed by the contract, yield in case of need to the interests of the assured. The first requisite of any method of apportionment sought to be applied must be the assured's protection to the full extent of his rights under his policies. Any method which, in a given case, fails to afford him the full measure of his just indemnity, must give place to another which will. In the present case the plaintiff has no concern as to which of the suggested modes be adopted in distributing his loss among his insurers. The interests of the latter are alone involved. The whole question arises out of the application to the facts of the case of the provisions of the pro-

rating clause in the policies. Each insurer has not entered into an unqualified obligation to indemnify the assured to the extent of his loss, or to the extent of his loss limited by the amount of the policy. It has made a contract which gives it, as against the assured, a benefit arising from coinsurance. It stipulates that its liability shall be limited in amount dependent upon the existence and amount of such coinsurance. The policy expressly states how its liability shall be determined. The question, therefore, becomes one of contract construction. It is not one of equitable determination in the absence of an agreement, as was the case in certain of the adjudicated cases. We are not called upon to adjust the equities between coinsurers, one having paid more than his fair share of the loss. We are not dealing with the doctrine of subrogation. The parties have recorded their agreement, and we have only to determine its meaning, and enforce it.

The policy provision, to restate its pertinent portion, is: "This company shall not be liable under this policy for a greater proportion of any loss on the described property . . . than the amount hereby insured shall bear to the whole insurance." It is thus provided that the mode to be employed in determining the extent of liability is purely a mathematical one, involving the stating of a problem in simple proportion. The three known terms of the proportion, from which the fourth, to wit, the amount of the liability under the given policy, is to be deduced, are stated to be the whole insurance, the amount insured under the policy, and the loss. The loss is in this case an ascertained sum. In any it is a determinable one. Where the given policy is a specific one, the second term is also a definite one, and only the first remains open to question. If the given policy is a blanket one, then both the first and second terms are subject to dispute. An answer to a single question, however, resolves all. That question which thus stands out as the controlling one in the situation is thus seen to be this: "By the terms of a blanket policy, what amount of insurance attaches to each item embraced within the insurance?" The answer to this question is not a hidden one. The characteristic features of a blanket policy are well understood. Its very essence is that it covers to its full amount every item of property described in it. If the loss upon one portion or item of the property exhausts the full amount of the policy, the whole insurance must be paid. There can be no apportionment of it. In the absence of a prorating clause, one blanket insurer among many insurers, whether blanket or specific, may be sued, and he must pay the whole loss, if it is not in excess of his policy. His payment will give him certain equitable rights of contribution as against his coinsurers, but his legal obligation to pay the assured cannot be questioned. The contract holds him to that. These principles are elementary. 3 Joyce, Ins. § 2492; 1 May, Ins. 3d ed. § 13; Ostrander, Fire Ins. 60 L. R. A.

§ 204. It is in such particulars as these that blanket policies differ from specific. The difference is one which inheres in the nature of the two contracts, and has its recognition in the accepted advantages of a blanket policy to the assured and its disadvantages to the insurer, and in the more exacting terms which are customarily demanded for its issue. The answer to our question must, therefore, be that the whole amount insured by a blanket policy attaches, and invariably attaches to each item thereunder. The blanket insurers concede the peculiar character which in general inheres in such policies, but they say that for the purpose of the contributing clause they are entitled to an apportionment of their insurance in cases of adjustment in connection with specific insurers. We fail to see anything in this claim but an appeal from the contract to assumed principles of fairness and equity. It certainly does not rest upon any logical foundation. The palpable answer to it is found in the fact that the question is one of legal construction of an express contract obligation, and not of equitable determination. The parties having made a contract, the courts are powerless to change it. What the blanket insurers ask is, in effect, that there be read into their policies a provision which is not there. Had the parties wished, this provision might easily have been incorporated. It was not, and the contract must stand as made.

We have thus far discussed the question at issue as one of reason, and not of authority. The analogous cases are few. They are, however, to be found. Concerning them it has to be confessed that the majority which have arisen under the operation of the prorating clause have adopted the compound insurers' view. It is noticeable, also, that of these all save a very few state the proposition as a *dictum*, or imply its correctness without argument or reason therefor. Such are the cases of *Blake v. Exchange Mut. Ins. Co.* 12 Gray, 272; *Cromie v. Kentucky & L. Mut. Ins. Co.* 15 B. Mon. 432; *Lesure Lumber Co. v. Mutual F. Ins. Co.* 101 Iowa, 514, 70 N. W. 761. In *Chandler v. Insurance Co. of N. A.* 70 Vt. 562, 41 Atl. 502, the court attempts to give a reason for this position. It is contained in these words only: "As by the terms of the specific policies they cannot be converted into blanket policies, it necessarily follows that the only way in which the loss can be adjusted is to turn the blanket policies into specific ones." This is a clear case of a *non sequitur*. The argument rests upon an assumed necessity which does not exist. It is practically as simple to adjust a loss by not apportioning as by apportioning the blanket insurance. In *Ogden v. East River Ins. Co.* 50 N. Y. 388, 10 Am. Rep. 492, the court finds its reason in the fact that it was unreasonable to assume that any of the parcels included in the blanket insurance was over-insured where the total insurance was not in excess of the total value. What method of adjustment this argument would have led the court to adopt had concurrent compound policies for differ-

ent gross sums, all or part exceeding specific item valuations, been involved, was not stated. An assumption of such a situation sufficiently discloses the fallacy of the case. Of all these cases it is to be observed that none attempts to lay down a rule of universal, or even general, application. They treat each case by itself, conceding that in the next the rule might not apply. The trouble has been that, in ignoring the contract, all has been left to arbitrary and uncertain action, which fairness and equity in the given case seemed to dictate. In *Page v. Sun Ins. Office*, 33 L. R. A. 249, 20 C. C. A. 397, 36 U. S. App. 672, 74 Fed. 203, the other side of this question is distinctly avowed. The decision is put squarely upon the terms of the contract. The argument, although brief, is substantially that which has guided us. The position assumed in the case last cited seems to have the approval of Joyce in his latest work. 4 Joyce, Ins. § 3457. In *Sherman v. Madison Mut. Ins. Co.* 39 Wis. 104, also, this doctrine receives at least implied sanction.

One other point remains to be considered. As the existence of the specific policies compels the adjustment of the loss by items, these items must be taken up in some order. This order might very materially affect the result, both as respects the companies and the insured, since that portion of a blanket policy which is exhausted in the settlement upon the first item no longer remains to be applied to the second item, and so on through the list. This matter of order is one upon which the policies in suit and policies ordinarily are silent. Evidently nothing remains but some arbitrary method of selection, in which the considerations influencing a choice should be what, on the whole, under the conditions, best satisfies the ends of fairness and justice as between the companies, the assured being given his rightful amount of indemnity. A little study of the peculiar situations which may arise may convince one that no rule of universal and unvarying application can be safely laid

down. Whether one suggests the order of the greatest losses, or of the least losses, or the order of the enumeration in the special insurance, or an order to be determined by lot,—two at least of which methods appear to have been used,—or some other order, he will quite likely be met with an assumed situation in which his system seems to fail to fully accomplish equity and justice. Fortunately we have no need to search for a universal rule. In the present case it matters not to the assured, and little to the insurers, what order of adjustment is adopted. The order first indicated, to wit, that of the greatest losses, is one which, as a general rule, has some considerations in its favor. In this case it works out substantial equity and justice to all concerned. We therefore select it for the purposes of this case as on the whole the best.

The superior court is advised that in the adjustment of the plaintiff's loss and its apportionment among the defendant companies the items upon which there was loss be taken up in the order of the greatest losses, the whole property being divided for this purpose into items corresponding to those designated in the specific insurance; that in computing the total amount of insurance upon the first item the full amount of the blanket insurance be applied, and that the full amount of any given blanket policy be regarded as the amount of insurance upon the item under such policy; that with respect to the second and subsequent items the same rule be adopted, save that the total amount of insurance thereon be reduced by the amount of blanket insurance already exhausted in the settlement upon former items, and the amount of insurance under any given blanket policy likewise reduced by the amount thereof used in prior adjustments, and that judgment be rendered against the several defendants according to the results thus obtained.

The other Judges concur.

FLORIDA SUPREME COURT.

STATE of Florida *ex rel.* John MILTON *et al.*, *Plffs. in Err.*,
v.

E. T. C. DICKENSON *et al.*

(.....Fla.....)

*1. The militia of the state is an arm of the state government, and is in no sense such a county institution or establishment as that any particular county can, ex-

clusively, be required to impose taxes for its, or any part of its, maintenance.

2. Section 27, chap. 4084, Laws 1890, requiring the board of county commissioners in each county in which there is a company or battery of state troops to provide each company or battery with an armory for its meetings, drills, etc.,—*Held*, to be unconstitutional and void.

(*Mabry, J., dissents.*)

(October 21, 1902.)

*Headnotes by TAYLOR, CH. J.

NOTE.—For a case in this series holding that an act authorizing the imposition of a tax on all taxable property in a county to secure the location there of a state institution is invalid, see *Wasson v. Wayne County* (Ohio) 17 L. R. A. 795.
60 L. R. A.

ERROR to the Circuit Court for Jackson County to review a judgment refusing a writ of mandamus to compel the commissioners of Jackson County to proceed to erect an armory. *Affirmed.*

Statement by **Taylor**, Ch. J.:

The plaintiffs in error instituted mandamus proceedings in the circuit court of Jackson county against the county commissioners of said county. An alternative writ was granted and issued, and alleges as follows:

"In the Name of the State of Florida: To E. T. C. Dickenson, Chairman, Frank Peacock, A. A. Stribling, C. B. Pledger, and J. W. Carter, Members of the Board of County Commissioners of Jackson County, Florida, and Composing said Board of County Commissioners, Greeting:

"Whereas, a sworn petition of John Milton, Jr., as captain, C. L. Wilson as first lieutenant, and George Horne as second lieutenant, of a military company known as the 'Jackson Guards,' and designated as Company M, Third Battalion, First Regiment of Florida State Troops, shows that John Milton, Jr., is captain, and C. L. Wilson is first lieutenant, and George Horne is second lieutenant, of a military company known as the 'Jackson Guards;' that said military company has been duly mustered into the service of the state of Florida, and is a part of the Florida State Troops, and known and designated as Company M, Third Battalion, First Regiment Florida State Troops; that it contains, rank and file, forty men; that said men all reside at Marianna, Jackson county, Florida, and in the immediate vicinity of said town, except one, or perhaps two, who were enlisted and were mustered in in said town and have since removed; that said military company has been duly armed and equipped by the state of Florida, and has possession of a large quantity of arms, uniforms, and other military equipments furnished by the state; that said company has no armory suitable for its meetings and drills and for the safe storage of its arms and equipments; that its captain and commissioned officers have applied to the county commissioners of Jackson county, state of Florida, to provide them with an armory suitable for its meetings and drills and for the storage of its arms and equipments, but said respondents have wholly neglected, refused, and failed to provide such an armory.

... In the name of the state of Florida, you are hereby commanded to provide a suitable armory for its meetings and drills, and for the safe storage of its arms, of the Jackson Guards, Company M, Third Battalion, First Regiment Florida State Troops, forthwith, or to show cause before the judge of the first judicial circuit of Florida, at his office in the city of De Funiak Springs, Florida, Walton county, at 10 o'clock A. M. on the 16th day of September, 1901, why you should not do so; that you have then and there this writ."

The respondents moved to quash the alternative writ upon the following grounds: That Laws 1899, § 27, chap. 4684, laws of the state of Florida, under which said alternative writ was issued, is null and void for the following reasons: (a) That said section is in contravention and contrary to § 5, art. 9, of the Constitution of Florida; (b) that said section is in contravention and

contrary to the provisions of §§ 20, 21, art. 3, of the Constitution of the state of Florida; (c) that said section is contrary to the provisions of article 14 of the Constitution of the state of Florida; (d) because said section is contrary to the provisions of § 16, art. 3, of the Constitution of the state of Florida.

This motion was granted, and the alternative writ was quashed, and this judgment the relators have brought here for review by writ of error.

Messrs. Benjamin S. Liddon and William B. Farley, for plaintiffs in error:

The armory is a county purpose within the meaning of the Constitution. The court has never been narrow or technical in placing a construction upon the phrase "county purpose." It has stated that no certain, fixed rule can be prescribed by which the question can be determined.

Cotten v. Leon County, 6 Fla. 610.

Military aid in the maintenance of law and order, and the protection of the public property, the suppression of mobs and riots, and the prevention of what is called lynch law, are each more of a county purpose.

Columbia County v. King, 13 Fla. 451; *Stockton v. Porcell*, 29 Fla. 1, 15 L. R. A. 42, 10 So. 688; *Advisory Opinion*, 13 Fla. 687; *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *State v. Nelson County*, 1 N. D. 88, 8 L. R. A. 283, 45 N. W. 33; *Folsom v. Township Ninety-Six*, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 174; *Roberts v. Northern P. R. Co.* 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; *Hasbrouck v. Milwaukee*, 13 Wis. 38, 80 Am. Dec. 718; *Lund v. Chippewa County*, 93 Wis. 640, 34 L. R. A. 131, 67 N. W. 927; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *Marks v. Purdue University*, 37 Ind. 155, 56 Ind. 288; *Merrick v. Amherst*, 12 Allen, 500; *State ex rel. Bd. of Edu. v. Haben*, 22 Wis. 661; *Sleight v. People*, 74 Ill. 47; *Taylor v. Thompson*, 42 Ill. 9; *Burr v. Carbondale*, 76 Ill. 455; *Hensley Twp. v. People*, 84 Ill. 544.

The state legislature has the supreme power of taxation within the limits of the Constitution. A county is a mere local subdivision of the state.

Lund v. Chippewa County, 93 Wis. 640, 34 L. R. A. 131, 67 N. W. 927; *Duval County v. Jacksonville*, 36 Fla. 196, 29 L. R. A. 416, 18 So. 339.

The Constitution should be construed in the light shed upon it by former constitutions and the former judicial and legislative history of the state.

Advisory Opinion, 13 Fla. 716; *Cotten v. Leon County*, 6 Fla. 610.

The first legislature assumed after the adoption of the Constitution of 1868 required the county commissioners to provide armories for the volunteer militia within the limits of the county.

Fla. Laws, chap. 1638; *Bush's Digest*, p. 593; *McClellan's Digest*, p. 776, § 28.

The practical construction put upon the law by a co-ordinate branch of the govern-

ment is entitled to a great consideration at the hands of the judiciary. Especially is this true when said construction is made by the highest power of the state,—the legislature.

Bloxham v. Consumer's Electric Light & Street R. Co. 36 Fla. 519, 29 L. R. A. 507, 18 So. 444; *Short v. State*, 80 Md. 392, 29 L. R. A. 404, 31 Atl. 322.

Counties have power to provide armories.

People ex rel. Stockwell v. Earle, 47 How. Pr. 370; *Ford v. New York*, 63 N. Y. 640.

It is within the power of the legislature to impose a tax upon the different subdivisions of the state, when in the judgment of the legislature, it is for the benefit of that locality as well as the state at large.

Young v. Kansas City, 152 Mo. 661, 54 S. W. 535; *State ex rel. Aull v. Field*, 119 Mo. 593, 24 S. W. 752.

On petition for rehearing.

The court errs in following the precedent of *Hubbard v. Fitzsimmons*, 57 Ohio St. 436, 49 N. E. 477, and *Wasson v. Wayne County*, 49 Ohio St. 622, 17 L. R. A. 795, 32 N. E. 472, because said authority depends upon the case of *Livingston County v. Weider*, 64 Ill. 427, which is severely criticised and exposed by the Supreme Court of the United States in the case of *Livingston County v. Darlington*, 101 U. S. 407-417, 25 L. ed. 1015-1019.

Mr. M. D. Price, for defendants in error:

County purposes are those which are for the use and benefit of the people of the county at large, or of some considerable portion of them, and intended and needed by the inhabitants thereof residing within such county.

Skinner v. Henderson, 26 Fla. 121, 8 L. R. A. 55, 7 So. 464; *Cotten v. Leon County*, 6 Fla. 610; *Stockton v. Powell*, 29 Fla. 1, 15 L. R. A. 42, 10 So. 688; *Cooley*, Taxn. 2d ed. p. 116; *Duval County v. Jacksonville*, 36 Fla. 196, 29 L. R. A. 416, 18 So. 339; *Advisory Opinion*, 13 Fla. 688.

The erection of an armory for a company of the Florida state troops in the county where such company is organized is not a county purpose. Each company is a compound part of the state troops and subject to governor's orders.

Fla. Const. art. 14, § 4; Acts 1899, chap. 4684, §§ 1, 4.

There is no such benefit arising to the county by reason of the organization of a company of the state troops therein as would "peculiarly affect the people of the county in their property and local interest," in any manner different or in any different degree than any other county in the same portion of the state, or in fact any other county in the state.

Advisory Opinion, 13 Fla. 688.

There is no county purpose connected with the building; it serves no county end, and is in no way of a peculiar benefit to the inhabitants of the county, different from the inhabitants of other counties of the state.

Wasson v. Wayne County, 49 Ohio St. 622, 17 L. R. A. 795, 32 N. E. 472; *Hub-*

bard v. Fitzsimmons, 57 Ohio St. 436, 49 N. E. 477.

Nor is the question in any way affected by the fact that the legal title to the armory is in Cuyahoga county. The character of the imposition is determined by the fact that the armory is to be used for the accomplishment of duties which the Constitution charges upon the general assembly and the officers of the state.

Hubbard v. Fitzsimmons, 57 Ohio St. 436, 49 N. E. 477; *State ex rel. Frease v. Kreighbaum*, 9 Ohio C. C. 619; *State ex rel. Long v. Brinkman*, 7 Ohio C. C. 165; *Wilder v. Daniels*, 53 Ohio St. 658, 44 N. E. 1150; *Daniel v. Columbus*, 8 Ohio C. C. 642; *Wasson v. Wayne County*, 49 Ohio St. 622, 17 L. R. A. 795, 32 N. E. 472.

The imposition of taxes by a county must be for a public purpose. Unless the legislation authorizing the imposition of taxes be not only for a public, but also for a county, purpose, it is not enforceable.

Cooley, Const. Lim. 5th ed. 594; *Sedgw. Stat. & Const. Law*, p. 414; *Livingston County v. Weider*, 64 Ill. 427.

If such building is for state purposes, or for the benefit of the state, then, in such event, a county has no right to assume as a county charge; neither can the legislature compel it to assume, a burden which should properly be borne by the state. A local assessment for a general purpose is unconstitutional.

Desty, Taxn. 274; *Foster v. Kenosha*, 12 Wis. 618; *Gordon v. Cornes*, 47 N. Y. 608; *Livingston County v. Darlington*, 101 U. S. 407, 25 L. ed. 1015; *State v. Nelson County*, 1 N. D. 88, 8 L. R. A. 283, 45 N. W. 33.

The expenses incident to the performance of a duty of this general character cannot be made the subject of a local imposition.

Wilder v. Daniels, 53 Ohio St. 658, 44 N. E. 1150; *Hubbard v. Fitzsimmons*, 57 Ohio St. 436, 49 N. E. 477; *State ex rel. Frease v. Kreighbaum*, 9 Ohio C. C. 619; *State ex rel. Long v. Brinkman*, 7 Ohio C. C. 165.

Taylor, Ch. J., delivered the opinion of the court:

Laws enacted in 1899, chap. 4684, § 27, to enforce the provisions of which this proceeding was instituted, provides as follows: "It shall be the duty of the board of county commissioners in each county in which there is a company or battery of state troops to provide each company or battery with an armory suitable for its meetings and drills and the safe storage of arms and equipments." The first contention of the motion to quash the alternative writ is that the provision of this section of the law is void because it violates the provisions of § 5 of article 9 of the Florida Constitution, which reads as follows: "The legislature shall authorize the several counties and incorporated cities or towns in the state to assess and impose taxes for county and municipal purposes, and for no other purposes, and all property shall be taxed upon the principles established for state taxation. But the cities and incorporated towns shall make

their own assessments for municipal purposes upon the property within their limits. The legislature may also provide for levying a special capitation tax, and a tax on licenses. But the capitation tax shall not exceed \$1 a year, and shall be applied exclusively to common-school purposes." The limitation imposed by this section of the organic law upon the legislature, in its grants of authority to the counties to assess and impose taxes, is that such taxes must be for none other than county purposes. As the expense of building or renting armories for state troops must necessarily be met by taxation, it follows that the validity of a law imposing the burden of supplying such armories upon the counties must depend upon the question whether or not it is a county purpose. And this brings us to the question, Is a company of state troops, regularly enlisted as a part of the militia of the state, in any sort or sense such a county institution of the county where its members individually reside as that the erection or maintenance of its armory in such county can properly be termed a county purpose?

Section 1 of article 14 of our Constitution provides as follows: "All able-bodied male inhabitants of the state between the ages of eighteen and forty-five years, that are citizens of the United States, or have declared their intention to become citizens thereof, shall constitute the militia of the state; but no male citizen of whatever religious creed or opinion shall be exempt from military duty except upon such conditions as may be prescribed by law." Section 2 of the same article provides that "the legislature may provide by law for organizing and disciplining the militia of the state, for the encouragement of volunteer corps, the safe keeping of the public arms, and for a guard for the state prison." Section 3 of the same article provides for the appointment by the governor, by and with the consent of the senate, of two major generals and four brigadier generals of militia. Section 4 of the same article provides that "the governor shall have power to call out the militia to preserve the public peace, to execute the laws of the state, to suppress insurrections, or to repel invasion." Section 16 of article 4 of our Constitution provides that "the governor shall appoint all commissioned officers of the state militia, including an adjutant general for the state. The adjutant general shall be the chief officer of the governor's staff, with the rank of major-general. His duties and compensation shall be prescribed by law." Section 4 of article 4 of the Constitution provides that "the governor shall be commander-in-chief of the military forces of the state, except when they shall be called into the service of the United States."

From these provisions of our organic law it will be seen that that instrument recognizes and provides for the militia as a state institution, of which the chief executive of the state is made the commander in chief, and it is designated therein as being "the militia of the state," and every able-bodied

male inhabitant of the state, regardless of the county of his residence, between the ages of eighteen and forty-five years, who are citizens of the United States, or who have declared their intention to become citizens thereof, are made members thereof; and it is made the duty of the legislature to provide by law for the proper discipline thereof, and, as part and parcel thereof, to encourage volunteer corps. The arms with which they are equipped is also recognized as being the public property of the state. The provisions of § 2 of said article 14, providing for the state militia, also seems to contemplate that the legislature may, from the body of the militia of the state, supply a guard for the state prison. If the state prison were fixedly established in any particular county, and a company of state militia were organized in such county exclusively of residents thereof, and such company were assigned to duty as a guard for such state prison, there could be no question but that the expense of housing and maintenance of such guard would be properly chargeable to the state. And this duty of acting as a guard for the state prison seems to be contemplated by the Constitution as being one of the functions of the militia of the state. Their other functions and duties are summarized in § 4 of article 14, above quoted, as being subject to the call, not of a county or any local official, but of the governor, to preserve the public peace, to execute the laws of the state, to suppress insurrection, or to repel invasion, not confined in any particular county or locality, but anywhere within the borders of the state. In a democratic form of government like ours the military establishment may be said to be the *dernier ressort* of governmental authority, that is never called upon except when all other civil authority fails and becomes powerless to preserve public order. It is the strong arm of, and represents the might of, governmental sovereignty, and is a power that should never be surrendered to an agency of the state, such as a county or municipality, but should be held, as our Constitution seems to contemplate, subject to be wielded solely by the supreme sovereign arm of the state. Said chapter 4684, Laws 1899, entitled "An Act to Provide for and Encourage the Organization of a Corps of Volunteer Militia for Service as a Land Force," etc., provides that there shall be organized in this state, for service as a land force, a body of militia composed of such able-bodied males between the ages of eighteen and forty-five, that are citizens of the United States, as may volunteer and take the oath of enlistment. It provides further that the applicant for enlistment shall be physically examined, and shall take an oath of enlistment, and the certificate of physical fitness and oath of enlistment shall be forwarded promptly to the adjutant general by the commander of the organization in which the applicant enlists. It provides further that the body of the militia thus enlisting shall be known as the "Florida state troops," and shall be the first to be called into service by

the commander-in-chief to preserve the public peace, to execute the laws of this state, to suppress insurrection, or to repel invasions, and shall be the first troops subject to any call of the President of the United States for the militia to execute the laws of the Union, suppress insurrections, and repel invasions. Section 4 of the same act provides that the governor shall be the commander in chief of such Florida state troops, and shall appoint all commissioned officers thereof, including an adjutant general, and all officers so appointed shall hold office for four years. Section 40 of said act provides that the state troops, or any portion thereof, when called out to aid the civil authorities, shall be considered for the time being in actual service, and shall be governed by such articles, rules, and regulations as may be promulgated by the adjutant general for the government and discipline of the state troops. Section 42 of said act provides that "when an invasion of, or insurrection in, the state is made or threatened, or whenever there exists a riot, mob, unlawful assembly, breach of the peace, or resistance to the execution of the laws of the state, or imminent danger thereof, and the civil authorities are unable to suppress the same, it shall be the duty of the commander-in-chief, or, in case he cannot be reached and the emergency will not admit of awaiting his orders, it shall be the duty of the adjutant general, to issue an order to the officer in command of the nearest body of state troops, commanding such officer to call out the troops under his command, and to proceed with all possible promptness to suppress the same." From this and the other provisions of law, statute and organic, referred to and quoted, it will be seen that the only duty or function that a body of state troops can be called upon, or are under any duty, to perform, in any given county, is dependent in such county upon the happening there of any of the extraordinary contingencies that justify resort to military force, and their duties and functions are not confined exclusively to the county where its individual members reside, but can be called into play in any other county of the state wherever the same contingency may arise. No body of the state militia, in other words, has any prescribed function or duty to perform exclusively in or for any particular county in the state that it is not under equal obligation to perform in or for any other county of the state wherever the exigency may arise for its exercise. And whenever and wherever it is so called upon to act, it is there as the representative of the state's supreme sovereignty, and not as that of the county in which it acts. The place of residence of its individual members has nothing whatever to do with fixing its status either as a state or county institution. The conclusion reached is that the militia of the state, and every part thereof, is essentially and necessarily a state institution, or, rather, an arm of the state government, resort to which can only be had upon the failure of all other governmental authority; and that it can be, and

should be, in the very nature of things, wielded only by the supreme sovereign power of the state; that it is in no sense such a county institution or establishment as that any particular county can exclusively be either authorized or required to impose taxes for its, or any part of its, maintenance. It is essentially a state institution, taxation for the support and maintenance of which can be imposed only by the state, and, when so imposed, such taxation is required by § 1 of article 9 of our Constitution to be at a uniform and equal rate upon all the taxable property throughout the state, and cannot for such purpose be confined to or burdened upon the property in any one county, to the exclusion of any or all of the other counties of the state. *Hubbard v. Fitzsimmons*, 57 Ohio St. 436, 49 N. E. 477; *Wasson v. Wayne County*, 49 Ohio St. 622, 17 L. R. A. 795, 32 N. E. 472; *Sanborn v. Rice County*, 9 Minn. 273, Gil. 258; *Taylor, McBean, & Co. v. Chandler*, 9 Heisk. 349, 24 Am. Rep. 308; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Hutchinson v. Ozark Land Co.* 57 Ark. 554, 22 S. W. 173; *Jackson County v. State*, 155 Ind. 604, 58 N. E. 1037.

It follows from what has been said that § 27 of chapter 4684, Laws enacted in 1899, imposing the duty upon the board of county commissioners in each county in which there is a company or battery of state troops to provide each company or battery with an armory for its meetings and drills and the safe storage of its arms and equipments, violates the provisions of §§ 1 and 5 of article 9 of our Constitution, and is, therefore, null and void.

The judgment of the court below is hereby affirmed at the cost of the plaintiffs in error.

Carter, J., concurring:

I concur fully in the conclusion reached by the chief justice, that a county cannot be compelled under Laws 1899, chap. 4684, § 27, to erect an armory for the use of a company of state troops organized therein. In reaching this conclusion, I have given due weight to the legislative construction of the Constitution of 1868, and that of 1885, as evidenced by the various acts of that body from 1868 up to the present time, imposing the duty upon the several counties of providing armories for companies located therein; and I also recognize the rule that, if the constitutionality of an act is doubtful, the doubt must be resolved in favor of the act. A careful consideration of the question has, however, convinced me that a proper construction of the Constitution requires us to hold that the power does not reside in the legislature to compel a county to provide an armory under the circumstances of the present case. It may be admitted that the legislature possesses unlimited power over the counties, which are merely governmental agencies of the state, unless restrained by express or implied limitations in the Constitution, and that, to deny the power, the court must find the limitation in that in-

strument. I am not prepared to say that most, if not all, "state purposes" are not also county purposes in a sense, but I think it would not be questioned that if the state capitol, or a state prison, or the state asylum, or institution for the blind and deaf, or a state college or university, or any other state institution, were located in a particular county, an act of the legislature requiring the county in which it was located, either alone or in conjunction with a number of other counties less than the whole, to pay for the erection or maintenance in whole or in part of such state institution, would be unconstitutional, though it is apparent that such institution would in a sense be a county purpose, and would greatly enhance property values in and otherwise benefit the county where located. These and all other state institutions are properly and primarily "state purposes," to be erected and maintained from the state revenues, which must, under §§ 1 and 2, article 9, be derived by means of a uniform and equal rate of taxation upon all the taxable property throughout the state, and to require one or more counties to build or maintain them would clearly violate that constitutional rule of taxation, even though such institutions are in a sense county purposes, and particular counties may derive special benefits from them. The state troops under the laws now in force is such a state institution; companies are organized in the several counties, without reference to the wishes or desires of such counties, by state militia officers, and without reference to the necessities for military protection of the particular counties in which they are organized. The number of companies is limited to less than the number of counties in the state, and one county may have more than one company. The members of a company are not required to be citizens of the same county, nor are the companies organized or stationed in those counties only which need the police protection of the military. In a word, the law looks to the organization of a state force, for the protection of the entire state and every part thereof, and not of county forces for the protection of the counties. If the military is needed, the nearest company is called upon, but each company can be required to go to any part of the state when needed. Jackson county no doubt derives an incidental benefit from the fact that it has a military company within its borders, the mere presence of which tends to prevent lawlessness and to the security of the property of its citizens, but Calhoun, Washington, Holmes, and other adjoining counties derive the same kind of benefit from the presence in Jackson county of such company, though in a less degree, yet they are not required to contribute to the expense of an armory for the use of such company. If Jackson county can be taxed to provide the armory, and in addition pay its share of the taxes required by the state to enable the latter to pay other expenses incident to the maintenance of the company, while the other counties mentioned are required to con-

tribute only to the general tax levied by the state, it is quite evident that the burdens laid upon those counties are much lighter than those laid upon Jackson county, and that, too, for a purpose in which all are interested and from which all derive a benefit. Sections 1 and 2, art. 9, of the Constitution, would be practically eliminated and without force if one or more counties could be compelled to assume the burdens incident to the maintenance of a state institution, in whole or in part, upon the theory that a mere incidental benefit accruing from the location of such institution within its or their borders would authorize the legislature to compel the counties to erect or maintain it, as being for county purposes. No doubt the location of the state capitol at Tallahassee is beneficial in many ways to the people of that city and the county of Leon, and that it adds greatly to the welfare and prosperity of the city and county; but I apprehend it would not be maintained by anyone that the legislature could compel that city or county to pay for the improvements now being made upon the capitol. It may be that the legislature could authorize the county of Jackson through its proper officers to provide an armory for the use of the Jackson Guards, and that the county could voluntarily provide it under such power, but that question is not involved in this case, and I express no opinion in regard to it. It may be that, if the civil authorities were unable to maintain law and order in the county without the aid of the military, the legislature could provide for organizing and stationing a company there, and compel the county to pay the expense thereof, or furnish an armory therefor; but that question is not involved, and I express no opinion as to that. The proposition in the present case is that the legislature can compel one county in the state to pay the expense of providing an armory for a state institution, to wit, a company of state troops, that happens to be located therein, without reference to the needs of such county for military protection, or its consent to the imposition of such burden. I am satisfied no such power exists, and that the decision of the court below is correct.

Mabry, J., dissenting:

I do not concur in the conclusion and views of the court in this case. The sole question involved is the constitutionality of the Laws of 1899, § 27, chap. 4684 "to provide for and encourage the organization of a corps of volunteer militia for service as a land force, and to enforce the discipline therein," and to repeal certain prior laws on the subject.

The motion to quash the alternative writ is on the grounds that the section of the statute referred to is unconstitutional because in contravention of (a) § 5, art. 9, (b) §§ 20 and 21, art. 3, (c) article 14, and (d) § 16, art. 3, of the Constitution of the state. After a reference to various provisions of the Constitution, the conclusion in the opinion prepared by the chief justice is

that the section of the statute referred to is in conflict with § 5, art. 9, of the Constitution, though mention is made in connection therewith of § 1 of said article. The view expressed by Mr. Justice Carter, in agreeing to the conclusion reached, is that the direct conflict of the designated section of the statute is with § 1, art. 9, of the Constitution. I will make no reference to §§ 16, 20, and 21, art. 3, as it appears they have exerted no influence in the conclusion reached.

The 5th section of article 9 of the Constitution provides, in reference to county taxation, that the legislature shall authorize the several counties in the state to assess and impose taxes for county purposes, and for no other purposes. The limitation contained in this section is on the power of the legislature to authorize counties to levy taxes for other than county purposes. If the authorized tax is for a county purpose, then there is no limitation so far as this section is concerned. The Constitution does not undertake to define what are "county purposes," and, as said by this court in *Stockton v. Powell*, 29 Fla. 1, 15 L. R. A. 42, 10 So. 688, the authorities have formulated no generally accepted definition of such purposes, but leave each case involving the question to be decided as it may arise. In *Cotten v. Leon County*, 6 Fla. 610, this court said, in construing a similar constitutional provision, "that the Constitution does not attempt to give a definition to the term 'county purpose,' and to obtain a correct interpretation of that phrase we must look to the contemporaneous legislation upon that subject, and the uniform action of the county courts under the territorial government." And in *Stockton v. Powell* it is said: "In somewhat the same strain Judge Cooley, in treating of what constitute public purposes for which taxation may be laid, says in his work on Taxation, 2d ed. p. 116, that in deciding whether in a given case the object for which the taxes are assessed is public or private, the courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support, and for the proper use, of the government, whether state or municipal; that whatever lawfully pertains to this, and is sanctioned by time and the acquiescence of the people, may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation." It was held in that case that the act of the legislature authorizing Duval county to issue bonds to improve the navigation of the St. Johns river was valid, although the river was a navigable stream and public highway running from its mouth in the county hundreds of miles beyond its limits through other counties, and commerce was carried on it from other states and foreign countries, and the commerce or business

on the river confined within the limits of Duval county was very small and of no importance. The cases of *Skinner v. Henderson*, 26 Fla. 121, 8 L. R. A. 55, 7 So. 404, and *Duval County v. Jacksonville*, 36 Fla. 196, 29 L. R. A. 416, 18 So. 339, recognized the authority of the legislature to direct the application of funds raised by county taxation to objects that were embraced within the term "county purposes," though such objects might also include in part other purposes. In the case of *Cotten v. Leon County*, 6 Fla. 610, it was held that neither the locality of the work nor the anticipated benefit is of itself a certain test, but as furnishing a general rule the concurrence of the two would seem to be required. The views expressed in *Nichol v. Nashville*, 9 Humph. 252, were approved, to the effect that the improvements must have some connection with the corporate town claiming them as a corporate purpose more direct than that which would result from the general increase of prosperity of the country by reason of such improvement made without a direct reference to or connection with the town. In the case of *Hamilton County v. Mighels*, 7 Ohio St. 109, a case characterized by Judge Dillon, as observed by this court in *Stockton v. Powell*, as one in which the distinction between cities and towns, or municipal corporations proper, and involuntary quasi corporations, such as counties, is very clearly drawn, it is said: "A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy." The word "county" signifies the same as "shire,"—"county being derived from the French, and shire from the Saxon. Both these words signify a circuit or portion of the realm into which the whole land is divided for the better government thereof and the more easy administration of justice." 1 Bouvier, Law Dict. Rawle's Revision, p. 450. It is the settled rule of constitutional construction in this court that, if there is a reasonable doubt as to the constitutionality of an act of the legislature, it should, in deference to the legislative judgment, be upheld, and this rule of construction should apply especially to a legislative declaration of what is a county purpose. *Duval County v. Jacksonville*, 36 Fla. 196, 29 L. R. A. 416, 18 So. 339; *State ex rel. Turner v. Hocker*, 36 Fla. 358, 18 So. 767. In view of these authorities and the past legislation in this state, I do not think it should be held that the section of the statute in question is in conflict with the 5th

section of article 9 of our Constitution. The 2d section of article 14 ordains that "the legislature may provide by law for organizing and disciplining the militia of the state, for the encouragement of volunteer corps, the safe keeping of the public arms, and for a guard for the state prison." All able-bodied male inhabitants of the state between the ages of eighteen and forty-five years, that are citizens of the United States, or have declared their intention to become such, are constituted the militia of the state, and subject to military duty. They are ascertained and enrolled by the county authorities in each county. The Laws of 1899 (chap. 4684) provide for a volunteer organization to consist of not more than two regiments of infantry of twelve companies each, and one battalion of artillery of four batteries of field artillery, to be known as the "Florida state troops." The organization under it is by the commander-in-chief, and based in part upon the volunteer organizations existing under prior laws. Of the existing organizations, two regiments of three battalions each, one to contain four companies, and the others three companies each, were to be organized, and the additional companies provided for were to be added at such times as the commander-in-chief might deem advisable. At no time could the enrolled militia organize and become a part of the volunteer corps of state troops at will, but the organization and admission of a military company into such body have been under the control and direction of the commander-in-chief. The policy of the state, as evinced by the course of action in reference to voluntary organizations, is to enlist companies in the populous districts of the state where violence, riots, and forcible resistance to the execution of the laws are more liable to happen, and where there is the greatest need for an armed force. When an organized company has been accepted and duly admitted into the body of state troops, it may be required to do service in the preservation of the peace, the execution of the laws, and the suppression of insurrections and invasions. The 42d section of the act provides that "when an invasion of, or insurrection in, the state is made or threatened, or whenever there exists a riot, mob, unlawful assembly, breach of the peace, or resistance to the execution of the laws of the state, or imminent danger thereof, and the civil authorities are unable to suppress the same, it shall be the duty of the commander-in-chief, or, in case he cannot be reached, and the emergency will not admit of awaiting his orders, it shall be the duty of the adjutant general, to issue an order to the officer in command of the nearest body of state troops, commanding such officer to call out the troops under his command and proceed with all possible promptness to suppress the same." But it is contended that such services are rendered for the state, and, the military organization rendering them being a part of a state institution, the bur-

den of maintaining and supporting it devolves upon the state at large. If it be conceded that the construction of local armories in counties for the use of volunteer companies therein is a county as well as a state purpose (and clearly the suppression of riots, mobs, the preservation of the peace, and assistance in the execution of the laws subserve county organizations and purposes), there is nothing in § 5, art. 9, of the Constitution to prevent county taxation to accomplish it. The only limitation therein is in the power of the legislature to authorize county taxation for other than county purposes, and, conceding such purpose, the power exists. If the building of local armories in the counties in which military companies exist is exclusively a state institution, and one of the general charges of the state government for the maintenance of which taxes should be imposed as equally as possible on all the property of the state, the prohibition against county taxation to build them is to be found in § 1 of the 9th article. But I do not think that a local armory constructed by a county in its limits for the use of a volunteer military company domiciled therein is a state institution. The provision held to be unconstitutional makes it the duty of the county commissioners of any county in which there is a military company of state troops to provide each company with an armory suitable for its meetings and drill and the safe storage of its arms. This armory is for the use in the county by a company in aid of its efficiency for prompt and effective service, and is not made the property of the state, or subject to the control of state authorities. There is no purpose in the act to impose by county taxation the burden on the counties, as such, to maintain the organized militia of the state. All the expenses incident to such organizations, including those of the stated encampments of the state troops, except the building of armories in the counties, are borne by the state at large. For a period of thirty-five years the construction of such armories for use by companies in the counties has been regarded by the legislature as a county purpose. Almost contemporaneous with the Constitution of 1868, containing provisions as to military organizations similar to those found in the present revision, it was provided by the legislature that the county commissioners should provide at the cost of the counties suitable and safe armories for the volunteer companies within their respective limits. Acts 1868, § 20, chap. 1636. From that time to the present similar provisions have been kept continually on our statute books. The existence of a volunteer company in a county has a direct contact and connection with it, and affords a special and more direct protection, in case of emergency, to the lives and property of its inhabitants, than would be afforded by a company in another and possibly distant county. In view of this special benefit resulting to the counties in which companies

are organized and exist, it would appear that there was ample basis for a legislative declaration that the construction of armories in a county for the use of companies therein was a county purpose. It is eminently proper and just that populous districts where lawlessness, riots, mobs, and the resistance to the laws are more apt to occur, and which demand the existence of military organizations therein, should defray the expense of providing a storage room for the arms and a meeting place for the efficient training of the men who may be called on to render their special services. *Bryant v. Palmer*, 152 N. Y. 412, 46 N. E. 851.

If taxes can be authorized by the counties to erect such armories, it must be on the ground of a county purpose, and if it can be authorized as such it can be enforced as a duty. Decisions in Illinois, under constitutional provisions somewhat similar to those found in article 9 of our Constitution, hold that the legislature may authorize a municipality to levy the tax, but cannot compel it to do so. These decisions are referred to in the case of *Potter v. Lainhart* (Fla.) 33 So. 251. It is also decided in that state that, where the tax is authorized to accomplish an object which it is the duty of the municipality in the exercise of a governmental agency to carry out, the tax may be enforced. A county is specially an agency of the state in the administration of justice and the carrying out of the objects of government, and, if the tax for armories can be permitted, it may be coerced as a duty properly imposed upon it.

The motion to quash did not question the alternative writ on the ground that the provision in reference to the construction of armories was in conflict with § 1, art. 9, of the Constitution, but, if it did, I do not think the result would be different. That section directs that the legislature shall provide for a uniform and equal rate of taxation, which means that, when a tax for state purposes is authorized, it must be uniform and equal on all the property in the state not exempt, and when it is authorized for a county or municipal purpose it must rest uniformly and equally upon all the taxable property in the county or municipality respectively. *Duval County v. Jacksonville*, 36 Fla. 196, 29 L. R. A. 416, 18 So. 339. If the construction of an armory is a county purpose, then the tax to pay for it must rest upon all the taxable property in the county. There is no suggestion in this case that such would not be the result if the county should be compelled to build the armory.

This is an outline of my views, without further discussion of the authorities, or a distinguishing of those cited in the opinion, which I think are not sufficient when properly applied to support the conclusion reached.

Rehearing not allowed.
60 L. R. A.

David GAMBLE, *Plff. in Err.*,
v.

STATE of Florida.

(.....Fla.....)

- *1. The mere separation of jurors impaneled to try a capital case, from their fellows, without the attendance of an officer, although an irregularity, is not a sufficient cause for setting aside the verdict, if the court is satisfied that the prisoner has not sustained any injury from such separation. But where there has been an improper separation during such trial, if the verdict is against the prisoner he is entitled to the benefit of a presumption that the irregularity has been prejudicial to him, and the burden of proof is upon the prosecution to show to the entire satisfaction of the court that the prisoner has suffered no injury by reason of the separation. Contrary *dicta* in *State v. Madoil*, 12 Fla. 151, disapproved.
2. If intoxicants be shown to have been used by the jury impaneled in a capital case, the presumption arises in favor of the convicted defendant that it resulted injuriously to him; and the burden is on the state to show affirmatively, to the entire satisfaction of the court, that their use was to such a limited and moderate extent as completely and satisfactorily to negative any harm to the defendant from its use by the jury, or any member of it.

(October 7, 1902.)

ERROR to the Circuit Court for Dade County to review a judgment convicting defendant of murder. *Affirmed*.

The facts are stated in the opinion.

Mr. B. A. Thrasher, for plaintiff in error:

The separation of the jury that tried this case was so flagrant and gross a violation of the law and rights of the prisoner that the court should have granted a new trial.

Thompson & M. Juries, § 313; *State v. Madoil*, 12 Fla. 159; *Coker v. Merritt*, 16 Fla. 426; 12 Am. & Eng. Enc. Law, p. 375.

The use of intoxicants by a jury is ground for new trial.

Ryan v. Harrow, 27 Iowa, 494, 1 Am. Rep. 307; *Davis v. State*, 35 Ind. 496, 9 Am. Rep. 760; *People v. Gray*, 61 Cal. 164, 44 Am. Rep. 549.

In a capital case the burden of proof is upon the state to show that there was no chance for anyone to tamper with the jury.

State v. Madoil, 12 Fla. 151.

Mr. William B. Lamar, Attorney General, for the State.

Taylor, Ch. J., delivered the opinion of the court:

The plaintiff in error, David Gamble, was indicted, tried, convicted, and sentenced for the crime of murder in the first degree at the spring term, 1902, of the circuit court

*Headnotes by TAYLOR, CH. J.

NOTE.—As to effect of separation of jurors during criminal trial, see also, in this series, *Kling v. State* (Tenn.) 3 L. R. A. 210; *People v. Ebanks* (Cal.) 40 L. R. A. 269; and *State v. Cotts* (W. Va.) 55 L. R. A. 176.

for Dade county, and comes here by writ of error.

The only question presented here is the propriety of the denial of the defendant's motion for new trial, upon the fifth and sixth grounds thereof, as follows:

"(5) Because the jury that was impaneled to try, and did try, this case, were not, during said trial and consideration of this case, so guarded or protected as the law requires, either by the sheriff or bailiff, as to prevent said jury or protect them from improper communications or instructions."

"(6) That the said jury were allowed during the trial of the case to separate and absent themselves from the presence of each other and from the presence of the bailiff, and individual members of the jury were allowed to talk and converse with other persons who were not members of the jury, said person or juror so conversing not being at the time in the presence of the members of the jury, or in the presence of the bailiff, sheriff, or other officer; that the place where said jury ate and slept during the time of the trial and consideration of this case was at the hotel known as the 'Everglade,' one of the leading hotels of the city of Miami, Dade county, and located several blocks from the courthouse; that much of the time was spent at and about said hotel, during which time various members of the jury would separate or absent themselves from the jury as a body, some being in the porch of the hotel, some in the hall, some in the toilet room, and some in the yard, during which time the said several members of the jury, or those who desired, could, and some did, converse with persons not members of the jury; that said jury at night occupied different rooms in said hotel, to wit, three rooms, there being four jurymen to each room."

In the case of *State v. Madoil*, 12 Fla. 151, which was a trial for larceny, it is said: "In trials for offenses punished capitally, where one or more of the jury separate from their fellows, we think it should be shown that the separation was from urgent necessity, and that no opportunity was offered for any improper or undue influence. In such cases the conduct of the absent juror should be subjected to the most rigid scrutiny, in order to ascertain if it was blameless while separated from his fellows; and the verdict should only be allowed to stand when the prosecution can show that there was no opportunity to tamper with the juror, or to influence him in finding his verdict." This rule, we think, indulges too strong a presumption against the integrity of the jurors, and is too favorable to the accused in such cases, as it makes the integrity of the verdict dependent solely upon the existence of an opportunity for an improper tampering with a juror, whether such opportunity was utilized, or not, by anyone in any manner. Besides this, what was said in that case as to the rule governing the separation of jurors in capital cases was *obiter dicta*, as the court was not dealing with a capital case, but one of larceny only. In the case of *Bird v. State*, 18 Fla. 60 L. R. A.

493, it is said that "where it is shown to the satisfaction of the court that there was no misconduct upon the part of the jurors, and it is so certified by the court in the bill of exceptions, the mere separation of the jury is not a sufficient ground for a new trial." The *Bird Case* was one for murder, and it recognizes the propriety of the rule that, even though there may be an opportunity for the exertion of improper influences upon the jurors, yet the bare fact of such opportunity, without resultant harm to the accused, is not enough to avoid the verdict. The correct rule, as we think, deducible from these and other cases, is that the mere separation of jurors impaneled to try a capital case, from their fellows, without the attendance of an officer, although an irregularity, is not a sufficient cause for setting aside the verdict, if the court is satisfied that the prisoner has not sustained any injury from such separation. But where there has been an improper separation during such trial, if the verdict is against the prisoner, he is entitled to the benefit of a presumption that the irregularity has been prejudicial to him, and the burden of proof is upon the prosecution to show to the entire satisfaction of the court that the prisoner has suffered no injury by reason of the separation. See *State v. Cucuel*, 31 N. J. L. 249.

The facts, in brief, disclosed by the examination of the jurors, bailiff, sheriff, and others, in this case, are, in substance, as follows: The jury, in charge of a bailiff, took their meals and slept at a hotel in the town of Miami, where the trial was had. They occupied three adjoining rooms on the upper floor of said hotel, and were the sole occupants of that floor; the bailiff in charge staying there with them. In passing to and fro between the courtroom and hotel they did not keep compactly together, but straggled somewhat, and such straggling also occurred while they were about the hotel; but on such occasions they were all in view of the bailiff. At the hotel some of them would loiter in the halls, and on one or two occasions while so loitering would speak a few words to some girls who were staying there. When they would come into the hotel from the courthouse, they would all repair to a small washroom of the hotel, too small to accommodate them all at once; and, as one batch of them would get through bathing, they would step outside and wait just outside the door, under a tree, until the others got through; the bailiff the while having all of them practically in his view. On one occasion one of the jurors got up from the dining table during meal time, and went upstairs alone to their rooms, for the purpose of getting his handkerchief, and remained away several minutes. The bailiff went after him, leaving the rest of the jury unattended at the dining table, but met him on the stairs, and returned immediately with him to the rest of the jury in the dining room. On one occasion, at a late hour in the night, one of the jurors being sick, the bailiff and another juror got up and went

out of the hotel, and into the town with him, and saw a doctor, and from the doctor went to a drug store, and immediately back to their rooms at the hotel; the rest of the jury being left meantime unattended and unconfined in their rooms at the hotel. On another occasion, while the jury, in a body, were walking past the barber shop of one of their number, they stopped while the owner of the shop went in and gave some business directions to his assistants in charge of the shop. The jury were also taken in body to the postoffice to get their mail, but none of them received any letters or other communications that had anything to do with the case. On one occasion an outside party was permitted by the bailiff, after exhibiting two telegrams to the bailiff, to show them to one of the jurors in the presence of the others. These telegrams were entirely foreign to the case on trial, and were from commission firms in two distant cities in other states, relative exclusively to the sale and shipment of tomatoes for the juror to whom the telegrams were shown.

While the motion for new trial was not based upon the use of intoxicants by the jury during the trial, yet it appeared from their examination that they procured and had in their rooms at the hotel ten or a dozen bottles of lager beer, a pint and half pint flasks of whisky, and a regular bottle of whisky, during the time of the trial. The proofs showed that of this they drank very sparingly and moderately; none of them being at any time the slightest bit intoxicated from its use; half of the full bottle of whisky being left unconsumed at the close of the trial. This liquor, it appears, was procured at the expense of the jurors themselves; they contributing money for its purchase. While these irregularities and separations on the part of the jury were shown by their own statements to have occurred, yet we think that it was also affirmatively and satisfactorily shown that nothing occurred from it to influence the verdict, and that no harm resulted therefrom to the defendant. It was affirmatively shown that, in all the separations of the jury, no communication in reference to the case was had between them and any outside party, and that none of them heard anything tending to influence their verdict; that none of them conversed with anyone in reference to the case; neither was anything said with reference to it in their hearing; and none of them received any communications from outside in reference to the case. The use of intoxicants by the jury was also affirmatively and satisfactorily shown to have been to such a limited and moderate extent as to leave no room for any supposition that harm resulted therefrom to the defendant. As to the use of intoxicating liquors by juries in capital trials, practically the same rule applies that appertains to separations by the jury in such cases. If intoxicants be shown to have been used by the jury, the presumption arises in favor of the convicted defendant that it resulted injuriously to him, and the burden is on the state to show 60 L. R. A.

affirmatively, to the entire satisfaction of the court, that its use was to such a limited and moderate extent as to completely and satisfactorily negative any harm to the defendant from its use by the jury, or any member of it. *Jones v. People*, 6 Colo. 452, 45 Am. Rep. 526; *Jones v. State*, 68 Ga. 760. The conduct of both the bailiff in charge of the jury in this case and of the jurors themselves was highly irregular, and unbecoming the proper and decorous conduct of the trial of a citizen for his life, for all of which misconduct on the part of the bailiff and the jurors they should, at least, have been severely reprimanded by the court, if not more severely dealt with; but, in consonance with the rule of law above announced, it having been affirmatively and satisfactorily shown, as we think, that no harm resulted to the defendant from such irregularities and misconduct on the part of the jury and the bailiff in charge, we cannot disturb the verdict found.

This disposes of the only question presented either by the record or in the briefs of counsel, and, finding no reversible error, *the judgment of the court below is hereby affirmed.*

DUVAL COUNTY, *Plff. in Err.*,

v.

CHARLESTON LUMBER & MANUFACTURING COMPANY.

(.....Fla.....)

*Rev. Stat. § 1666, as amended by Fla. Laws 1893, chap. 4136, which provides: "Every person who shall have brought a suit in any court of this state against any person, natural or corporate, shall have a right to a writ of garnishment under the circumstances and in the manner hereinafter provided, to subject any indebtedness due to the defendant by a third person, and any goods, moneys, chattels, or effects of the defendant in the hands, possession, or control of a third person. The officers, agents, and employees of any companies or corporations shall be, as regards such companies or corporations, third persons, and as such shall be subject to garnishment after judgment against such companies or corporations."—does not authorize a writ of garnishment against a county; and where such writ has been issued, and judgment entered against a county, the judgment is void.

(*Carter, J., dissents.*)

(January 27, 1903.)

ERROR to the Circuit Court for Duval County to review a judgment in favor of plaintiff in a garnishment proceeding to reach an asset of S. S. Leonard, which was alleged to be in the hands of the county. *Reversed.*

*Headnote by HOCKER, J.

NOTE.—As to liability of county to garnishment, see also *State ex rel. Summersfield v. Tyler* (Wash.) 37 L. R. A. 207, and *note*.

The facts are stated in the opinion.

Mr. George U. Walker for plaintiff in error.

Messrs. Fleming & Fleming for defendant in error.

Hooker, J., delivered the opinion of the court:

This cause was taken up and considered by division B, and, there being a difference of opinion among the members thereof, the cause was referred to the court in banc for decision.

On July 6, 1896, the Charleston Lumber & Manufacturing Company filed its declaration in assumpsit against S. S. Leonard. A final judgment by default was entered against Leonard for \$504.49 damages, and costs, \$3.43.

On September 13, 1897, the Charleston Lumber & Manufacturing Company filed the affidavit of its attorney, F. P. Fleming, Jr., as a basis for garnishment, alleging a balance of \$200 to be due, and a præcipe for garnishment to be directed to Duval county.

A writ of garnishment was issued, and duly served upon the chairman of the board of county commissioners of said county September 15, 1897.

On November 1, 1897, default in said garnishment proceedings was entered by the clerk against the county of Duval for want of appearance or answer.

On November 5, 1897, the clerk issued a writ of scire facias to said garnishee, notifying it that in the suit of the Charleston Lumber & Manufacturing Company against S. S. Leonard default had been entered against it as garnishee, and warning it to show cause December 6, 1897, why final judgment should not be entered upon said default, which writ was duly served on Duval county on the same day.

On December 6, 1897, judgment was rendered by the court and entered by the clerk, wherein and whereby the foregoing facts were recited, and a final judgment entered against Duval county as garnishee in the sum of \$200.

On May 6, 1898, a writ of error from this court to the circuit court of Duval county was sued out returnable to the June term, 1898, of this court. The only error assigned is that the county of Duval is not subject to be garnished, as was done in this cause, and prays the reversal and annulment of said judgment.

Two questions are presented in the briefs of the respective parties: First, whether under the law of Florida a county is liable to be garnished; second, whether in this case the county of Duval, having permitted a default against itself for want of appearance and answer, can in this court for the first time challenge the judgment entered against it, and from which it appeals.

Section 1666 of the Revised Statutes, as amended by Laws 1893, chap. 4136, provides: "Every person who shall have brought a suit in any court of this state against any person, natural or corporate, shall have a right to a writ of garnishment

under the circumstances and in the manner hereinafter provided, to subject any indebtedness due to the defendant by a third person, and any goods, moneys, chattels, or effects of the defendant in the hands, possession, or control of a third person. The officers, agents, and employees of any companies or corporations shall be, as regards such companies or corporations, third persons, and as such shall be subject to garnishment, after judgment against such companies or corporations."

Section 1, chap. 1, title 1, div. 1, of the Revised Statutes, provides: "In determining the meaning of these Revised Statutes . . . the word 'person' may extend to and be applied to a corporation."

In the case of *Martin v. Townsend*, 32 Fla. 318, 13 So. 887, in determining the mode in which a deed should be executed by county commissioners, this court used this language: "Boards of county commissioners are quasi corporations, and their official duties and powers partake more of the characteristics of corporate acts and powers than those of mere trustees." This language is to be understood in its relation to the matter in hand, which was the mode in which a deed should be executed by a board of county commissioners. In classifying corporations they are generally divided into public and private corporations. Says Beach on Public Corporations, vol. 1, § 2: "The difference between strictly private and strictly public corporations is obvious and radical; the former being formed by the voluntary action of the corporators between whom there exists a contract whereby each subjects his interest, with certain restrictions, to the control of the corporate management for the accomplishment of the ends for which the company was formed, and the latter not being in the same sense voluntary associations, and no contract existing between the members." Again, in § 3, Id., public corporations "are subdivided into municipal and public quasi corporations. Municipal corporations embrace incorporated cities, villages, and towns, which are full-fledged corporations with all the powers, duties, and liabilities incident to such a status, while public quasi corporations possess only a portion of the powers, duties, and liabilities of corporations. As instances of the latter class may be mentioned counties, hundreds, townships, overseers of the poor, town supervisors, school districts, and road districts."

In § 4, Id., this author further discusses the generic differences between municipal and quasi public corporations, but in the latter part of § 5 he says: "As popularly and loosely used, the term 'municipal corporation' frequently includes the public quasi corporations, such as counties, school districts," etc. It will be observed that in some of the cases hereinafter referred to the term "municipal corporation" is used as embracing counties, and, so far as the points here under consideration are concerned, they apply the same principles of law to cities and counties.

It is stated in the text-books that by the weight of authority municipal corporations (including therein counties) are not subject to garnishee process, unless the right to so subject them is conferred by clearly expressed legislation. 2 Beach, Pub. Corp. §§ 1654, 1655; 1 Dill. Mun. Corp. § 101, and note 1; Drake, Attachm. § 516. There is, however, a conflict of authority on this question, as will be seen from the foregoing authorities. The decisions on this question are very numerous, and a critical examination of each one of them would lead to great prolixity. The majority of the cases cited by Drake are against the right of garnishment. Of those cited by him in favor of the right, the case of *Whidden v. Drake*, 5 N. H. 13, is based on a statute which provides "that when any corporations or body politic within this state shall be possessed of any money, goods, . . . of any debtor, such corporation or body politic may be summoned as the trustee of such debtor," etc.

In Connecticut it is held that the word "corporation" embraced towns, and subjected them to garnishment process. *Bray v. Wallingford*, 20 Conn. 416. In the case of *Adams v. Tyler*, 121 Mass. 380, it is held that a county is chargeable with trustee process, inasmuch as the statute makes a county a corporation for the purpose, among others, of suing and being sued, making contracts, etc.; and inasmuch as the legislature had indicated its intent that counties should be subject to garnishee process by eliminating from the statute an exception in their favor as regards such process. In the case of *Wales v. Muscatine*, 4 Iowa, 302, the liability of the town to garnishment is based on the theory that the word "corporation" in the statute embraces towns, and no distinction is made between public and private corporations. In *Laredo v. Nalle*, 65 Tex. 359, it was held that, inasmuch as there was no statute exempting municipal corporations from garnishment process, the defendant was liable, taking into consideration the character of the debt garnished, it not being a salary. In Kentucky it seems the salaries of state officers cannot be garnished, because the state cannot be sued, and a garnishment proceeding is a suit. But the salaries of city officers can be garnished because cities can be sued. *Rodman v. Musselman*, 12 Bush, 354, 23 Am. Rep. 724. In *Waterbury v. Deer Lodge County*, 10 Mont. 515, 20 Pac. 1002, it was held that counties are subject to garnishment process because the statute makes all persons having in possession or under their control and credits or personal property, etc., of a defendant liable to garnishment process, and that the word "person" may be applied to bodies "politic and corporate," and that counties are bodies "politic and corporate." As sustaining the doctrine that a county or municipal corporation cannot be garnished unless the process is plainly authorized by statute, the following cases are cited: *Mobile v. Rowland*, 26 Ala. 498; *Skelly v. Westminster School Dist.* 103 Cal. 652, 37 Pac. 643; *Holt v. Experience*, 26 Ga. 113; *McLellan v. Young*, 60 L. R. A.

54 Ga. 399, 21 Am. Rep. 276; *First Nat. Bank v. Ottawa*, 43 Kan. 294, 23 Pac. 485; *Switzer v. Wellington*, 40 Kan. 250, 19 Pac. 620; *Baltimore v. Root*, 8 Md. 95, 63 Am. Dec. 696; *Merwin v. Chicago*, 45 Ill. 133, 92 Am. Dec. 204; *Wallace v. Lawyer*, 54 Ind. 501, 23 Am. Rep. 661; *McDougal v. Hennepin County*, 4 Minn. 184, Gil. 130; *Dollman v. Moore*, 70 Miss. 267, 19 L. R. A. 222, 12 So. 23; *Hawthorn v. St. Louis*, 11 Mo. 59, 47 Am. Dec. 141; *People ex rel. Spaun v. Omaha*, 2 Neb. 166; *State ex rel. Crawford v. Eberly*, 12 Neb. 616, 12 N. W. 96; *Memphis v. Laski*, 9 Heisk. 511, 24 Am. Rep. 327; *Chamberlain v. Watters*, 10 Utah, 298, 37 Pac. 566; *VanCott v. Pratt*, 11 Utah, 209, 39 Pac. 827; *Merrill v. Campbell*, 49 Wis. 535, 35 Am. Rep. 785, 5 N. W. 912; *Stermer v. LaPlata County*, 5 Colo. App. 379, 38 Pac. 839; *Mesa County v. Brown Bros.* 6 Colo. App. 43, 39 Pac. 989; *Porter & B. Hardware Co. v. Perdue*, 105 Ala. 293, 16 So. 713; *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, 37 L. R. A. 207, note, 45 Pac. 31. Several of the foregoing cases hold that statutes authorizing garnishment proceedings against corporations do not apply to public, but only to private, corporations. The reasoning of these authorities is summarized in that of the court in *McDougal v. Hennepin County*, 4 Minn. 184, Gil. 130. The garnishment law "which authorizes 'corporations to be proceeded against as garnishees in the same manner and with like effect as individuals,' . . . applies only to private corporations, and was not designed to include municipal corporations charged with the interests of the public. Counties are public corporations, and their officers are public officers. The varied relations which such bodies, through their officers, hold towards individuals as their debtors, would render them liable to be constantly attacked with such process, and would very materially embarrass them in the performance of their official duties. If they are subject to such suits, they are bound to give them the same attention which is required of private individuals; and this would involve their attendance upon distant courts, and the consequent absence from respective . . . offices." It might be added that it would also subject them to the payment of attorneys' fees, and in some instances costs. It can readily be seen that in large counties, where the public interests required the employment of a considerable number of persons, a liability to garnishment would be highly injurious to the public interests. Public corporations such as counties are created for the care and promotion of public interests, and should not, from motives of public policy, be subjected to the liability of becoming involved in the disputes of private persons, or be made the instrumentalities for collecting private debts. Admitting that the word "person," used in the garnishment statute (Laws 1893, chap. 4136), "may extend to and be applied to a corporation," as provided in § 1, chap. 1, title 1, div. 1, of the Revised Statutes,

yet, under the authority of the decisions cited, it cannot be held to include public quasi corporations, such as counties. Our conclusion is that a county is not liable to the process of garnishment.

The next and only other question to be determined is whether, by failing to appear or answer the garnishment process and permitting a default judgment against itself, it waived the right to contest in this court the judgment appealed from.

The defendant in error contends that the exemption from garnishment proceedings claimed by the plaintiff in error cannot be raised for the first time in this court. In support of this view the following Florida cases are cited: *Parker v. Hendry*, 8 Fla. 53; *Summis v. L'Engle*, 19 Fla. 800; *Peck v. Spencer*, 26 Fla. 23, 7 So. 642; *Livingston v. Webster*, 26 Fla. 325, 8 So. 442; *Jacksonville & A. R. Co. v. Woodworth*, 26 Fla. 368, 8 So. 177; *Waddell v. Cunningham*, 27 Fla. 477, 8 So. 643; *Logan v. Slade*, 28 Fla. 699, 10 So. 25. In all of these cases the parties were before the court below, and in none of them was the question attempted to be raised in this court of a jurisdictional nature. Moreover, none of these cases involved a garnishment proceeding.

It is generally held in this country that garnishment is a purely statutory proceeding, and cannot be pushed in its operation beyond the statutory authority under which it is resorted to. *Drake, Attachm. § 451 (a)*; 9 Enc. Pl. & Pr. p. 809. In *Mississippi*, a county, if its board of supervisors object, cannot be garnished, either at law or in equity. If the county does not object to the garnishment, the debtor cannot. It is held that the courts have jurisdiction of a garnishment against a county, but must sustain an objection made by the board of supervisors, the board being the judge whether or not the proceeding will restrict the performance of its public functions. *McBain v. Rodgers* (Miss.) 29 So. 91; *Dollar v. Allen-West Commission Co.* 78 Miss. 274, 28 So. 876; *Dollman v. Moore*, 70 Miss. 267, 19 L. R. A. 222, 12 So. 23. In *Las Animas County v. Bond*, 3 Colo. 411, the court decided that generally, and upon considerations of public policy, a municipal corporation is not subject to garnishment. The exemption may, however, be waived by appearance and submission to liability. "Here the judgment expressly recites that no one appeared on behalf of the board of county commissioners. Whether process was served on the board or not is unimportant. If it did not appear and waive the exemption, no valid judgment could be given." In the case of *Van Cott v. Pratt*, 11 Utah, 209, 39 Pac. 827, it was held that Salt Lake City, a municipality, could not, by ordinance, waive the exemption from liability to garnishment process. The same doctrine is announced in *Porter & B. Hardware Co. v. Perdue*, 105 Ala. 293, 16 So. 713. In *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, 37 L. R. A. 207, 45 Pac. 31, the court holds that a county is not liable to garnishment unless made so by express statutory provision; that

a statute naming corporations among those subject to garnishment does not apply to a county; and that a judgment against a county as garnishee defendant, when the statutes do not make a county subject to garnishment process, is void on collateral attack. The court says: "If the process served upon the county was one which was not authorized by the statute, no rights could be obtained by such service. If it commanded the county to do that which, under the statute, it had no right to do, it was without force."

The contention by defendant in error that, because a county can be sued, it is, therefore, liable to garnishment, is met in several of the cases which have been cited, and especially in the last one, and the holding is adverse to the contention in all of them except one or two. In our view, by the great weight of authority, and upon principles of public policy, a county is not, in this state, subject to garnishee process, and no valid judgment can be rendered against it in such a proceeding.

The judgment of the Circuit Court is reversed.

Carter, J., dissenting:

On August 22, 1896, defendant in error obtained judgment in the circuit court of Duval county against S. S. Leonard for \$504.49, and on September 13, 1897, after complying with the requirements of the garnishment statutes, caused to be issued and served upon the county of Duval a writ of garnishment, alleging in the affidavit therefor that \$200 remained due on the judgment. The county failed to appear, in consequence of which a default was entered, and thereafter a scire facias was duly issued to it, and served as required by the statute. Thereafter, on December 6, 1897, the county having failed to show cause, as required by the scire facias, the court rendered judgment against it in the sum of \$200. From such judgment the county sued out this writ of error on May 6, 1898. The only error assigned is "that the said county is not subject to be garnished, as was done in said cause." It is conceded in the brief that the judgment is valid and binding unless the law is that "a county—quasi a municipal corporation—is not liable to garnishment." This proposition is the only one argued or insisted upon for reversal of the judgment.

The writ of garnishment has from the earliest period of the territorial history of this state been authorized by statutes enacted from time to time to subject indebtedness due defendants by other persons, and goods, moneys, chattels, or effects of such defendants in the hands of such persons, to the payment of judgments against them upon application of judgment creditors. See Acts 1822, p. 14; Duval, Comp. § 17, p. 11; Thomp. Dig. p. 371. In 1845 the remedy was extended to plaintiffs in attachment even before judgment obtained (McClellan's Dig., § 12, p. 550), and in 1861 it was extended to every plaintiff in every suit before as well as after judgment obtained

(§ 14, p. 551, Id.). By Laws 1887, chap. 3738, the remedy was extended so as to reach money and property of railroad companies in the hands of their officers, employees, or agents. By Acts 1893, chap. 4136, the remedy was further extended so as to authorize garnishments to issue to officers, agents, and employees of "any companies or corporations" after judgment against them. By Acts 1901, chap. 4973, the writ is authorized to subject to decrees for alimony "all moneys or other things due to any person or public officer, state or county," whether the money or other thing is due for the salary, personal labor, or service of such person or otherwise. Act 1845, chap. 43, § 1, authorized the writ of garnishment to issue against "any person or persons other than the defendant" who were indebted to or who had any of the effects or property of defendant "in his, her, or their hands or possession or control." This act became the basis of Rev. Stat. § 1666, which, both before and after it was amended by Acts 1893, chap. 4136, provides that "every person who shall have brought a suit in any court of this state against any person, natural or corporate, shall have the right to a writ of garnishment under the circumstances and in the manner hereinafter provided to subject any indebtedness due to the defendant by a third person and any goods, chattels, money, effects, or credits of the defendant in the hands, possession, or control of a third person." I refer to these various statutes to show that the legislature has steadily extended the remedy by garnishment, and, as they are remedial statutes, they ought to be interpreted so as to carry out the evident purpose of the legislature, which was to extend to creditors complete remedies for subjecting to their demands every species of the property of their debtors liable for debt. The only statutory exemption from garnishment or statutory prohibition of its employment is that found in Rev. Stat. § 2008, compiled from Acts 1875, chap. 2065, to the effect that no writ of garnishment shall issue to attach or delay payment of any money or other thing due to any person who is the head of a family, when the money or thing is due for the personal labor or services of such person.

Counties are, and have been from the earliest period, recognized as political subdivisions of the state. The present Constitution recognizes and provides for such political subdivisions, and provides for county commissioners and other officials of the several counties. By Laws 1872, chap. 1882, it was provided that the county commissioners should "represent the county in the prosecution and defense of all legal causes." Rev. Stat. § 578. It may be conceded that this statute did not extend to counties the writ of garnishment theretofore provided for, but in 1881 another act was passed, which, as subsequently incorporated into the Revised Statutes, provides that "the county commissioners of the several counties shall sue and be sued in the name of the county of which they are commissioners." It fur-

ther provides that a change in the persons composing the board shall not abate the suit, but that it may be proceeded with as if such change had not taken place. While this legislation may not constitute them corporations, strictly speaking, it does recognize them as distinct entities capable of suing and of being sued in like manner as corporations. The word "person" in the garnishment laws does not mean natural persons only, but evidently embraces artificial entities, who are by law capable of suing or being sued, and of contracting indebtedness, or of holding property belonging to another. And I take it that this was so before the rule of interpretation that the word "person" may be construed to mean "corporation," which exists independently of legislation, was incorporated into § 1 of the Revised Statutes. *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 45 L. R. A. 246, 33 S. E. 516. Now, garnishment is a suit. Counties are capable of suing or being sued, and of owing debts, and perhaps of holding possession of the "property, money, or effects" of others. They are, therefore, "persons" or "corporations" within the meaning of the garnishment laws, unless some good reason exists for excluding them. Nearly, if not all, of the authorities which hold that counties and municipal corporations cannot be garnished, admit that under legislation like ours the language of the statutes is broad enough to cover them, but that by reason of public policy the general language will be restrained so as not to embrace them. If, therefore, there exists in this state no public policy forbidding the garnishment of a municipal corporation or county, the courts are not justified in writing an exception into the statute; and, if there is a public policy, the exception ought logically to extend no further than that public policy requires it to be extended. Respectable courts have differed as to the existence in particular states of a public policy that would require them to exempt from the general language of garnishment statutes municipal corporations or counties. Those which admit such a public policy do not agree upon its extent; some holding that it requires a complete exemption, others that it applies only to exempt cases, where the writ will cause embarrassment to the municipality or county in the performance of its governmental functions, or to its officers in such performance. It must not be forgotten that the exemption of such municipalities or counties from garnishment necessarily exempts the funds or property in their hands from the debts so long as it remains due from or in the hands of such municipalities. A party may, under such a rule, be the creditor of a county for thousands of dollars by purchasing indebtedness against it, or becoming its creditor by investing in its securities or otherwise, and this indebtedness is effectually shielded from the grasp of his creditors by reason of their inability to sue, and even though it largely exceeds the sum which the Constitution exempts from his debts, leaving the creditor

absolutely powerless to subject the excess. If there is a public policy in allowing this injustice, when to require the county to pay the money to the creditor under garnishment proceedings will not interfere in the slightest with its governmental functions, I am unable to see it. The counties of this state owe thousands of dollars, evidenced by warrants, fines, and forfeiture scrip, bonds, and other evidences of debt. Duval, Hillsborough, Dade, and other counties have hundreds of thousands of dollars in bonds issued to secure money for various purposes; and to say that owners of these bonds hold them exempt from their debts is a proposition shocking to our sense of justice; and yet such must be so if the county is exempt from the process of the courts which would require them to pay the proceeds over to a creditor of their creditor. Judge Dillon, in his work on *Municipal Corporations*, vol. 1, § 101, says that on principle a municipal corporation is exempt from liability to garnishment with respect to its revenues and the salaries of its officers, but that, where it owes an ordinary debt to a third person, the mere inconvenience of having to answer as garnishee furnishes no sufficient reason for withdrawing it from the reach of the remedies which the law gives to creditors of natural persons and of private corporations. His view is concurred in by the supreme courts of Texas and New Jersey, and is quoted with approval in Virginia in opinions that are forcible and convincing. *Laredo v. Nalle*, 65 Tex. 359; *State, Jersey City, Prosecutor, v. Horton*, 38 N. J. L. 89; *Portsmouth Gas Co. v. Sanford*, 97 Va. 124, 45 L. R. A. 246, 33 S. E. 516. See also the opinion of Mr. Waples in his work on *Attachment & Garnishment*, 2d ed., § 430, and of Mr. Wade in his work on *Attachment*, vol. 2, § 345. The public policy theory has also been repudiated, either wholly or partly, in Iowa, New Hampshire, Montana, Kentucky, Connecticut, Ohio, and Rhode Island. *Wales v. Muscatine*, 4 Iowa, 302; *Whidden v. Drake*, 5 N. H. 13; *Waterbury v. Deer Lodge County*, 10 Mont. 515, 26 Pac. 1002; *Rodman v. Musselman*, 12 Bush. 354, 23 Am. Rep. 724; *Bray v. Wellingford*, 20 Conn. 416; *Newark v. Funk*, 15 Ohio St. 462; *Wilson v. Lewis*, 10 R. I. 285. See also *Adams v. Tyler*, 121 Mass. 380. The first four cases cited discuss the question of public policy very fully. The most of the authorities supposed to sustain the opposite doctrine are referred to in the majority opinion. In many, if not most, of those cases the effort was to subject to the process of garnishment wages or salaries due to the officers of the municipality; and, while the arguments of the courts in deciding them are very broad, the facts of the cases bring them within Judge Dillon's rule, and in others the facts showed that to permit the garnishment would embarrass the municipality in its governmental functions, and therefore fall strictly within the rule that private interests must not be permitted to interfere with those of the public. The reasons stated for these decisions are not uniformly the 60 L. R. A.

same, and in some of the states where it is held that municipalities cannot be garnished it is held that this exemption is a privilege which can be waived. This cannot logically be true if it be conceded that the garnishment statutes do not include municipal corporations, as is held in some cases. We ought to be sure that there is a public policy in Florida that forbids garnishment proceedings against municipalities under any and all circumstances before we deny to creditors the remedies afforded by our statutes to subject to their demands the property of or debts due to their debtors. It is one of the prime purposes of government to furnish remedies whereby to compel every member of society to render unto every other member that which is due; and, unless in so doing the public interests will be injuriously affected, this public policy is paramount to considerations of mere convenience. Where, as in many states, municipalities are limited, as to debts they may contract, to those matters wherein a garnishment of such debt would interfere with their governmental functions, or where the power given to sue them is limited, there is much reason for holding that garnishment should not lie against them; but where, as in this state, the power to sue them is general, and the powers to create debts are broad enough to embrace debts, the garnishment of which will not interfere with their governmental functions, I can see no reason why their liability to garnishment shall be altogether denied by the courts. It is more just to hold them liable in all cases where public policy does not demand that they be exempt. If their creditors should assign their demands against them to other persons, the municipality will be compelled to pay same to the assignee. The garnishing creditor stands in the place of an assignee, the only difference being that the assignment in his case is one forced by the law, instead of being a voluntary assignment by the debtor.

The rule I contend for is this: That the statutes of this state authorize counties and municipal corporations to be sued in garnishment, but that this general authority to sue does not repeal the rule of public policy which forbids it in case such garnishment will embarrass them in their governmental functions. This principle is expressly ruled in *Lewis v. Denver*, 9 Colo. App. 328, 48 Pac. 317, and *Troy Laundry & Machinery Co. v. Denver*, 11 Colo. App. 308, 53 Pac. 256, wherein it was held that, although the statute expressly authorized municipal corporations to be garnished, yet that this statute would not be held to authorize garnishment of the salary of a municipal officer, because public policy forbade it. I think it finds support, also, in the decisions of this court in *Post v. Love*, 19 Fla. 634, and *Crescent Ins. Co. v. Bear*, 23 Fla. 50, 1 So. 318. In those cases it was held that garnishment does not lie against an executor during the progress of the administration of an estate to reach a legacy bequeathed to a debtor, and that a debt due

a partnership cannot be garnished by a creditor of one of the parties, although the statute authorizes the writ to issue against "any person or persons," which clearly embraces executors and persons indebted to partnerships. Although our statute, by the use of the term "third person," would embrace persons who act as receivers, clerks of the court, sheriffs, or other officers holding money in a fiduciary capacity, yet many courts hold, and probably this court would hold, that no recovery could be had in garnishment against them, not because such receiver, clerk, or sheriff is not a "person," but because public policy forbids it. They are not exempt from suit because not embraced in the garnishment statutes, but no recovery can be had against them on grounds of public policy if the facts are made to appear.

In the present case the county made no defense. It does not affirmatively appear

upon the face of the record that the debt sought to be garnished was one which was exempt from garnishment upon grounds of public policy, and the default admits that it was not. I think, therefore, that the judgment ought to be affirmed. I regard the principle decided in this case as an important one, and sufficiently broad to exempt cities and towns from garnishment, and to declare absolutely void any judgment against municipal corporations in garnishment proceedings, because the courts have no jurisdiction to render them. Because of its importance, and the great hardship upon creditors of withdrawing from the grasp of process in their favor all debts due by cities, towns, and counties, of whatever nature, I have thought best to express my views at length.

In my opinion, the judgment ought to be affirmed.

GEORGIA SUPREME COURT.

May Q. ROBINSON, *Plff. in Err.*,

v.

GEORGIA RAILROAD & BANKING
COMPANY.

(.....Ga.....)

*The mother of an illegitimate child has no right of action, under Civil Code, § 3828, for his homicide.

(February 10, 1908.)

ERROR to the City Court of Atlanta to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's child. *Affirmed.*

The facts are stated in the opinion.

Messrs. Arnold & Arnold, for plaintiff in error:

The mother is recognized as the only parent, and exercises all parental power.

Ga. Code, § 2509.

Even if a woman has both legitimate and illegitimate children, bastards inherit equally the estate of their mother; and, if the bastard dies without issue or widow, his mother and brothers and sisters inherit his estate.

Ga. Code, § 2510.

The bastard is made the mother's son in every legal sense. The child, as relates to his mother, is, under our statutes, a legitimate child, as to everything in which the common law made him illegitimate.

Marshall v. Wabash R. Co. 120 Mo. 275,

*Headnote by FISH, J.

NOTE.—As to right of action for death of illegitimate child, see also, in this series, *McDonald v. Pittsburgh, C. C. & St. L. R. Co.* (Ind.) 82 L. R. A. 309, and *Alabama v. R. Co. v. Williams* (Miss.) 51 L. R. A. 836. 60 L. R. A.

25 S. W. 179; *Muhl v. Michigan Southern R. Co.* 10 Ohio St. 272.

Messrs. Joseph B. Cumming, Bryan Cumming, and Sanders McDaniel for defendant in error.

FISH, J., delivered the opinion of the court:

This record presents but a single question for our determination, and that is, Has the mother of an illegitimate child a right of action, under Civil Code, § 3828, for his wrongful or negligent homicide? That section reads as follows: "A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent, and if suit be brought by the widow or children, and the former or one of the latter dies pending the action, the same shall survive in the first case to the children, and in the latter to the surviving child or children. The husband may recover for the homicide of his wife, and if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child minor or *sui juris*, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband, or child. Said mother or father shall be entitled to recover the full value of the life of said child." In seeking for the true meaning of this section as to the question under consideration, we must be guided by two firmly established and familiar rules of construction: (1) That statutes in derogation of the common law are to be strictly construed, and (2) that *prima facie* the word

"child" or "children," when used in a statute, will, or deed, means legitimate child or children,—in other words, bastards are not within the term "child" or "children." This court on several occasions, in construing this very section, has applied to it the first of these rules. In *Smith v. Patcher*, 102 Ga. 158, 29 S. E. 162, it was held: "It is essential to the maintenance of an action by a parent for the homicide of his child that the former should, at the time of the homicide, be to a material extent dependent upon the latter for a support, and that the child should then be actually contributing thereto." In the opinion Lumpkin, P. J., said: "The statute giving a right of action to a parent for the homicide of a child, and conferring upon the former the right to recover the full value of the child's life, is, to say the least, a harsh one, and must be strictly construed." Substantially the same language is used by the learned justice in *Georgia R. & Bkg. Co. v. Spinks*, 111 Ga. 573, 36 S. E. 855. In *Marshall v. Macon Sash, Door, & Lumber Co.* 103 Ga. 725, 41 L. R. A. 211, 30 S. E. 571, it was held: "A child has no right of action for the homicide of its stepfather." In that case it was alleged that the plaintiffs were the only heirs of their stepfather, he having left no widow and no other children; that he married the mother of the plaintiffs eight years prior to his death, and from the time of such marriage to the date of his death he maintained and supported the plaintiffs as his children, rearing them in his own home, feeding, clothing, and schooling them, and exercising over them complete parental control, by consent of their mother and themselves; and that such relation continued up to the date of his death, up to which time he not only contributed to their support, but they were entirely dependent upon him for a livelihood. The action was dismissed on general demurrer. Mr. Justice Lewis said: "The right of action provided for in the above Code section [3828] did not exist at common law. This statute is therefore in derogation of the common law; and, applying to it the universal rule of strict construction, we cannot see how there is any escape from the conclusion that the legislature never contemplated giving a child any right of action for the homicide of a step-parent." Instances of the application by this court of the second of these rules of construction are: *Hicks v. Smith*, 94 Ga. 809, 22 S. E. 153; *Floyd v. Floyd*, 97 Ga. 124, 24 S. E. 451; and *Johnston v. Taliaferro*, 107 Ga. 6, 45 L. R. A. 95, 32 S. E. 931. In the first of these cases it was held: "Where, by the provisions of a will made by the great-grandfather of a bastard on the paternal line, an estate is vested in the father of a bastard for life with remainder over to his children, and, he failing issue, remainder over in fee to other great-grandchildren of the testator, upon the death of the father of such bastard without issue other than such legitimated bastard, while the latter, by force of the statute, may take by descent from his father, he cannot take by purchase under the will 60 L. R. A.

of his great-grandfather, which devises the estate to his great-grandchildren generally, there being in the will no language expressly indicating a purpose to include within the scheme of his benevolence any bastard descendants." Mr. Justice Atkinson in that case said: "The word 'children,' as a general rule, means legitimate children, and will not be extended by implication so as to embrace children other than legitimate, unless such construction be necessary to carry into effect the manifest purpose of the testator." In the second case it was held: "The term 'child,' as employed in § 2664 of the Code, does not include a bastard so as to entitle him to the benefits of its provisions, and the conclusive presumption of a gift resulting from continuous possession, under the circumstances therein set forth, arises only in favor of legitimate children." In the opinion Chief Justice Simmons said: "It is well settled that at common law the words 'child' and 'children' mean only legitimate child and children." In the third case it was held: "The words 'child' and 'children,' appearing in a deed conveying to an unmarried female certain property during her life, and at her death to such child or children as she may leave living at the time of her death, will not include an illegitimate child of such female born several years after the making of the deed, unless it plainly appears from the language of the instrument that it was the intention of the grantor that an illegitimate child was to take thereunder. The word 'issue,' used in a subsequent part of the deed under consideration in the present case, is to be given the same meaning as the words 'child' or 'children.'" Mr. Justice Cobb, in delivering the opinion, said: "The words 'children' and 'issue' in deeds, wills, and other conveyances must be held to mean legitimate children or issue, unless the context is such as to require a different meaning, or the circumstances surrounding the execution of the paper are such as to make the words import other than legitimates." Page 20, 107 Ga., page 102, 45 L. R. A., and page 937, 32 S. E.

The exact question we have in hand has been decided by courts in other jurisdictions, and upon the application of the two rules of construction under discussion. In *Dickinson v. North Eastern R. Co.* 2 Hurlst. & C. 735, it was held that the word "child," in § 2 of 9 & 10 Vict. chap. 93 (Lord Campbell's act, which is the prototype of our statute), means a legitimate child, and that an action could not be maintained on behalf of a bastard child against a railway company for the homicide of its mother. Counsel for the plaintiff in that case contended that the case was within the spirit of the act, for beyond question the child was dependent solely on the mother, and that the act must mean any child who was deriving pecuniary advantage, and is deprived thereof by the death. Pollock, C. B., said: "We have no doubt that in the act of Parliament, as in all others, the word 'child' means 'legitimate' child only. In *Gibson v. Midland R. Co.* 2 Ont. Rep. 653, it was held, under a

statute of Ontario similar to Lord Campbell's act, the mother of an illegitimate child could not recover damages for its death. To the same effect is *Clarke v. Carlin Coal Co.* [1891] A. C. 412. In *Harkins v. Philadelphia & R. R. Co.* 15 Phila. 280, it was held: "The mother of an illegitimate child is not within the words or meaning of the act of April 26, 1855, which enacts that the persons entitled to recover damages for any injury causing death shall be the 'husband, widow, children, or parents of the deceased and no other relative.'" In his opinion, Thayer, P. J., after citing *Dickinson v. North Eastern R. Co.* 2 Hurlst. & C. 735, said: "The line of argument adopted by the plaintiff's counsel in that case was much the same as that pursued by the plaintiff's counsel in the present case, viz., that the legislature intended the right of action to be co-extensive with the moral right to support; that, for many purposes, the law recognizes the relationship of a bastard child to his parent; and that, therefore, the question of legitimacy or illegitimacy is immaterial. But we are not convinced by this reasoning. It is true that some rights have been accorded by statute to illegitimate children and their mothers which did not exist at common law. The act of 26th of April, 1855, § 3 (Purdon, Dig. p. 810), enacts that illegitimate children shall take the name of the mother, and that they and the mother respectively shall have capacity to take or inherit from each other personal estate as next of kin and real estate as heirs, but this act conferred only limited powers upon persons of this description. It did not legitimate illegitimate children, and it was so ruled by the supreme court of this state," citing cases. In conclusion, the learned justice said: "In addition, it may be observed that, by the act of 26th of April, 1855, the right of action is given, not to the mother alone, but to the 'parents' of the deceased. If the effect of the act of 26th of April, 1855, were to legitimate bastards for all purposes, and to give to them and their natural parents the standing in all respects which the law accords to lawful children and lawful parents, then the natural father would, equally with the natural mother, be within the enabling words of the act. We do not think this to have been the purpose of the law, but are of the opinion that the legislature, in enacting the act of 26th of April, 1855, and when using the words, 'husband, widow, children, parents of the deceased, and no other relative,' had in view the family relation as constituted and recognized by law, and that it was not intended to extend the benefits of the act to persons not falling within the legal definition of the enumerated relationships." In *Alabama & V. R. Co. v. Williams*, 78 Miss. 209, 51 L. R. A. 836, 28 So. 853, it was held: "A mother cannot maintain an action for damages caused by the wrongful killing of her bastard son," citing *Illinois C. R. Co. v. Johnson*, 77 Miss. 727, 51 L. R. A. 837, 28 So. 753, where it was held that an illegitimate half-sister cannot maintain an action

under a statute of Mississippi entitling a sister or brother to sue for the homicide of a sister or brother.

In further support of the proposition that the right of action for a negligent or wrongful homicide is purely a statutory one and in derogation of common law, and that, therefore, the statute giving the right must be strictly construed and the case brought clearly within its provisions to enable the plaintiff to recover, we select from a number of cases the following: *Good v. Towns*, 56 Vt. 410, 48 Am. Rep. 799, wherein it was held: "Under the civil damage act, giving an action to one 'dependent' on the deceased, a plaintiff claiming to be his widow must show a lawful marriage, and one claiming to be his child must show his legitimacy." Rowell, J., said: "It is true, as contended, that the language of the statute is broad—in any manner dependent; but, after all, we think it should be construed to mean a legal dependency only, the same as though it read, 'in any manner legally dependent.'" *Dickinson v. North Eastern R. Co.* 2 Hurlst. & C. 735, was approvingly cited, *Thornburg v. American Steamboard Co.* 141 Ind. 443, 40 N. E. 1062, wherein it was held that a statute giving a father a right of action for the homicide of his child confers no right upon one who marries the mother of a bastard child, and receives the child into his home as a member of his family, to sue for the death of the child. *McDonald v. Pittsburgh, C. C. & St. L. R. Co.* 144 Ind. 459, 32 L. R. A. 309, 43 N. E. 447, in which it was held a bastard is not a child within the meaning of the statute of Indiana providing that a father may maintain an action for the death of a child. It appeared in that case that the plaintiff, when the child for whose death the action was brought was six months old, received him from his mother and relieved her of his care and custody, and acknowledged him as his own son, and afterwards discharged every duty as a parent towards him, and received from him all the services, obedience, and respect due from a legitimate son, and that his mother abandoned him and was dead, and that the deceased had no guardian or next of kin. The plaintiff's action was dismissed on demurrer. *Citizens' Street R. Co. v. Cooper*, 22 Ind. App. 459, 53 N. E. 1092, in which it was held: "The right of a father or mother to recover damages for the wrongful killing of a child is statutory, and such an action cannot be maintained by a woman, where she is not the mother and has not legally adopted the child, although it was given to her in infancy, and she had ever since maintained and treated it as her own." *Western U. Teleg. Co. v. McGill*, 21 L. R. A. 818, 6 C. C. A. 521, 12 U. S. App. 651, 57 Fed. 699, where it was held under a statute of Kansas, giving a right of action for death by wrongful act, and providing that the damages must inure to the exclusive benefit of the widow and children, if any, or next of kin, that a widower could not recover for the wrongful death of his wife, who left children living, because he was not one of

the beneficiaries of the statute, although under the Kansas statute of descent and distribution of estates a husband who survives his wife is entitled to a share of her personal estate. In the opinion, Sanborn, J., referring to the statutes giving a right of action for the negligent killing of another, said: "Under these statutes the following rules have been established without dissent among the authorities: The action under them is entirely the creature of the statute. If the right to maintain it and to recover the damages allowed in it in any case is not expressly given by these statutes, the judgment rendered cannot stand. Where such a statute giving a new right of action for damages specifies the person or class of persons for whose exclusive benefit the damages are to be recovered, no damages to any other person or class of persons can be allowed in the action based on the statute." In 1 Shearman & Redfield on the Law of Negligence, § 136, it is said: "Whereas, in England, Maine, New Hampshire, Massachusetts, Maryland, Pennsylvania, Louisiana, Georgia, Alabama, Missouri, and Kansas, and other states, the statute [giving a right of action for homicide] specifies the 'child' of the deceased, an illegitimate child is not within the description."

There are, however, authorities of a different tenor. In *Muhl v. Michigan Southern R. Co.* 10 Ohio St. 272, the headnote is: "In an action by the administrator of a woman killed by the carelessness of the servants of a railroad company in running its locomotive, the petition alleging and the proof showing the deceased to have left a son as her sole surviving heir, held (1) That it is error to order a nonsuit on the ground that such child is illegitimate; (2) that the fact of such child's legitimacy or illegitimacy can in no respect affect the right of action in his behalf." It appears that the suit was based upon a statute of Ohio, which provided that the action for a homicide should be brought by the personal representative of the deceased, and that the recovery should be distributed to the "widow and next of kin, in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate." Act March 25, 1851. The deceased left a lawful sister and an illegitimate son. The trial court granted a nonsuit because the child alleged in the petition to be next of kin was a bastard. This ruling was reversed by the supreme court, upon the ground that the action was properly brought in the name of the personal representative of the deceased, and that the question whether the child or sister should be regarded as the next of kin did not in any way affect the cause of action, for the reason that the right to sue existed in favor of the administrator in either case. It is true the court added: "But it is quite evident that the nearness or remoteness of kin on the part of the son of the deceased mother, neither in fact, nor by any canon of descent

under the statute, depended at all upon the circumstance of his being born within or without lawful wedlock." In view of the ruling made, this remark seems merely *obiter*. In *Security Title & T. Co. v. West Chicago Street R. Co.* 91 Ill. App. 332, it was held: "(1) It was the intention of the legislature, by § 2 of the act of 1872 (Laws 1872, p. 353), . . . to remove the common-law disability of illegitimate children. (2) . . . Under the statute requiring compensation for causing death by wrongful act, neglect, or default, an action can be maintained for the benefit of the mother of an illegitimate child, as the next of kin of such child." The Illinois statute seems to be the same as the Ohio statute just referred to, and provides that the recovery "shall be for the exclusive benefit of the widow and next of kin," etc. Hurd's Rev. Stat. 1893, p. 813, chap. 70, § 2. As the mother of an illegitimate child could inherit from it under the law of Illinois, the court held that she was included within the term "next of kin" of such child. In *Marshall v. Wabash R. Co.* 120 Mo. 275, 25 S. W. 179, it was held: "Under the provisions of Rev. Stat. 1889, § 4425, giving the father and mother the right to join in an action for damages for the wrongful death of their unmarried minor child, and, in case of the death of either parent, that such suit may be brought by the survivor, the mother of a deceased illegitimate minor child may, in such case, sue alone, and the reputed father need not, and should not, be made a party." In delivering the opinion, Black, P. J., said: "The harsh rules of the common law have been modified by express statute in this state, so that the mother is declared the natural guardian of her illegitimate child. Rev. Stat. 1889, § 5279. And § 4473 declares: 'Bastards shall be capable of inheriting and transmitting inheritance on the part of their mother, and such mother may inherit from her bastard child or children in like manner as if they had been lawfully begotten of her.' It may be stated that the plaintiff in this case finally brought his action against the same defendant in the circuit court, S. D. Ohio, W. D., and, while the case was dismissed upon the ground that the statute upon which it was based was penal, and for that reason could be enforced only within the sovereignty of its creation, yet Sage, J., said, as the matter had been fully argued before him, he would express his opinion as to whether the plaintiff had any standing in court. His opinion was that the statute extended only to the cases of natural born legitimate children, and no action could be maintained by a mother for the death of her bastard child. *Marshall v. Wabash R. Co.* 46 Fed. 269.

In this state, the mother of a bastard child is entitled to its possession, unless it is legitimated by the father, and, being the only recognized parent, may exercise all the paternal power. Civil Code, § 2509. "Bastards have no inheritable blood, except that

given to them by express law. They may inherit from their mother, and from each other, children of the same mother, in the same manner, as if legitimate. If a mother have both legitimate and illegitimate children, they shall inherit alike the estate of the mother. If a bastard dies leaving no issue or widow, his mother, brothers, and sisters shall inherit his estate equally. In distributions under this law the children of a deceased bastard shall represent the deceased parent." Id. § 2510. While it is evidently true that the status of bastards under our law is greatly superior to what it was under the common law, yet it cannot be said that they have been legitimated, at least for all purposes, and placed upon the same footing in all respects as children born in lawful wedlock; and in view of the decisions of this court above cited, to the effect that the statute giving a right of action for a homicide should be strictly construed, and that the word "child" used in a statute *prima facie* means a legitimate child, we are constrained to hold that the mother of an illegitimate child has no right of action for his wrongful or negligent homicide. The statute provides that "a mother, or, if no mother, a father, may recover for the homicide of a child minor or *sui juris*, upon whom she or he is dependent, or who contributes to his or her support, unless said child leave a wife, husband, or child: Said mother or father shall be entitled to recover the full value of the life of said child." There are no words in the statute qualifying the word "child" in any particular, nor is there anything in the context which would authorize a conclusion that the legislature intended to use the word in any broader sense than is usually given it in statutes, but, on the contrary, the context plainly indicates, to our mind, that the child in legislative contemplation, was the child of a lawful marriage, whose mother, or, if no mother, whose father, might recover for his homicide.

Judgment affirmed.

All the Justices concur, except **Lumpkin**, P. J., absent on account of sickness.

Candler, J., concurring specially:

I concur in the judgment rendered in this case, because of the previous rulings of this court, which seem to be binding upon us. If it were an original question, I would never agree to a judgment which holds that the doubly unfortunate mother of a child whose sole parent she is and upon whom she is dependent,—this dependence probably due to the fact of its miserable birth,—cannot recover for its homicide, although our law-makers have declared that "a mother may recover for the homicide of a child upon whom she is dependent, or who contributes to her support."

60 L. R. A.

H. J. BERKNER, *Plff. in Err.*,

v.

Joseph DANNENBERG et al.

(.....Ga.....)

1. Inasmuch as the answers filed deny the commission of an assault and battery of the kind and character alleged in the petition, and for which the plaintiff sought to recover damages, they cannot properly be treated as pleas of justification, although they admit a battery of a minor character, and aver, as a justification of the battery as admitted, certain opprobrious words and abusive language spoken by the plaintiff to one of the defendants. But, treating the answers as pleas in extenuation and mitigation of damages, the trial judge committed no error in overruling a demurrer to the same.
2. The provision of our statute that opprobrious words or abusive language may justify an assault, or an assault and battery, is applicable only on the trial of one who has been indicted for either of these offenses; and while, on the trial of a civil action brought by one person against another to recover damages for an assault and battery alleged to have been committed on the plaintiff by the defendants, any such words and language may properly go to the jury, they are admissible only in extenuation or mitigation of damages, and not as a justification.
3. In an action to recover damages resulting from an assault and battery committed on the plaintiff, if there be aggravating circumstances either in the act or intention, punitive or exemplary damages may be recovered.
4. In order to entitle the defendant to the opening and conclusion before the jury under a plea of justification filed in an action to recover damages for the commission of a tort, the plea must admit the commission of the acts charged in the petition as they are therein alleged; and a plea which only partially admits the commission of the acts charged is not a plea of justification, and does not entitle the defendant to the opening and conclusion of the argument.

(*Fish, J., dissents from proposition 2.*)

(January 10, 1903.)

ERROR to the Superior Court for Bibb County to review a judgment in favor of defendants in an action brought to recover damages for an assault. *Reversed.*

The facts are stated in the opinion.

Mr. Arthur L. Dasher for plaintiff in error.

Messrs. Hardeman, Davis, Turner, & Jones, for defendants in error:

Whether the epithet would justify the battery, if not excessive, was for the jury alone.

Ga. Penal Code, § 103; 2 Am. & Eng. Enc. Law, 2d ed. 977, V. 1.

Whether or not the menace was sufficient to arouse the fears of a reasonable man was

*Headnotes by **LITTLE, J.**

NOTE.—For abusive and provocative words as defense in action for assault, see also, in this series, *Goldsmith v. Joy* (Vt.) 4 L. R. A. 500, and *Willey v. Carpenter* (Vt.) 15 L. R. A. 853.

not a question of law, but one of fact for the jury.

Cumming v. State, 99 Ga. 662, 27 S. E. 177; 2 Am. & Eng. Enc. Law, 2d ed. p. 977.

The batteries were separate; therefore the torts were severable, and severable or separate damages might have been assessed by the jury.

Kennebeck Purchase v. Boulton, 4 Mass. 419; *Buddington v. Shearer*, 20 Pick. 477; *Russell v. Tomlinson*, 2 Conn. 206.

The three defendants not acting in concert, there being no conspiracy between them to assault the plaintiff, but their actions each being inspired on the spur of the moment, each acting for himself without any common purpose, the battery of each was a several, not a joint, act, and each was responsible only for the consequences of his own act.

Durgin v. Neal, 82 Cal. 595, 23 Pac. 133, 375; *White v. Conly*, 14 Lea, 51, 52 Am. Rep. 154.

The defendant assumed and carried the burden without objection, and, whether the plea was a good plea of justification or not, the plaintiff is estopped from claiming the conclusion.

Zachry v. Stewart, 67 Ga. 218; *Abel v. Jarratt*, 100 Ga. 732, 28 S. E. 453; *Willingham v. Macon & B. R. Co.* 113 Ga. 374, 38 S. E. 843.

This was a plea of justification.

Strickland v. Atlantic & W. P. R. Co. 99 Ga. 124, 24 S. E. 981.

The rule in civil actions for recovering damages for assault and battery, and of the defenses thereto, is the same as in criminal proceedings, and what would justify one in a criminal prosecution would shield him from damages in a civil action.

2 Am. & Eng. Enc. Law, 2d ed. p. 977; *Baker v. Gausin*, 76 Ind. 317; *Thomason v. Gray*, 82 Ala. 291, 3 So. 38.

It is a good defense to a charge for assault and battery that the force used was made necessary to repel a threatened attack by the prosecutor.

2 Am. & Eng. Enc. Law, 2d ed. p. 977.

The defendants were entitled to use a sufficient force, not only to resent the opprobrious words that were used, but to prevent a repetition thereof.

2 Am. & Eng. Enc. Law, 2d ed. p. 978; *People v. Pearl*, 76 Mich. 207, 4 L. R. A. 709, 42 N. W. 1109.

Little, J., delivered the opinion of the court:

An action to recover damages on the part of Berkner for personal injuries which he alleged the defendants had inflicted on him was tried, and there was a verdict for the defendants.

1. In his bill of exceptions the plaintiff in error alleges that the trial judge erred in overruling the demurrer which he filed to the pleas of the defendants. Evidently the main purpose of the demurrer was to call in question the sufficiency of the defendants' answers as pleas of justification. We are of the opinion that the answers filed cannot, in 60 L. R. A.

law, be treated as pleas of justification. The action brought by the plaintiff sought a recovery in damages for a tort, and Civil Code, § 3891, declares that in every case of a tort, if the defendant was authorized by law to do the act complained of, he may plead the same as a justification. The test, therefore, to which the answers are to be subjected to determine whether or not they can properly be classed as pleas of justification, is: First. Do the answers admit the battery as set out in the petition? Second. Do the matters set up as a reason for committing the battery, in law, authorize the defendants to commit the battery? If the pleas be wanting in either of these particulars, they are not pleas of justification. An examination of the answers discloses that they do not admit the assault and battery as charged in the petition. In order to make a plea one of justification, it must plainly admit that the act as charged in the petition was committed by the defendant. Under such a plea there can be no issue between the parties as to whether the acts charged were committed by the defendant, but the only issue raised is whether the defendant was in law justified in doing the acts for which the plaintiff seeks redress. The answers in this case, therefore, cannot be considered as pleas of justification. By Civ. Code, § 3892, it is declared that what does not amount to a justification may be pleaded in extenuation and mitigation of damages; and, while much of the matter contained in the answers could well have been omitted, we are not aware of any reason why the answers should have been stricken, but, on the contrary, are of opinion that the matter which they contained could properly be pleaded in extenuation or mitigation of damages under the Code section just cited. Those grounds of the demurrer not directed to the answers as pleas of justification do not raise issues of sufficient importance to cause the pleas to be stricken. Although much of the language and many of the expressions contained in the answers to which these grounds of the demurrer are directed are objectionable, and add no weight to the material averments of the plea, and should not have been set out, yet they can properly be treated as mere surplusage.

2. The motion for a new trial contains thirty-five grounds. A careful examination of each of these in connection with the brief of evidence and the charge given to the jury has resulted in the conclusion that the trial judge erred in overruling the motion for a new trial. The particular causes for a reversal of the judgment will be hereafter specifically set forth. In the meantime, however, a number of immaterial errors, set out in some of the grounds of the motion other than those particularly mentioned, appear to have been committed on the trial; but they are not of sufficient importance of themselves to work a new trial. These errors are found set out in the first, second, eighth, tenth, and other grounds, which are indicated in what will be hereafter said. The

grounds not thus indicated or specifically set out do not show the commission of error. In the fourteenth ground of the motion error is assigned to the action of the court in instructing the jury as follows: "It is a rule of law in this state, laid down in the Code, that in all cases of assault and battery [and the charge in this case on the part of the plaintiff is that the defendants did commit an assault and battery upon him, and the plea of the defendants admits that an assault and battery was committed on the plaintiff] the law permits, wherever an assault and battery is made, and an effort is made on the part of the person inflicting that assault and battery to justify—that is to say, to show that the person who inflicted the assault and battery was justified in that battery—the law says that the jury trying the case may have shown to them by the testimony any opprobrious words used by the person beaten to the person beating, by the person who inflicts the injury or battery or beating, in order that the jury trying the case may pass upon the question of whether or not the battery inflicted was disproportionate to the opprobrious words, if they were insulting words and opprobrious words, whether the battery inflicted was disproportionate to the words used." The provisions of our Code to which undoubtedly the trial judge had reference in this part of his charge are to be found in Penal Code, § 103, which is in the following language: "On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury." In terms the provisions of this section are only applicable in the trial of one who is charged with the offense of assault, or assault and battery, and they have no applicability to a civil case, so far as they may be construed to allow the jury to find opprobrious words to be such a justification for an assault and battery as to prevent a recovery by the plaintiff. On the contrary, our Civil Code, § 3826, but declares the doctrine of the common law when it lays down the rule that "a physical injury done to another gives a right of action, whatever may be the intention of the actor, unless he is justified under some rule of law." The rule for measuring damages in such an action is stated (Civil Code, § 3905) in these words: "If the injury be small, or the mitigating circumstances be strong, nominal damages only are given." The suit here is to recover damages for physical injuries. The plaintiff is entitled, when he shows that these injuries were inflicted by the defendant, to recover nominal damages at least, unless the defendant on his part shows that he was justified, under the law, in the commission of the assault or battery, or both. As we have said, the rule that opprobrious words may, in the estimation of the jury, afford a

justification of an assault and battery, is confined to the trial of one who is charged on the criminal side of the court with assault and battery as an offense against the laws of the state. At common law opprobrious words would never justify an assault or battery (*Berry v. State*, 105 Ga. 683, 31 S. E. 592), and we have no statute which makes such words a justification in a civil action. It must, therefore, be ruled that the charge complained of was error. While this is true, evidence of opprobrious words or abusive language may nevertheless properly go to the jury, not as proof of justification, but to be considered in extenuation and mitigation of damages which must be awarded, except in cases where the acts admitted or proved are justified. We know of no rule of law, when a physical injury is shown to have been intentionally inflicted, which bars the right of the injured person to at least recover nominal damages, when it appears that the only cause for the infliction of the injury was opprobrious words used by the person injured to him who caused the injury. We are, of course, dealing with the charge as set out in a ground of the motion, and cannot be understood as intimating anything in relation to the other claim made by the defendants that what they did was in consequence of a belief on their part that the plaintiff was about to draw and use a weapon. The evidence in relation to that and other circumstances is for the jury; but, inasmuch as opprobrious words and abusive language will not of themselves free a person who actually committed an assault and battery from liability in an action for damages, it is not, we think, necessary to discuss or pass upon the question of the mutual rights of the father, son, and son-in-law to protect each other.

3. Another ground of the motion complains that the court erred in charging the jury that they were not authorized to consider the question of punitive damages, and that they were not authorized to find punitive damages for the plaintiff, but, if they should find damages for the plaintiff, their verdict should be for such damages "as will compensate him for the injury inflicted upon him, if such injury has been inflicted upon him from which he still suffers, as well as such injuries suffered from time to time in the past, in the way of physical injury, as well as compensation for wounded feelings." We have not quoted in full the part of the charge complained of because of its length, but we gather from it that the charge instructed the jury that in a case like this they were not authorized to find punitive damages. So construed, we think the charge was error. In the case of *Ratteree v. Chapman*, 79 Ga. 574, 4 S. E. 684, it was ruled by this court that under the law of this state, in actions for torts, when there are aggravating circumstances, the jury may give additional damages, either to deter the wrongdoer from repeating the trespass or as compensation for wounded feelings. The action brought in that case was to recover damages for an assault and battery which

the plaintiff alleged the defendant had inflicted on him; and in the case of *Parker v. Lanier*, 82 Ga. 216, 8 S. E. 57, which was an action to recover damages alleged to have been sustained by the plaintiff at the hands of the defendant in consequence of an assault and battery, this court expressly ruled that punitive damages, as well as compensatory damages, might be awarded. Under these authorities it must be ruled that this part of the charge was error. We, of course, do not mean to be understood as saying or intimating that under the evidence in this case the jury should or should not have awarded punitive or exemplary damages. The plaintiff contended that the defendants, without cause or any mitigating circumstances, committed an aggravated battery on him. Whether they did so or not, whether there were aggravating circumstances or not, are all questions for the jury; but in the charge excepted to the jury were instructed that they could not consider the question of punitive damages. As was said by Mr. Justice Simmons in *Ratteree v. Chapman*, 79 Ga. 580, 4 S. E. 684: "Whatever may have been the dispute amongst text-writers and courts heretofore as to this question, . . . the legislature has settled it in this state;" and he then proceeds to quote from the Civil Code, § 3906, which declares, in effect, that, where there are aggravating circumstances either in the act or in the intention in the commission of a tort, the jury may give additional damages, either to deter the wrongdoer from repeating the trespass, or as compensation for the wounded feelings of the plaintiff. Under these rulings it must be held that the charge complained of was error.

4. It is further complained that the court erred in ruling, over the objection of the plaintiff, that the plea filed by the defendants in this case was a sufficient plea of justification to entitle the defendants to the opening and conclusion in the argument before the jury. It is not necessary for us to repeat what we have said above,—that, in our judgment, the answers filed were not pleas of justification, but from what has been said on that point it is clear that the defendant was not entitled to the opening and conclusion, which has been ruled by this court to be an important right. This right is only secured when the plea admits the commission of the acts as they are charged in the petition. Such an admission is necessary to characterize the plea as one of justification, which alone authorizes the defendant to have the opening and conclusion. It was ruled in the case of *Ransone v. Christian*, 49 Ga. 491, construing Civil Code, § 3891, which relates to pleas of justification, that under the law of this state a plea of justification filed in a case of libel admitted, not only the publication, but the manner of it as charged in the declaration. See also, to the same effect, *Ocean S. S. Co. v. Williams*, 69 Ga. 251. And in the case of *Seymour v. Bailey*, 76 Ga. 338, being a case wherein the plaintiff sought to recover damages because the defendant "with an ax

helve and with his fist gave and struck petitioner a great many violent blows," etc., it was held "that it was not a sufficient plea of justification to allege that the plaintiff made an assault upon the defendant, and would have beaten and ill treated him if he had not immediately defended himself against the plaintiff, and therefore he did a little beat, ill treat, and wound the plaintiff necessarily and unavoidably, and the plaintiff, by his assault, brought it upon himself;" and that the plea did not give the defendant the right to open and conclude before the jury. Under the plea filed in this case much of the matter alleged in the petition was not admitted, but was denied. The effect of a plea of this character is to still leave upon the plaintiff the burden of proving those allegations not admitted. Hence the plea was not one of justification, and did not give to the defendant the right to open and conclude.

We have not, for want of time, been able to take up the grounds of the motion *seriatim*, but it is believed that the rulings herein made, and the reasons assigned for the same, cover all the material points made in the record.

Judgment reversed.

All the Justices concur, except **Lumpkin**, P. J., absent on account of sickness, and **Candler**, J., not presiding.

Fish, J., dissenting in part:

While I concur in the result reached by the court in this case upon the other grounds dealt with in the opinion of the majority of the court, I respectfully dissent from the proposition laid down in the second head-note. It is undoubtedly true that, under the common law, opprobrious words or abusive language could not be pleaded in justification of an alleged assault and battery, either upon a criminal prosecution for the alleged offense or in a civil suit for damages based upon the alleged tort; and it is also true that, unless this principle of the common law, as applied to such a civil action, has been abrogated in this state by the statute (Penal Code, § 163), it still prevails. In my opinion, however, there is no escape from the conclusion that this principle of the common law was abolished in this state, both as to criminal and civil actions, when that statute was enacted. Under the common law, whenever a person could plead justification to an indictment for assault and battery, he could plead justification in defense to an action for damages based upon the same act. To an indictment for assault and battery he could plead that the alleged battery was committed in self-defense, and to a civil suit, based upon the same act, he could enter the same plea; and if he sustained it in the latter case, he was as much entitled to a verdict in his favor as he would be if he sustained it in the former. The same principle of justification applied in each case. Civil Code, § 3891, provides: "In every case of tort, if the defendant was authorized by law to do the act complained

of, he may plead the same as a justification." And § 3826 declares: "A physical injury done to another gives a right of action, whatever may be the intention of the actor, unless he is justified under some rule of law." Therefore, if, in a civil action for alleged assault and battery, "the defendant was authorized by law to do the act complained of, he may plead the same in justification;" and "a physical injury done to another" gives no right of action to the injured party if the person inflicting the injury was "justified under some rule of law." Penal Code, § 103, provides: "On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury." It seems to me clear that when, in a prosecution for assault and battery, opprobrious words or abusive language do amount to a justification of the beating, the person doing the beating "was authorized by law to do the act complained of," and that it therefore follows that in a suit for tort, based upon the same beating, he "may plead the same in justification." Clearly, if, in a given case, opprobrious words or abusive language would, in a prosecution for assault and battery, amount to a justification for the particular beating inflicted, the person doing the beating "was justified under some rule of law." He would be justified under the rule of law laid down in the above-quoted section of the Penal Code, and, being justified under this rule of law, the physical injury which he inflicted upon the other party would give no right of action to the latter. "Battery is the unlawful beating of another." Penal Code, § 102. Therefore a beating which is lawful is, in the legal sense, no battery. A beating which is justifiable is a lawful beating. A lawful beating affords no cause of action to the person beaten. Opprobrious words or abusive language may, as we have seen, justify a beating, if, in the opinion of the jury trying the case, the beating was not disproportioned to the provocation given by such words. Where opprobrious words or abusive language do justify a beating, the beating is lawful, and, being lawful, no right of action can flow therefrom to the person beaten. In my opinion, it will not do to say that a beating may be justifiable, and therefore lawful, when the state is prosecuting the beater for a violation of its criminal statute, and that the same beating is obliged to be unjustifiable, and therefore unlawful, when the person beaten is suing his assailant for damages alleged to have been sustained in consequence of the beating. It cannot be that the state, when it, by a prosecution for assault and battery, is seeking to protect the right of every law-abiding citizen to personal security, will justify one person for having beaten another, upon a ground which affords no justification whatever for the act

complained of when the issue is between the person assaulted and beaten and his assailant. I cannot believe that the state in a criminal case has one standard by which to measure the right to personal security, and in a civil case has another standard by which to measure the same right. The right for the protection of which the state enacted its criminal statute, and in vindication of which it brings its criminal prosecution, is the same right for the alleged violation of which the person beaten brings his action for damages. And when the state, as the sovereign protector of the rights of its citizens, in a statute enacted for the purpose of protecting the right of personal security, provides that a given provocation may justify one person for assaulting and beating another, it impliedly declares that under such circumstances the right of the person assaulted and beaten to personal security has not been violated. When one person is justified in striking another, he has the right to do so. If he has the right to strike the blow, he cannot, by striking it, violate any right of the person whom he strikes, and, unless some right of the person struck is violated by the blow, no right of action for damages can accrue to him therefrom.

For these reasons I am of opinion that the charge of the trial court, dealt with in the second division of the opinion of the majority of this court, was not an erroneous statement of the law. I may add that, while the precise question which I have been considering may not have been directly involved in *Tucker v. Walters*, 78 Ga. 232, 2 S. E. 689, it is very clear that this court, as then constituted, was of opinion that the provisions of our statute in reference to opprobrious words or abusive language as a justification for an alleged assault and battery were applicable in a civil case. There Tucker sued Walters for damages, for having stabbed him with a pocketknife, and Walters' defense was that the stabbing was done in self-defense. The evidence showed that Tucker first assaulted and beat Walters. The plaintiff contended that the assault which he made on the defendant was justified by certain words which the latter used to him, which, in the manner and under the circumstances in which they were used, were opprobrious. The trial judge instructed the jury that the words in question, whether spoken in a mild, kind, or insulting manner, were not opprobrious words, and that the manner in which they were spoken could not make them so. The main ground of the motion for a new trial was that the court erred in this instruction, and this court held that the charge was erroneous, upon the ground that the question, whether the words were opprobrious or not, was one to be determined by the jury. Clearly, if the law in reference to opprobrious words as a justification for a beating does not apply in a civil suit for damages, the question whether the instruction to the jury was abstractly right or wrong was utterly immaterial; as, whether right or

wrong, the plaintiff could not have been hurt by the charge given. Therefore the fact that this court gravely considered and determined the question presented shows that

it was of opinion that the provision now contained in Penal Code, § 103, with reference to opprobrious words, is applicable in a civil case.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE of New Jersey,
William O. ALLISON, Prosecutor, *Plff. in Err.*,
v.
Charles CORKER *et al.*

(67 N. J. L. 596.)

- *1. A statute so framed as to be wholly or in part unconstitutional, but having a title expressing a constitutional object, may, by amendatory legislation, be rendered constitutional, without having recourse to an enactment independent throughout its provisions.
2. Any power or powers of local government in townships may, at the discretion of the legislature, be exercised in districts; and the fixing of the number and boundaries of the districts may constitutionally be delegated to the township committee.
3. In order to effectuate such power or

*Headnotes by COLLINS, J.

powers, the legislature, constitutionally, may authorize the legal voters of each district to make appropriations of money, to be raised by taxation and expended within the district. The district becomes, for the purposes of the legislation, a political division of the state.

4. "An Act Concerning Public Roads and Parks and Creating Boards for the Control and Management of the Same," approved March 1, 1893 (P. L. p. 69; 3 Gen. Stat. p. 2951), as amended and supplemented March 17, 1896 (P. L. p. 80), is constitutional as to roads, but ineffectual as to parks.
5. "An Act Authorizing the Division of Townships into Street Lighting Districts and the Erection and Maintenance of Street Lights Therein and the Election of Street Light Commissioners in Said District," passed May 25, 1894 (P. L. p. 540; 3 Gen. Stat. p. 3669), as amended March 25, 1896 (P. L. p. 132), is constitutional.

(June 18, 1902.)

NOTE.—Power to cure unconstitutional statute by amendment.

- I. Introductory, 564.
- II. Statutes only partially unconstitutional, 564.
- III. Statutes unconstitutional in entirety.
 - a. In general, 565.
 - b. Curing defect in title of statute by amendment of title only, 566.

I. Introductory.

There are but few authorities bearing directly on the question as to whether a statute which violates a constitutional provision can be validly amended by a legislative act which removes the offending portions of the statute, but does not re-enact the entire statute. There can be but little question but that such a statute may be so amended where the defective provision is so separable from the rest of the statute as not to render it unconstitutional in its entirety. Such a statute is as though the defective portion had never been enacted, and the rest, being valid and operative, may be amended. A more difficult question is presented where the offending provision of the statute is so inseparably connected with its purpose and object as to bring the entire act within the condemnation of the Constitution. The premise from which it is argued that such a statute cannot be amended so as to cure the defect is that it is null and void, and that a null and void statute cannot be amended. In *STATE, ALLISON, PROSECUTOR, v. CORKER* the court held that such an act is not void, but merely inoperative, and that it becomes operative upon the removal of the defect by an amendment. It also held that, even though the act be considered null and void, it does not follow that it may not be imported into valid legislation by appropriate reference; that it is within the legislative power to give effect to documents without their full recital; that the matter is one purely of identification, and nothing is more definite than a reference to 60 L. R. A.

a document that has been regularly promulgated as a public statute.

II. Statutes only partially unconstitutional.

In *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774, it was held that a portion of a statute which is unconstitutional may be amended so as to cure the defect, the court saying that, where the act is valid, and only a portion of it violates the Constitution, an amendment may be made to any part of the defective section, or by substituting an entire new section in lieu thereof, provided that the act, when amended, does not embrace a purpose outside of its title and inconsistent with the provisions remaining un repealed.

In *Sweet v. Syracuse*, 120 N. Y. 337, 27 N. E. 1081, 29 N. E. 289, *infra*, where an amendment was attacked on the ground that the original statute was rendered entirely invalid by a constitutional defect, it was assumed that, if the unconstitutional portion did not invalidate the act in its entirety, it could be properly amended, and the court rested on this ground its decision sustaining the amendment.

In *State, Trenton Iron Co., Prosecutor, v. Yard*, 42 N. J. L. 357, the statute involved was an act concerning corporations, one section of which related to the taxation of corporations, and was complete within itself, but was claimed to be unconstitutional in that it applied only to corporations incorporated after the passage of the act. This section was amended for the purpose of curing the defect by a supplemental act likewise complete within itself, which applied to all corporations regardless of when incorporated; and the court held that such amendment was valid, even though the original statute may have been unconstitutional. It will be noted that the amendatory act, being complete within itself, might, as the court said in its opinion, have been enacted without referring to the old section, and that such reference was not detrimental to it as an act of legis-

ERROR to the Supreme Court to review a judgment affirming a tax assessment. *Reversed in part.*

The facts are stated in the opinion.

Mr. George R. Dutton, with Mr. William B. Mackay, Jr., for plaintiff in error:

No tax can be imposed upon a division or district less than a political district.

State, McClosky, Prosecutor, v. Chamberlin, 37 N. J. L. 388; *State, Baldwin, Prosecutor, v. Fuller*, 39 N. J. L. 576, 41 N. J. L. 615; *State, Lydecker, Prosecutor, v. Englewood Twp. Drainage & Water Comrs.* 41 N. J. L. 154; *State, Bailey, Prosecutor, v. Brown*, 53 N. J. L. 166, 20 Atl. 772; *Howell v. Millville*, 60 N. J. L. 97, 36 Atl. 691.

The road districts and the lamp districts have none of the characteristics specified in *State, Lydecker, Prosecutor, v. Englewood Twp. Drainage & Water Comrs.* 41 N. J. L.

lation; and that it was not necessary for the legislature to repeal the whole corporation act and re-enact it with the changed provision. This case, then, is clearly distinguishable from *STATE, ALLISON, PROSECUTOR, v. CORKER*, and like cases where the amendment relates to only a dependent portion of the statute, and standing by itself would not make a complete law.

In *State, McLorinan, Prosecutor, v. Ryno*, 49 N. J. L. 603, 10 Atl. 189, the court held, on the authority of the *Yard Case*, that the legislature could cure a defect in an unconstitutional statute by an enactment in the form of an amendment. The amendment involved in this case was also complete within itself, and, if it had been enacted without a reference to the original statute, which it purported in its title to amend, would have been valid, although the court in its decision did not refer to such fact, but contented itself with saying that "there is no impediment in the way of the legislature curing such defect by subsequent enactment in the form of an amendment or supplement," and cited the *Yard Case*.

III. Statutes unconstitutional in entirety.

a. In general.

In *State ex rel. Richards v. Cincinnati*, 52 Ohio St. 419, 27 L. R. A. 737, 40 N. E. 508, it was claimed that the statute involved was rendered unconstitutional in its entirety by the fact that, by the use of the word "present" in one of its sections, its application was limited to municipal corporations belonging to a specified class at the time of its passage, so as to infringe a constitutional provision forbidding the conferring of corporate power by special legislation. It was held that such statute, even though entirely obnoxious to the constitutional provision, was rendered valid by an amendment which re-enacted the offending section, but omitted the word "present;" and the court said that, where one or more sections of a statute are amended by a new act, and the amendatory act contains the entire section or sections amended, such sections must be construed as though introduced in the place of the repealed section or sections; and that the other sections are to be interpreted in connection with, and in view of, the amended section or sections; and, in its application to cases arising after the amendment has been made, the whole statute must have the same operation and effect as if it had been re-enacted in terms.

Dicta to the same effect, and based on similar reasoning, are found in *Sweet v. Syracuse*, 120 60 L. R. A.

157, necessary to make them political divisions.

State, Auryansen, Prosecutor, v. Hackensack Improvement Commission, 45 N. J. L. 115; *State, Taylor, Prosecutrix, v. Smith*, 50 N. J. L. 107, 11 Atl. 321; *State, Peck, Prosecutor, v. Ruritan Twp.* 52 N. J. L. 320, 19 Atl. 610; *State, Carter, Prosecutor, v. Wade*, 59 N. J. L. 122, 35 Atl. 649.

Mr. Peter W. Stagg, for defendants in error:

This act as amended is constitutional.

Smith v. Howell, 60 N. J. L. 384, 38 Atl. 180; *State, Auryansen, Prosecutor, v. Hackensack Improvement Commission*, 45 N. J. L. 113.

Collins, J., delivered the opinion of the court:

In this case the supreme court affirmed, upon certiorari, road and lamp taxes as-

N. Y. 337, 27 N. E. 1081, 20 N. E. 289, where it was claimed that an amendment attempting to remove a constitutional defect was ineffective by reason of the fact that the offending provision was a necessary part of the entire scheme of the act and rendered it void. The court, while holding that the unconstitutional provision did not have that effect, and that the balance of the act was good, and consequently could be amended, said that it was not, however, prepared to say that, even if the whole act was rendered invalid in consequence of the invalidity of the particular section involved, the defect could not be cured by an amendment which would eliminate the unconstitutional portion; that, as to all action taken under such an act subsequently to its amendment, it would have to be construed as if the section as amended had always been a part of it, and that it would then constitute an act of the legislature passed with all the form prescribed by the Constitution, and containing no provision obnoxious to it.

In *Ferry v. Campbell*, 110 Iowa, 290, 50 L. R. A. 92, 81 N. W. 604, a collateral inheritance statute, which was unconstitutional as constituting a deprivation of property without due process of law by reason of its failure to provide for notice to the heirs, legatees, or devisees, of the appraisal of the property, was held to have been validly amended by an amendatory act which provided for such notice. The court, in so holding, said that the original act imposed a tax upon the property of a testator, and declared that it should be a lien upon the estate from the death of the decedent until paid; that the rate per cent was fixed, and the appraisement was necessary simply to fix the value of the property in order that the tax might be computed; that there was no objection to the levy of the tax; that the statute was invalid simply because the legislature did not provide for notice of the proceedings by which the amount of the tax was to be ascertained; that a re-enactment of the whole statute was unnecessary, as the amendatory act simply removed an impediment to the enforcement of the tax, and, when that impediment was removed, the original act was effectual and capable of enforcement.

This case is a close one, and differences of opinion may arise as to how far it goes in holding that all unconstitutional statutes may be validly amended without re-enactment, by a statute which removes the constitutional objection, regardless of whether or not the invalid portion was so interwoven with the purpose and object of the statute as to render it in-

essed in 1897 and 1898 upon lands of the prosecutor in the township of Ridgefield, in the county of Bergen, and set aside a park tax assessed in 1897 upon the same lands. The present writ of error is in review of such affirmance.

The foundation of the road and park taxes is an act entitled "An Act Concerning Public Roads and Parks, and Creating Boards for the Control and Management of the Same," approved March 1, 1893 (P. L. p. 69, 3 Gen. Stat. p. 2951), as amended and supplemented by an act approved March 17, 1896 (P. L. p. 80), and accepted in said township. The act of 1893 provided that the township committee of any township in the state might cause it to be divided into convenient road districts, and in such case should submit the question of the acceptance or rejection of the act to the legal voters of the township, and that after acceptance such committee should call an assembly of the freeholders of each district to elect a suitable person, who should be a legal voter in the township and a freeholder and resident in such district, as a road commissioner of the district for a term of three years. The commissioners elected and their successors were constituted a board of commissioners, to be known as a "public road board," of the

township. At the same meeting, and annually thereafter, the assembled freeholders were authorized to vote to raise money by taxation within the district for the making, maintaining, and repairing of the public highways within the district, and for keeping in repair and improving any public parks in the township. Each commissioner was given the powers, within the limits of his district, of the overseers of highways, and to the board was committed the duties of the township committee over highways and parks. Powers of condemnation and improvement, and assessment of consequent benefits, were also conferred by the act, but those are not involved in this case. The taxes voted in each district were to be assessed and collected by the township assessor and collector. This statute was by the supreme court, in 1894, held unconstitutional in *State ex rel. Allison v. Blake*, 57 N. J. L. 6, 25 L. R. A. 480, 29 Atl. 417, because the election of the commissioners was limited to the freeholders of the districts. The act of 1896 by amendment of certain sections vested the power to elect commissioners and to vote taxes in the legal voters of the respective districts, instead of in the freeholders of the districts, and authorized the township committee, with the consent of the public

valid in its entirety. However, it will be noticed, as the court pointed out, that the objection did not go to the purpose or object of the statute itself, but merely to the lack of a provision which was essential to its enforcement. For this reason it cannot be said that this case goes any further than to hold that a statute having a constitutional object and purpose, and which does not violate any provision of the Constitution except in the proceedings that it provides for its enforcement, is not invalid and void, but is simply rendered inoperative and unenforceable by reason of the absence of the provision for its enforcement, and that such defect may be supplied by an amendatory statute which provides for a valid method of enforcement. It is a valid and constitutional statute creating rights and fixing liabilities, but omits to prescribe a method of enforcing it,—the fact that the proceeding for enforcement prescribed by it was invalid left it as though such provision had never been placed there,—and may be validly amended by adding a provision prescribing proceedings for its enforcement.

There are two Indiana cases (*Igove v. State*, 14 Ind. 239; *Grubbs v. State*, 24 Ind. 295) which have been sometimes cited as upholding the proposition that an unconstitutional statute cannot be amended; but these cases do not go that far. The portion of the statute to which the amendment involved in these cases related had been held unconstitutional on the ground that its subject was not expressed in the title of the act, and the amendment did not attempt to cure this defect. The most that can be said is that they hold that the amendatory act was void, not because it attempted to amend an unconstitutional statute, but because the amendment did not cure or remove the defect; and, consequently, the statute as amended remained subject to the same constitutional objection that adhered to the original act.

**b. Curing defect in title of statute by amend-
ment of title only.**

There are two Pennsylvania cases which hold that a statute which is unconstitutional because 60 L. R. A.

its subject-matter is not expressed in its title cannot be rendered valid by an amendatory act which simply amends its title. *Shear v. Potter County*, 9 Pa. Dist. R. 289; *Teeple v. Wayne County*, 23 Pa. Co. Ct. 361.

In the *Shear Case* the court said: "This is an attempt by the legislature of 1899 to make a void statute of 1897 legal and valid by simply amending its title. We do not think this can be done. It cannot be argued that the act of 1897 was not void. We have a class of cases upholding portions of acts of assembly and declaring other portions of the same acts void. This may be done where, by striking down the illegal part, a good and valid act capable of enforcement will remain." The court then went on to say that the act involved did not belong to this class, but must either stand or fall as a whole, and concluded by saying: "It is an alarming proposition that a legislature can pass an act, void because the subject of it is not expressed in the title, and then, after it has gone among the statutes of the commonwealth, a subsequent legislature impose its burdens upon the public by simply manufacturing for the void act a good title."

In the *Teeple Case* the court, after holding that the original act was unconstitutional, said: "The legislature has attempted to put life into this dead body by ingrafting it with a new head. If the main stock were alive, and only the top were affected, this ingrafting process might give it new life. A transfusion of blood may save a dying patient, but a dead one cannot be resurrected by such process. The original act never was a law. By reason of its constitutional infringement, it was void and dead and could not be revived in this manner." Whether the court based its decision in the *Teeple Case* solely upon the reasoning above quoted is rendered somewhat uncertain by the fact that such language is followed by a quotation from the Pennsylvania Constitution which declares that no law shall be revived, amended, or the provisions thereof extended or conferred by references to its title only.

C. W. P.

road board, to increase or diminish the number or change the boundaries of the districts. The foundation of the lamp tax is an act entitled "An Act Authorizing the Division of Townships into Street Lighting Districts and the Erection and Maintenance of Street Lights Therein and the Election of Street Light Commissioners in Said District," passed May 25, 1894 (P. L. p. 540; 3 Gen. Stat. p. 3669), as amended March 25, 1896 (P. L. p. 132). The act of 1894 authorized the township committee of any township in any county of the second and third class in the state to set off and divide the said township into districts, to be designated by numbers, and to alter the same from time to time, and by resolution to define and declare the limits, boundaries, and numbers of the districts; and it was provided that the same, being so defined and declared, should be deemed and taken as street lighting districts, each of which should be a body corporate under the name of "Street Lighting District No.—," and have power to sue and be sued, make and use a common seal, and all other corporate powers necessary for carrying out the powers conferred by the act. It was further provided that on the first Tuesday of June of each year the legal voters of such district should be authorized to meet for the purpose of electing three commissioners of the district, and to determine by ballot, by the vote of the majority of those present and voting, a sum of money to be raised and expended within the district for the ensuing year for the erection and maintenance of street lights. It was further provided that the sum so appropriated should be certified to the commissioners, who should give notice to the township assessor to assess the same upon the taxable property within the district, and that the taxes so assessed should be collected by the township collector, and paid over to the commissioners of the district, who were empowered to expend the same for the purpose of lighting the streets within the district. The act of 1896 by amendment eliminated the restriction of the original act to townships in particular counties.

We agree that the act of 1893 was unconstitutional for the reason given in the supreme court in the case of *State ex rel. Allison v. Blake*, 57 N. J. L. 6, 25 L. R. A. 480, 29 Atl. 417. In *Smith v. Howell*, 60 N. J. L. 384, 38 Atl. 180, in an opinion in the supreme court upholding the act of 1894 as amended it was rightly conceded that the original act was unconstitutional; but we do not approve the reason given for that concession. Such reason was that the title of the act could not support legislation not extending to all townships. The case of *Beverly v. Wahn*, 57 N. J. L. 143, 30 Atl. 545, was cited as authority; but in that case the object expressed in the title of the statute involved was legislation respecting "the cities of this state,"—a phraseology necessarily extending to all such cities, while the enactment was not so extensive. The opinion delivered in the cause, which seems to have been misleading by reason of a terse

ness otherwise admirable, has been properly explained in *Johnson v. Asbury Park*, 60 N. J. L. 427, 431, 39 Atl. 693, and *Kennedy v. Belmar*, 61 N. J. L. 20, 25, 38 Atl. 756. The real reason of unconstitutionality of the act of 1894 was that the townships of the specified counties had no characteristics to differentiate them from townships of other counties. The act, therefore, was in violation of article 4, § 7, ¶ 11, of the Constitution, prohibiting private, local, or special laws regulating the internal affairs of towns and counties.

It is contended for the plaintiff in error that, notwithstanding the amendments of 1896, the legislation recited is still unconstitutional. A preliminary question raised is of the validity of the two acts of 1896, independently considered. It is argued that, as the original statutes were void, they could not be amended. For the purposes of this case it may be conceded that the unconstitutional provisions referred to were inseparable from the legislative intent, so that in each case the entire statute was unconstitutional. The question raised, therefore, is fairly presented. The argument is that an unconstitutional statute is a nullity. Granting this, it does not follow that it may not be imported into valid legislation by appropriate reference. It is entirely within the legislative power to give effect to documents without their full recital. Statutes validating agreements of lease, merger, or consolidation of railroad corporations are usually cast in that form (e. g., P. L. 1871, pp. 946-1093; P. L. 1872, p. 567). The matter is one purely of identification. Surely nothing can be more definite than a reference to a document that has been regularly promulgated as a public statute. In *Mortland v. State*, 52 N. J. L. 521, 20 Atl. 673, it was held by this court that a statute providing for election of chosen freeholders of a county from assembly districts created under previous legislation was valid, whether such districts could be constitutionally created or not. But I am prepared to go farther, and hold that an unconstitutional statute is nevertheless a statute; that is, a legislative act. Such a statute is commonly spoken of as void. I should prefer to call it unenforceable, because in conflict with a paramount law. If properly to be called void, it is only so with reference to claims based upon it. Neither of the three great departments to which the Constitution has committed government by the people can encroach upon the domain of another. The function of the judicial department with respect to legislation deemed unconstitutional is not exercised *in rem*, but always *in personam*. The supreme court cannot set aside a statute as it can a municipal ordinance. It simply ignores statutes deemed unconstitutional. For many purposes an unconstitutional statute may influence judicial judgment, where, for example, under color of it private or public action has been taken. An unconstitutional statute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with. Nowhere

has power been vested to expunge it or remove it from its proper place among statutes.

The plaintiff in error, in support of his contention, refers us to this injunction of the Constitution: "No law shall be revived or amended by reference to its title only, but the act revived, or the section or sections amended, shall be inserted at length." Art. 4, § 7, ¶ 4. The provision as to revival has no bearing on the present case. The claim is that under the provision as to amendment, where a statute is wholly unconstitutional, an amendment of the section or sections that make it so leaves the other sections unaffected, unless inserted at length in the new statute, and that they should be considered as if never enacted, so that the new legislation is incomplete and ineffectual. This is a strained and unnatural construction of the provision. To me it seems very plain that the two documents are to be read together, and if, when so read, a constitutional enactment appears, the courts must give it effect. Of course, the other provision of the same paragraph of the Constitution, that the object of every law shall be expressed in its title, must be considered; and I concede that a statute defective in that regard cannot be made constitutional, by an amendment of its title, in a statute similarly defective. For example, if "An Act Respecting Wills" should purport to treat of transactions *inter vivos*, it could not *quoad hoc* be given effect by legislation enacted simply under the title, "An Act to Amend an Act Respecting Wills," even though the enactment professed to amend the title of the original statute. But where the title of a statute is comprehensive of the legislation, both original and amendatory, I see no constitutional or other objection to perfecting by amendment that which was originally defective. It is absurd to say that inquirers need pay no attention to a bill introduced as an amendment to a cited act with such a comprehensive title, simply because they conceive that the original act was unconstitutional.

Inferentially the point has already been ruled in this court. In *Union Twp. v. Rader*, 39 N. J. L. 509, an act of the legislature was held unconstitutional because its object was not expressed in its title; but "An Act to Repeal" that statute was held efficacious to compel payment of claims incurred under it. The provisions for that purpose were adjudged to be incidental to an object expressed by a title of repealer alone, and were upheld, though intelligible only by reference back to the statute repealed. The opinion was by Chief Justice Beasley, and was delivered on demurrer to a declaration in a suit on such claims. In *Union Twp. v. Rader*, 41 N. J. L. 617, a judgment in the action, recovered on the merits, was unanimously affirmed. The opinion of this court was read by Chancellor Runyon, who said (p. 621): "The supreme court in *Union Twp. v. Rader*, 39 N. J. L. 509, passed upon all the questions which are presented here, except that which relates to the character

of the debts. I concur in the views of that court in regard to the questions dealt with in the opinion in that case." If an unconstitutional statute is a nullity, no such legislation as that sustained in the case cited could have been constitutionally possible under a mere title of supererogative repeal. On the other hand, if, as adjudged, inquirers should infer, merely from a title of proposed repealer of an unconstitutional statute, that proper equitable relief to those who have relied upon it may be afforded in the repealing statute, *a fortiori* should it be held that they should infer from a title of amendment of such a statute that it is proposed to remove its defects. A view opposite to that now taken would lead to much confusion. Many statutes are of doubtful constitutionality. To require that the removal of such a doubt should, at the peril of those interested, require an entirely new enactment, involving an express or implied repealer of the doubtful legislation, would be most unreasonable. After careful consideration of the subject, I have reached the conclusion that a statute so framed as to be wholly or in part unconstitutional, but having a title expressing a constitutional object, may by amendatory legislation be rendered constitutional without having recourse to an enactment independent throughout its provisions.

I come, therefore, to the question of the validity of the amended legislation. Under our Constitution the power of the legislature over the administration of local government is unlimited, except by the inhibition, above cited, of private local or special laws regulating the internal affairs of towns and counties. Road districts, like school districts, are well-recognized local governmental agencies, and may be either corporate or quasi corporate. Dill. Mun. Corp. 1st ed. § 10. Districts for street lighting purposes, though less common, are equally *intra vires*. Powers of local government may be divided and subdivided at the legislative will, and different agencies may exercise powers, separately committed, within the same territory. So far there can be no dispute. The requirement of generality is met in the legislation before us by its extension to all townships. *Hermann v. Guttenberg*, 63 N. J. L. 616, 44 Atl. 758. The condition of popular acceptance imposed as to road districts is valid. *Re Cleveland*, 52 N. J. L. 188, 7 L. R. A. 431, 19 Atl. 17, 20 Atl. 317. The only arguable objections are two, which are common to both statutory schemes and have been strongly urged upon us:

(1) That the vesting in the township committees of the function of dividing the township into districts for the respective legislative purposes is an unwarrantable delegation of power. It is assumed that authority to define the districts is tantamount to authority to create them. But this is clearly not so. The difference may be illustrated by familiar examples. The general act for the formation of boroughs, approved April 5, 1878 (1 Gen. Stat. p. 179), was declared constitutional by the supreme court in *State v. Clayton*, 53 N. J. L. 277, 21 Atl. 1026.

For nearly twenty years it formed the fundamental law under which scores of municipalities were organized, and is even yet the source of their existence, although now governed by a statute embracing all boroughs (P. L. 1897, p. 285). This act of 1878 on certain conditions gave authority to the owners of one tenth of the taxable real estate within limits fixed by themselves to set in motion proceedings for the erection of a borough embracing that territory by consent of the majority of the legal voters therein. "An Act Providing for the Incorporation of Cities," approved March 22, 1895 (1 Gen. Stat. p. 785), authorized township committees, on petition of fifty resident freeholders suggesting a district for a city, to enlarge or diminish its area and to submit the question of incorporation, as a city, of the district thus designated to the legal voters thereof. In *Stout v. Glen Ridge*, 59 N. J. L. 201, 35 Atl. 913, in this court, the validity of this legislation was taken for granted. The history of municipal creation in this state and elsewhere abounds in like instances of what may be termed delegation of legislative power to define territorial limits. The case is analogous to that presented by general laws providing for private corporations. The designated number of persons, by signing a certificate in compliance with the particular statute invoked, become a body corporate. The power to be a corporation is conferred by the legislature, but is inoperative until recipients are provided. The grant of power to commissioners appointed by mayors to fix the number and lines of city wards for general municipal purposes has been upheld by this court in *State, McLaughlin, Prosecutor, v. Newark*, 58 N. J. L. 202, 34 Atl. 13. There is no reason why a representative township committee should not be selected as an appropriate body to fix the number and lines of districts for legislative purposes more limited. In this state from a very early day the township committees have been authorized to divide the townships into road districts. Pat. Laws, p. 325; 3 Gen. Stat. p. 2817, § 52. In 1846 (P. L. p. 164) the right to divide townships into convenient school districts was vested in a town superintendent of schools, to be elected by the people, and a district composed of parts of two townships, even if in different counties, might be established by the joint action of their superintendents. This law subsisted until 1867 (P. L. p. 360), when the power was transferred to a county superintendent of schools, and thus continued until the school law of 1894 consolidated into one all the school districts of a township, except cities, boroughs, and incorporated towns, each of which was made a distinct district. 3 Gen. Stat. p. 3059, pl. 246; Id. p. 3061, pl. 257. The validity of this legislation, conformable as it was to that of many other states, has never been challenged, and in my judgment is unquestionable. The logical result of this train of reasoning is that the road districts and street lighting districts

now in question were constitutionally established.

The other objection is: (2) That only to the political divisions of the state can the power to raise money by taxation be committed, and that the districts in question are not such. Granted the major premise, I cannot concede the minor one. Depue, J., speaking for this court in *Bernards Twp. v. Allen*, 61 N. J. L. 228, 236, 39 Atl. 716, 49 Atl. 722, said: "The legislature, in the exercise of its sovereign power, may confer upon the minor political subdivisions of the state (which are merely instrumentalities for the better administration of the government in matters of local concern) power to impose and levy local rates, taxes, and assessments to provide the revenue by which municipal expenses are borne and debts and liabilities paid, on the principle that for local purposes the local authorities are the representatives of the people. The powers conferred on boards of chosen freeholders in the counties, and upon other political subdivisions, such as cities, towns, townships, etc., are instances in which this legislative power has been conferred upon minor subdivisions of the state." It is plain that the learned judge never meant to limit the range of subdivision. That matter must be one of legislative discretion, as he himself declared in *State ex rel. White House School Dist. No. 71 v. Readington Twp.* 36 N. J. L. 66. A borough or other municipality may have its sphere of taxation, and yet be subject in other respects to the township, of which, for many purposes, it remains a part. *State, Pancoast, Prosecutrix, v. Troth*, 34 N. J. L. 377, 36 N. J. L. 422. Improvement commissioners may lawfully tax property. *State, Hoey, Prosecutor, v. Ocean Twp.* 30 N. J. L. 75; *State, Auryansen, Prosecutor, v. Hackensack Improvement Commission*, 45 N. J. L. 113. The narrowness of scope of the powers conferred on the governmental agency is not the test. *Ibid.* A single governmental power carries with it *pro tanto* all the essential elements of sovereignty. In *State, Lydecker, Prosecutor, v. Englewood Twp. Drainage & Water Comrs.* 41 N. J. L. 154, 157, Mr. Justice Dixon thus states the "distinctive marks" of political divisions: "That they embrace a certain territory and its inhabitants, organized for the public advantage, and not in the interest of particular individuals or classes; that their chief design is the exercise of governmental functions; and that to the electors residing within each is to some extent committed the power of local government, to be wielded either mediately or immediately within their territory for the peculiar benefit of the people there residing."

Applying the test suggested, which seems a proper one, the legislation in question amply fulfills it. The policy of multiplying governmental agencies and subdividing powers is, with much reason, attacked by the plaintiff in error; but that consideration has not been committed to the judicial department of our government. The courts in such matters can only look at the question of

the legislative power. On the question of such power there is no decision of this court adverse to the views above expressed, and most of the rulings, if not the *dicta*, in the supreme court, are consistent with such views. In *State ex rel. Allison v. Blake*, 57 N. J. L. 6, 25 L. R. A. 480, 29 Atl. 417, Beasley, Ch. J., suggests a doubt of the legal feasibility of committing to freeholders the executive powers of the act; but he does not even remotely intimate any difficulty inhering in the creation of road districts or the vesting in them of the power of taxation. The doubt he does suggest must be resolved in favor of the power to require a property qualification in public officials. 19 Am. & Eng. Enc. Law, p. 408. In *State, McClosky, Prosecutor, v. Chamberlin*, 37 N. J. L. 388, the essential element, in a sustainable political division, of the popular voice of the inhabitants of the territory, was lacking in the drainage districts designated by the statute held invalid, and the tax imposed was an arbitrary one. In *State, Baldwin, Prosecutor, v. Fuller*, 39 N. J. L. 576, Affirmed in 40 N. J. L. 615, in *State, Lydecker, Prosecutor, v. Englewood Twp. Drainage & Water Comrs.* 41 N. J. L. 154, in *State, Morgan, Prosecutor, v. Elizabeth*, 44 N. J. L. 57, and in *Howell v. Millville*, 60 N. J. L. 95, 36 Atl. 691,—there were the same substantial defects in the legislation involved or criticised. In *State, Baldwin, Prosecutor, v. Fuller*, Mr. Justice Van Syckel, in answer to the supposed parallel of a school district, very aptly distinguished that institution. He said: "It is a district incorporated for an object affecting only those residing in it. They have absolute control of the question whether money shall be raised, and the facilities it affords for acquiring an education are limited to those upon whom the burden is cast." All the considerations mentioned apply with full force to the road districts and lamp districts now in controversy. The deliverance of Mr. Justice Lippincott in *State, Carter, Prosecutor, v. Wade*, 59 N. J. L. 119, 35 Atl. 649, was mere *dictum*, for the decision of the cause was rightly rested on the implied repeal of the statute impugned. The only case that presents features at all like those now being considered is *State, Peck, Prosecutor, v. Raritan Twp.* 52 N. J. L. 319, 19 Atl. 610; but a critical examination will show that the statute there condemned is clearly distinguishable from those now *sub judice*. Mr. Justice Garrison, who participated in the decision, evidently found it no barrier to the result reached by the same court, speaking through him, in *Smith v. Howell*, 60 N. J. L. 384, 38 Atl. 180, where the amended street lighting district act now challenged was upheld, and in the judgment at present under review. It is true that the statute held unconstitutional in *State, Peck, Prosecutor, v. Raritan Twp.* did leave to the legal voters of the respective lamp districts authorized the fixing of the sum to be therein raised by taxation; but it was, nevertheless, held that they were not political divisions. Mr. Justice Magie, who spoke for the court, after conceding that dual government

with distinct functions may coexist in the same territory, and that all that is necessary, in order to make an organization included within a township a political division, is that it shall have a public character and be endowed with some powers of local government, goes on to state the reasons that satisfy him that no such organization was designed to be established by the act then before the court. The difference from that now involved is very striking. He says: "The district is not given power to elect officers to act for it. It is not given a corporate name, nor corporate authority, even to contract for the erection and maintaining of the street lamps; and, while the voters therein are authorized to determine the amount to be raised for street lighting, the money voted is raised and expended by the township officers, who represent the township. It is clearly implied, from the terms of the act, that the township committee shall determine what streets shall be lighted, where the street lamps shall be erected, and how long they shall be maintained. In the disposition of the money raised the district has no voice. In respect, therefore, to this function of local government, the lighting of streets, the district is not given a separate and independent existence, nor endowed with any power except as a part of the township. It is not designed to become a political corporation or division of the state such as that considered in *State, Auryansen, Prosecutor, v. Hackensack Improvement Commission*, 45 N. J. L. 113.

The legislation now being considered presents most, if not all, of the features thus noted as absent from that there involved. I am satisfied that it was the legislative design to constitute the road districts and street lighting districts in question political divisions, for the purpose of the exercise therein of the governmental powers conferred and of incidental taxation, and that such design was thereby accomplished. The determination of the supreme court in the present case, therefore, was right; but, doubtless through inadvertence, there is an error in the judgment. The land of the prosecutor was sold for the taxes of 1897, and his writ directly attacked the sale. If the park tax was illegal, as declared by the court, the sale that included it was also illegal. *Hopper v. Malleon*, 16 N. J. Eq. 382; *State, Dixon, Prosecutor, v. Jersey City*, 37 N. J. L. 39, approved in this court in *Pugh v. Sinking Fund Comrs.* 53 N. J. L. 629, 631, 23 Atl. 270. It was admitted by counsel for the defendants in error that the park tax was illegal, and it plainly was so, for the reason that the provisions of the act of 1893 were too meager with respect to parks to be effectual, and the expenditure of money raised for parks was not limited to the road district voting it, but was made general for the township.

So much of the judgment of the Supreme Court as affirms the sale of the lands of the plaintiff in error for the taxes of 1897 should be reversed, and in all other respects such judgment should be affirmed.

IOWA SUPREME COURT.

FOLEY, Admr., etc., of Edmond Lynch,
Appt.,
v.
BROEKSMIT.

(.....Iowa.....)

1. The allowance of \$455 out of an undertaker's bill for \$526 for the burial of an aged janitor, whose companions were laboring men, and whose most intimate friend was a street sweeper, and whose estate was less than \$5,000, is excessive.
2. A witness's estimate of the reasonableness of the expenses of a funeral is binding on neither jury nor court, in an action to recover therefor from decedent's estate.

(February 4, 1903.)

A PPEAL by defendant from a judgment of the District Court for Linn County in favor of plaintiff in a proceeding to establish a claim for funeral expenses against the estate of Edmond Lynch, deceased. *Reversed.*

Statement by **Deemer, J.:**

Proceedings to establish a claim for funeral expenses attending the burial of Edmond Lynch, deceased. The administrator pleaded that the expenses were extravagant and foolish, considering the condition of the decedent's estate and his social standing and station in life. Trial was had to a jury, resulting in a verdict and judgment for plaintiff in the sum of \$455. The administrator appeals.

Messrs. Smith & Smith for appellant.

Messrs. H. M. Troy and Redmond & Stewart for appellee.

Deemer, J., delivered the opinion of the court:

Edmond Lynch was about eighty years of age at the time of his death. He had for a number of years been a janitor in the general offices of the Burlington, Cedar Rapids, & Northern Railroad Company at Cedar Rapids. He had no relatives in that city, and boarded with a Mrs. Weir, who received her pay from the paymaster of the railroad company. His associates were generally laboring men, and his most intimate friend was a street sweeper. He left an estate valued at not exceeding \$5,000. When he died, plaintiff received a call to go to the place where the body was lying, and to take charge of the remains. He embalmed the body, dressed it, furnished the casket, hearse, five carriages, chairs, etc., for the funeral, and presented the following bill to the administrator for payment:

Oct. 31.	To washing and embalming body	\$ 25 00
Oct. 31.	Shaving	5 00
Oct. 31.	Burial robe	20 00
Oct. 31.	Burial slippers	3 50
Nov. 1.	Casket	425 00
Nov. 2.	Use of candelabra	5 00
Nov. 2.	Chairs and candles	2 50
Nov. 2.	Hearse	10 00
Nov. 2.	Wagonette	4 00
Nov. 2.	2 landaus, at \$4.00	8 00
Nov. 2.	2 three-seated carriages, at \$4.00	8 00
Nov. 2.	Personal services rendered	10 00
		<hr/> \$526 00

Payment was refused, and this action followed. The trial court instructed: "(3) You are instructed that the estate of deceased is liable for all reasonable and proper expenses necessary for decent interment of the deceased, and suitable for the station in life of deceased. Now, in this case you will satisfy yourselves from the evidence whether the items of charge are reasonable, and in conformity with the station in life of deceased, or otherwise; and if, from the evidence, you find that any of the charges in the account are not reasonable as necessary expenses attending the decent interment of deceased as funeral expenses, you will disallow the same, and allow plaintiff only what the evidence satisfies you the same are reasonably worth." Defendant contends that the verdict is contrary to these instructions, and entirely without support in the evidence. The law with reference to such matters is well settled, and generally understood. Such charges are not, strictly speaking, debts due from the deceased, but charges which the law out of decency imposes upon his estate. And, so far as these are reasonable in amount, they take legal priority of all such debts; as, likewise, do the administration charges. A decent burial should comport with the social condition of the deceased and the amount of his fortune. Justice to creditors, as well as to one's surviving family, demands, however, that there should be no extravagant outlay to their loss. If due regard to the character and social or public standing of the deceased requires a more costly funeral, public or private liberality should defray the additional cost. "Foolish and extravagant funerals, ordered by those not immediately concerned in the estate, are not to bind the representative and the immediate family of the deceased." Schouler, Exrs. & Admsrs. 2d ed. § 421. Of course, one who furnishes reasonable burial equipment should be allowed the value thereof from the estate of the deceased, although it was not ordered by the administrator, or authorized by him. But whatever is furnished should reasonably comport with the station in life of the de

NOTE.—As to liability of decedent's estate for funeral expenses, see also, in this series, *Fogg v. Holbrook* (Me.) 33 L. R. A. 660.
60 L. R. A.

ceased and the amount of his property. The privilege thus granted should not be construed into a license to plunder the estate. Lynch was a Catholic, and his burial was in accord with the customs and rites of that denomination. This was, of course, perfectly legitimate; but it is not shown, nor will we infer, that such customs call for gold trimmings or silk and satin linings of the casket. Our observation has led us to believe that this Christian denomination requires no more expensive funeral corteges for its members than any other. Surely, one may die in this faith without being troubled by visions of the undertaker plundering his estate. Seriously, the matter of a man's faith has little to do with the expenses of his funeral. It may, of course, call for some additional properties, which the law, out of regard for its policy of religious freedom, will consider as necessities. But the mere religious faith of one deceased adds nothing to the value of what is or should be furnished. We may readily agree that all the items mentioned in the bill were of such a character that they should have been furnished without being bound to accept the prices affixed as reasonable. That is to say, the deceased needed embalming, he needed proper clothing for burial, candelabra, chairs, candles, carriages, and proper services. But his burial robe need not be of satin, nor his casket metallic. The only evidence from plaintiff as to the value of the items furnished was, "They are all reasonable." He admitted on cross-examination that he never heard of a more expensive robe than the one he furnished; that he never put as good a robe as this one on a corpse before or since; that he had sold caskets from \$6 up to \$200 and \$250, and that he had never before or since sold one for \$425; that the casket he furnished was made of oak, broadcloth, and glass, and covered with broadcloth, and that it was trimmed with what is known as silver and gold plated trimmings. It was shown in the evidence introduced by defendant that the customary price for the use of a hearse was

\$5; that plaintiff paid but \$3 apiece for the landaus, \$3 each for the carriages, \$3 for the wagonette, and borrowed the candelabra, for the use of which he paid nothing. It was also shown that the usual price for embalming was \$10, that the usual price of a casket for such cases was from \$40 to \$60, that \$5 would buy a very nice robe, and that there was no charge for personal services when the body was embalmed. It was also shown that \$40 or \$50 is the medium price for a casket. The testimony leaves no doubt in our minds that plaintiff gave Lynch the best he had, without any regard for expense, thinking, perhaps, that, as there were no known relatives, there would be no one to object. He furnished the most expensive materials, and provided such a casket as he had never sold "before or since." Manifestly, this does not comport with a modest estate of less than \$5,000, nor with the station the deceased had in business or society. The mere statement of the case condemns the claims more efficiently than any argument we can make. But it is said that plaintiff testified that the prices were reasonable, and the jury was justified in believing him; and it is also argued that the whole matter was for the jury in any event. Suffice it to say that neither court nor jury is bound by a witness's estimate as to values, and, while the issue presented in this case is ordinarily for the jury, the case may be so plain that it is the duty of the court to interfere. That is the situation here. The idea that a man dying leaving an estate of less than \$5,000 should have a casket costing \$425, and that his estate should be burdened with funeral expenses amounting to \$526, is little short of ridiculous. Courts will not permit such an injustice to be tolerated, no matter what the finding of the jury. The case is reversed, and remanded for a new trial, or, at plaintiff's option, he may have judgment in this court for the sum of \$150. This option is to be exercised within thirty days from the filing of this opinion. Plaintiff will, in any event, pay the costs of this appeal.

Reversed.

KANSAS SUPREME COURT.

John Henry COLLINS, *Plff. in Err.*,
v.

STATE of Kansas.

(.....Kan.....)

***The writ of error coram nobis will not lie to vacate a judgment of conviction and secure a retrial of the accused, because of his inability within statutory limits of time to prepare a record on appeal to this**

***Headnote by DOSTER, CH. J.**

NOTE. As to scope of writ of *coram nobis*, see also, in this series, *State v. Calhoun* (Kan.) 18 L. R. A. 838 and *note*; also *Withrow v. Smithson* (W. Va.) 19 L. R. A. 702. 60 L. R. A.

court showing the errors of which complaint was made. Such writ lies only to correct errors of fact in ignorance or disregard of which the judgment was pronounced, and to relieve from which no other remedy exists.

(January 10, 1903.)

ERROR to the District Court for Shawnee County to review a judgment refusing to vacate a judgment convicting defendant of murder. *Affirmed.*

The facts are stated in the opinion.

Messrs. Hayden & Hayden and Welch & Welch, for plaintiff in error:

Collins was, without fault or negligence on his part, deprived of the right of appeal.

Until the enactment of chap. 275, Sess. Laws 1901, a bill of exceptions, to be available, must have been settled, signed, and filed during the same term of court at which the rulings of the court complained of were made.

Gallagher v. Southwood, 1 Kan. 143; *State v. Montgomery*, 8 Kan. 351; *State v. Bohan*, 19 Kan. 48; *State v. Schoenwald*, 26 Kan. 288; *State v. Burrows*, 33 Kan. 14, 5 Pac. 449; *State v. Smith*, 38 Kan. 194, 16 Pac. 254; *South Haven v. Christian*, 49 Kan. 229, 31 Pac. 154; *Powers v. McCue*, 48 Kan. 477, 29 Pac. 686; *Martin v. Southern Kansas R. Co.* 51 Kan. 162, 32 Pac. 901.

The supreme court of Kansas should pass upon the alleged errors committed by the trial court before anyone has the right to say that he has had a fair trial, and has no right to complain.

State v. Smith, 38 Kan. 194, 16 Pac. 254.

John Collins cannot be charged with negligence in relying on the official court stenographer for a transcript of the proceedings necessary to be shown in the preparation of his bill of exceptions.

Curran v. Wilcox, 10 Neb. 449, 6 N. W. 762; *Richards v. State*, 22 Neb. 145, 34 N. W. 346; *Horbach v. Omaha*, 49 Neb. 851, 69 N. W. 121; *Matheus v. Mulford*, 53 Neb. 252, 73 N. W. 661; *State ex rel. Downing v. Gaslin*, 32 Neb. 291, 49 N. W. 353; *Vincent v. State*, 37 Neb. 672, 56 N. W. 320; *Holland v. Chicago, B. & Q. R. Co.* 52 Neb. 100, 71 N. W. 989; *Cameron v. Calkins*, 43 Mich. 191, 5 N. W. 292; *Gram v. Wasey*, 45 Mich. 223, 7 N. W. 84, 762; *Keady v. Owers* (Colo.) 69 Pac. 509.

The deprivation of the right of appeal is equivalent to a denial of "the equal protection of the laws."

Re Parrott, 6 Sawy. 349, 1 Fed. 481; *People ex rel. Wright v. Detroit Super. Ct. Judge*, 41 Mich. 726.

Although a statute may, upon its face and in terms, be constitutional, yet if, in its application, a person is practically deprived of the "equal protection of the laws," he is entitled to redress.

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Williams v. Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687.

The denial of the right of appeal is a deprivation of liberty without "due process of law."

State v. Whisner, 35 Kan. 271, 10 Pac. 852; *Trammell v. State*, 1 Tex. App. 121; *Ruston v. State*, 15 Tex. App. 336; 2 Story, Const. 5th ed. § 1043; *State v. Wright*, 111 Iowa, 621, 82 N. W. 1013; *State v. Gray* (Iowa) 87 N. W. 416; *State v. Height* (Iowa) 88 N. W. 331.

The facts shown in application for the writ of error *coram nobis* constitute sufficient cause for vacating the judgment.

Curran v. Wilcox, 10 Neb. 449, 6 N. W. 762; *Parker v. Kuhn*, 19 Neb. 394, 27 N. W. 399; *Richards v. State*, 22 Neb. 145, 34 N. W. 346; *Horbach v. Omaha*, 49 Neb. 851, 69 60 L. R. A.

N. W. 121; *Matheus v. Mulford*, 53 Neb. 252, 73 N. W. 661; *State ex rel. Downing v. Gaslin*, 32 Neb. 291, 49 N. W. 353; *Vincent v. State*, 37 Neb. 672, 56 N. W. 320; *Holland v. Chicago, B. & Q. R. Co.* 52 Neb. 100, 71 N. W. 989; *Cameron v. Calkins*, 43 Mich. 191, 5 N. W. 292; *Gram v. Wasey*, 45 Mich. 223, 7 N. W. 84, 762; *People ex rel. Wright v. Detroit Super. Ct. Judge*, 41 Mich. 726, 49 N. W. 925; *Malony v. Adsit*, 175 U. S. 281, 44 L. ed. 163, 20 Sup. Ct. Rep. 115; *Hume v. Bowie*, 148 U. S. 245, 37 L. ed. 438, 13 Sup. Ct. Rep. 582; *Keady v. Owers* (Colo.) 69 Pac. 509; *Isler v. Haddock*, 72 N. C. 119; *Trammell v. State*, 1 Tex. App. 121; *Babb v. State*, 8 Tex. App. 173; *Ruston v. State*, 15 Tex. App. 336; *Johnson v. State*, 16 Tex. App. 372; *Henderson v. State*, 20 Tex. App. 304; *State v. Parks*, 107 N. C. 821, 12 S. E. 572; *Hughes v. Washington*, 65 Ill. 248; *Tyler v. Lathrop*, 5 Vt. 170; *Edwards v. Osgood*, 33 Vt. 224; *Scott v. Darling*, 66 Vt. 510, 29 Atl. 993.

If John Collins suffered a great wrong by being deprived of the benefit of the exceptions taken by him, then the principles of natural justice and equity, as well as the mandate of our supreme law, entitle him to adequate remedy.

Kan. Const. Bill of Rights, § 18; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

If this was an action to which the state was not a party, John Collins might obtain relief by a suit in equity.

Curran v. Wilcox, 10 Neb. 449, 6 N. W. 762; *Holland v. Chicago, B. & Q. R. Co.* 52 Neb. 100, 71 N. W. 989.

Or by a writ of *audita querela*.

Tyler v. Lathrop, 5 Vt. 170; *Edwards v. Osgood*, 33 Vt. 224; *Scott v. Darling*, 66 Vt. 510, 29 Atl. 993.

Or by mandamus to vacate the judgment.

People ex rel. Wright v. Detroit Super. Ct. Judge, 41 Mich. 726, 49 N. W. 925.

The only reason why he cannot pursue either of these remedies in this action is that each is, in effect, an independent suit, and neither proceeding will, therefore, lie against the state in its sovereign capacity.

Asbell v. State, 60 Kan. 51, 55 Pac. 338; *Com. v. Berger*, 8 Phila. 237; *Avery v. United States*, 12 Wall. 304, 20 L. ed. 405.

The ordinary motion for a new trial would not afford the proper remedy, because, whenever matters occurring either prior or subsequent to the rendition of a judgment are alleged as cause for the recalling or vacation thereof, an issue of fact is, or may be, presented, which is triable by jury.

State v. Calhoun, 50 Kan. 523, 18 L. R. A. 838, 32 Pac. 38; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48; *France v. Steele*, 14 Vt. 479; *Avery v. United States*, 12 Wall. 305, 20 L. ed. 405; *Brooks v. Hunt*, 17 Johns. 484.

Writ of error *coram nobis* is the appropriate remedy.

State v. Calhoun, 50 Kan. 523, 18 L. R. A. 838, 32 Pac. 38; *Nealis v. Dicks*, 72 Ind. 374; *Re Malison*, 36 Kan. 729, 14 Pac. 144; *Asbell v. State*, 60 Kan. 51, 55 Pac. 338, 62 Kan. 209, 61 Pac. 690; *Dobbs v. State*, 62 Kan. 108, 61 Pac. 408, 63 Kan. 321, 65 Pac. 658; *Giddings v. Steele*, 28 Tex. 735, 91 Am. Dec. 336; *Pocell v. Gott*, 13 Mo. 458, 53 Am. Dec. 153; *Sanders v. State*, 85 Ind. 318, 44 Am. Rep. 29; *Adler v. State*, 35 Ark. 517, 37 Am. Rep. 48; *Tyler v. Morris*, 20 N. C. (4 Dev. & B. L.) 487, 34 Am. Dec. 395; *Latshaw v. McNees*, 50 Mo. 381; *Holford v. Alexander*, 12 Ala. 280, 46 Am. Dec. 260; *McMillan v. Baker*, 20 Kan. 50.

The writ of error *coram nobis* is allowed for errors of fact, for errors in the process or through default of clerks.

7 Enc. Pl. & Pr. p. 821; *United States v. Plumer*, 3 Cliff. 58, Fed. Cas. No. 16,056; *Latshaw v. McNees*, 50 Mo. 384.

The right of appeal should be considered with greater liberality in a criminal, than in a civil, action.

14 Enc. Pl. & Pr. p. 845; *Bedford v. State*, 5 Humph. 552; *Dains v. State*, 2 Humph. 442; *State v. Jones*, 12 Mo. App. 93; *Andersen v. State*, 43 Conn. 514, 21 Am. Rep. 669; *Falk v. People*, 42 Ill. 331; *United States v. Briggs*, 8 Mackey, 585; *State v. Tomlinson*, 11 Iowa, 401.

The wrong which our client has suffered presents a case which must appeal so strongly to the conscience of the court that a denial of the relief prayed for must seem equivalent to a denial of justice. Under such circumstances it can never be the duty of a court to refuse the suitor's prayer upon the technical ground that none of the existing forms of remedy are exactly applicable to the case presented.

Fisher v. Prince, 3 Burr. 1363; *Hale v. Hardon*, 37 C. C. A. 240, 95 Fed. 747; *Potter's Dwarrr. Stat.* 123; 3 Bl. Com. 123; *Broom, Legal Maxims*, 193; 1 Kent, Com. 464; *Stief v. Hart*, 1 N. Y. 30; *Mara v. Quin*, 6 T. R. 1; *Ashby v. White*, 2 Ld. Raym. 938; *Boody v. Watson*, 64 N. H. 162, 9 Atl. 794; *Hayward v. Bath*, 35 N. H. 514; *Walker v. Walker*, 63 N. H. 321, 56 Am. Rep. 514; *Owen v. Weston*, 63 N. H. 599, 56 Am. Rep. 547, 4 Atl. 801; *Peaslee v. Dudley*, 63 N. H. 220.

Mr. Galen Nichols, for defendant in error:

The common law did not provide for appeal or new trial in case of felony.

Reg. v. Bertrand, 10 Cox C. C. 618; *Harris, Crim. Law*, 406; *Sanders v. State*, 85 Ind. 324, 44 Am. Rep. 29.

Therefore, if the accused desires to accept the possible benefits of statutory law in excess of his rights under the common law, he must put himself clearly within the provisions of the statute.

The office of a writ of *coram nobis* is to bring the attention of the court to, and obtain relief from, errors of fact, or a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made either through duress or fraud or excusable mistake; these 60 L. R. A.

facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned.

5 Enc. Pl. & Pr. p. 27; *Bronson v. Schulten*, 104 U. S. 416, 26 L. ed. 799; 1 Black, Judgm. § 300; *Roughton v. Brown*, 53 N. C. (8 Jones L.) 394; *Adler v. State*, 35 Ark. 529, 37 Am. Rep. 48; *Pickett v. Legerwood*, 7 Pet. 144, 8 L. ed. 638; *Sanders v. State*, 85 Ind. 326, 44 Am. Rep. 29; *Crawford v. Williams*, 1 Swan, 341; *Bigham v. Brewer*, 4 Sneed, 433; 2 Tidd, Pr. 1137; *Sheepshanks v. Lucas*, 1 Burr. 410; *Tyler v. Morris*, 20 N. C. (4 Dev. & B. L.) 489, 34 Am. Dec. 395; *Birch v. Triste*, 8 East, 415; *Dunni-vant v. Miller*, 1 Baxt. 227; *Asbell v. State*, 62 Kan. 209, 61 Pac. 690; *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658.

Mr. A. A. Godard, Attorney General, also for defendant in error.

Doster, Ch. J., delivered the opinion of the court:

This was a proceeding in error *coram nobis*, begun in the district court to vacate a judgment of conviction of John H. Collins of the crime of murder, and to secure for him a retrial. The court below denied the writ, and from its order of denial this proceeding in error has been instituted. The sole ground upon which a claim of right to the writ is based is that Collins was prevented from appealing his case to this court because of his inability to make up a record embodying his exceptions to the rulings of the court trying him, and showing the errors committed against him, within the time allowed by law for perfecting and filing such record. That, however grievous the hardship, does not constitute a reason for the issuance of the writ of error *coram nobis*. That writ lies only to correct the record of the trial itself in matters of fact existing at the time of the pronouncement of the judgment, but in respect of which the court was unadvised, but of which, had it been advised, the judgment would not have been pronounced. The unvarying test of the writ *coram nobis* is mistake or lack of knowledge of facts inhering in the judgment itself. It has never been granted to relieve from consequences arising subsequently to the judgment. In *State v. Calhoun*, 50 Kan. 523, 18 L. R. A. 838, 32 Pac. 38, it was allowed in order to relieve from the consequences of a plea of guilty made through duress of fears induced by threats of mob violence. In *Asbell v. State*, 62 Kan. 209, 61 Pac. 690, it was denied for the reason that the facts on which the application was predicated were known during the progress of the trial, or were available on motion for new trial, or, if not known in time for use on motion for new trial, would be merely cumulative upon facts which were known at that time. In that case it was held that "the office of the writ of error *coram nobis* is to bring to the attention of the court, for correction, an error of fact,—one not appearing on the face of the record, unknown to the court or the party affected, and which, if known in sea-

son, would have prevented the rendition of the judgment challenged." In *Dobbs v. State*, 63 Kan. 321, 65 Pac. 658, the writ was denied as a means of relief from prejudicial matters occurring before and on the trial, such as inability to learn and present facts entitling the party to a change of venue, ignorance, or unfaithful conduct of his attorney, etc. The court, among other things, held that "the application for a writ of error *coram nobis* must show that, if the facts upon which the error is predicated had been presented to the trial court, the judgment complained of could not have been entered." All the decisions are to the effect

that the writ lies only to correct errors of fact, in ignorance or disregard of which the judgment was pronounced, to relieve from which no other remedy exists. None of the courts have used it to relieve from the misfortune of being unable to prosecute an appeal for the correction of errors of law. We cannot allow it to be used for such purpose. We cannot invent forms of procedure to relieve unfortunate suitors.

The judgment of the court below will be affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

W. B. DUDLEY, *Appt.*,
v.
City of FLEMINGSBURG.

(.....Ky.....)

A municipal corporation is not liable for injuries caused by failure to prevent coasting in its streets, since the duty of preventing such conduct rests on the officers as servants of the state.

(March 3, 1903.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Fleming County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. G. A. Cassidy, J. D. Pumphrey, and J. F. Maher for appellant.

Messrs. W. G. Dearing and O. R. Bright for appellee.

Nunn, J., delivered the opinion of the court:

The appellant sued the city of Flemingsburg, alleging that in the month of February, 1902, a heavy sleet had fallen, and the streets of the city were covered with ice and snow, which remained on the streets for several days, during which time the mayor and the other officials of the city suffered, permitted, and encouraged men and boys to congregate on and coast down Main street, a distance of 400 or 500 yards, on sleds and slides, at the rate of about 75 miles per hour, to the great danger of persons using this street and other streets crossing it; "that this coasting was kept up almost throughout the entire day of the 7th of Feb-

ruary, 1902, the day on which appellant was injured, and many complained to the authorities, the mayor, police judge, councilmen, and marshal, and they neglected and refused to prevent or stop the illegal usage and practice of coasting on the street, although the street was appropriated almost entirely to the use of boys and reckless men, white and black, who were boisterous and riotous in their behavior and manner, and the same was continued for several days, with the knowledge of the officials of the defendant, without protest from them, or any effort to prevent it, and that the officials could have prevented the illegal and dangerous use of the streets if they had made any effort to do so; that on the evening of the 7th day of February, 1902, about the hour of seven o'clock, appellant started to the business portion of the city, and in his effort to cross Main street, and when exercising ordinary care for his own safety, he was run against by one of the coasters with a sled, and was knocked down, and his head injured, his collar bone broken, and he was otherwise bruised and severely injured, and was put to great expense in the way of medical and doctor bills to effect a cure; and that he was permanently injured, to his damage in the sum of \$2,000." The court below sustained a demurrer to that petition, and appellant is here on appeal.

There are two general principles underlying the administration of government of municipal corporations: The one is that a municipal corporation, in the preservation of peace, maintenance of good order, and the enforcement of the laws for the safety of the public, possesses governmental functions, and represents the state. The other is where the municipal corporation exercises those powers and privileges conferred for private,

NOTE.—As to liability of municipality for failing to prevent riding of bicycle on sidewalk, see *Jones v. Williamsburg* (Va.) 47 L. R. A. 294.

As to failure to enforce limiting speed of bicycle, see *Hagerstown v. Klotz* (Md.) 54 L. R. A. 940.

As to distinction between private and public functions of municipality in respect to liability 60 L. R. A.

for negligence, see *note* to *Barron v. Detroit* (Mich.) 19 L. R. A. 452; also *Gibson v. Huntington* (W. Va.) 22 L. R. A. 581; *Corning v. Saginaw* (Mich.) 40 L. R. A. 528; *Nicholson v. Detroit* (Mich.) 58 L. R. A. 601; *Peterson v. Wilmington* (N. C.) 58 L. R. A. 959; *Colwell v. Waterbury* (Conn.) 57 L. R. A. 218; *Hall v. Concord* (N. H.) 58 L. R. A. 455; and *McFadden v. Jewell* (Iowa) *ante*, 401.

local, or merely corporate purposes, peculiarly for the benefit of the corporation. Under the former the city is not liable for the malfeasance, misfeasance, or nonfeasance of its officers. Under the latter, it is. Malfeasance is the unjust performance of some act which the party had no right, or which he had contracted not, to do. Misfeasance is the wrongful and injurious exercise of lawful authority, or the doing of a lawful act in an unlawful manner. Nonfeasance is the nonperformance of some act which ought to be performed. Appellant's petition is, in substance and effect, to recover damages from appellee for personal injuries by reason of the misfeasance or nonfeasance of its officials in authorizing and consenting to the coasting on its streets by disorderly persons and riotous assemblies, and failing to prohibit and prevent the same. In the case of *Schultz v. Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779, 5 N. W. 342, the court said: "The coasting or sliding down Poplar street, in the manner and to the extent charged in the complaint, was, while being indulged in, a grievous public nuisance, which the city authorities ought to have prevented or suppressed. But this duty is a public or police, rather than a corporate, duty, in the performance of which the corporation, as such, has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community." And the court in that case relieved the city from liability. In the case of *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 9 (a case in which the facts are the same as those in the case at bar), the court said: "It is obvious that in the case before us the injury did not result from any defect in the highway. It was produced by the act of those improperly and unlawfully using the highway, which was at the time, and but for the unlawful acts of those improperly using the street, in a reasonably safe and convenient condition for public travel. The complaint is not that the appellant's son was injured because of defects in the street rendering it unsafe and unfit for public use, but because persons, while engaged in improperly using the street, ran their coasting sleds against his son, thereby injuring him. If the appellee is liable for the injury thus produced, it would follow, logically, that it would be liable for an injury caused by loafers lounging upon its streets, occurring in the presence of its officers, if it were known that such persons were accustomed to lounge and loaf upon its streets. To hold incorporated cities liable for such injuries would be unjust, and, we think, without the sanction of law." In the case of *Norristown v. Fitzpatrick*, 94 Pa. 121, 39 Am. Rep. 771, the court said: "The appellee could only arrest and stop the sport of coasting upon its streets through its officers and police force, but, as held in the same case, the appellee would not be responsible for the neglect or failure of its officers to stop those engaged in thus using its

streets." [*Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 9.]

The appellant, in his petition, claims that the use and the manner of use of this street by the coasters amounted to an obstruction of the street for which the city was liable. In the case of *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 9 "it is held . . . that anything in the condition of a highway which renders it unsafe or inconvenient for travel is a defect or want of repair. It may be a hole in the highway, or it may consist of a stone or log or other obstacle left on its surface, or a post standing within its limits, or a barrier stretched across it, though not touching it, or it may be trees or walls standing by or upon it, and liable to fall and injure travelers, or it may be an awning projecting over it." For injuries from such obstructions the city would be liable. Continuing, the court in that case said: "But we are not aware of any precedent for holding an illegal use of the highway by men, animals, vehicles, engines, or any other object, while movable and actually being moved by human will and direction, and neither fixed to, nor resting on, nor remaining in one position within the traveled part of, the highway, to be a defect or want of repair for which the city or town is liable." It is obvious that in the case before us the injury did not result from any defect or obstruction in the highway. It was produced by the acts of those improperly and unlawfully using the highway, and for which the city or corporation is not liable. To the same effect is the case of *Prather v. Lexington*, 13 B. Mon. 563, 56 Am. Dec. 585, in which a mob destroyed property of Prather in the city of Lexington. The court, after discussing defects in the petition, used this language: "But we place the decision of the question arising upon the demurrer to the plaintiff's declaration upon broader grounds. The officers of a city are quasi civil officers of the government, although appointed by the corporation. They are personally liable for their malfeasance or nonfeasance in office, but for neither is the corporation responsible." To the same effect is the case of *Ward v. Louisville*, 16 B. Mon. 191. In the case of *Jolly v. Hawesville*, 89 Ky. 281, 12 S. W. 313, the facts were that numerous persons congregated on the streets of Hawesville, in the presence of and with the consent of the city officials, with guns and pistols, and engaged in sham battle, pursuing and shooting at each other in such close proximity as to endanger the lives of those who were not, as well as those who were, engaged; and this continued from early in the morning until late in the evening, without any effort on the part of the marshal, though aware of it, to stop it; and plaintiff's son, who was not engaged in this unlawful amusement, was shot in the eye with a wad and killed, and the plaintiff sued the city for damages. The court, applying the principles of law above named, dismissed her petition; and the court in that case, after referring to *Pollock v. Louisville*, 13 Bush, 221, 26 Am. Rep. 260, and *Greenwood*

v. *Louisville*, 13 Bush, 226, 26 Am. Rep. 263, and the two cases, *Prather v. Lexington*, 13 B. Mon. 563, 56 Am. Dec. 585; *Ward v. Louisville*, 16 B. Mon. 191, as sustaining the court's position, used this language: "Such has been the uniform ruling of this court, and a different one would be not only perverse of the main design of creating municipal corporations, intended principally as auxiliary of the state government, but open the door for actions against cities on account of every personal injury in any degree attributable to misfeasance or nonfeasance of police officers, and thus impose burdens on taxpayers in no just sense at fault or liable. This long and well settled doctrine has not been modified by statute of this state, except to the extent that Gen. Stat. [now Ky. Stat. § 8], § 5, chap. 1, makes a city liable for damages done to property

therein by riotous and tumultuous assemblages of people. But the care and particularity with which the conditions of such liability are set out in the statute, and the restriction of it in express terms to cases of injury to property, shows the legislature did not intend thereby to authorize a recovery against a city for personal injury resulting from the malfeasance or negligence of police officers." To the same effect is the case of *Madisonville v. Bishop*, 23 Ky. L. Rep. 2363, 57 L. R. A. 130, 67 S. W. 269. These cases all rest on the ground that the municipal corporation represents the commonwealth, and municipal officers, while engaged in those duties which relate to the public safety and the preservation of public order, are the servants of the state.

Perceiving no error, the judgment is affirmed.

MARYLAND COURT OF APPEALS.

OLD TOWN BANK of Baltimore,
Appt.,
v.

J. Lawrence McCORMICK et al.

(96 Md. 341.)

Since the national bankruptcy law contains no provision for involuntary proceedings against persons engaged chiefly in the tillage of the soil, it does not supersede the provision of the state law authorizing such proceedings.

(January 21, 1903.)

APPREAL by plaintiff from an order of the Circuit Court for Harford County overruling demurrers to the pleas in proceedings under the state insolvency law. *Reversed.*

The facts are stated in the opinion.

Messrs. N. R. Gill & Sons, Dallam & Rouse, and Venable, Baetjer, & Howard, for appellant:

The enactment of the national bankrupt law suspends the operation of the state insolvent laws only so far as the state law conflicts with the national law; as to cases not provided for by the national law, the state law remains operative.

Sturges v. Crowninshield, 4 Wheat. 104, 4 L. ed. 529; *Tua v. Carriere*, 117 U. S. 201, 210, 29 L. ed. 855, 858, 6 Sup. Ct. Rep. 565; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606.

The uniformity required is only a geographical one. It is only necessary that the same national law apply to all states.

Leidigh Carriage Co. v. Stengel, 37 C. C. A. 210, 95 Fed. 637.

NOTE.—As to relation of bankrupt law to assignments and insolvency proceedings under state laws, see also State *ex rel. Strohl v. King* County Super. Ct. (Wash.) 45 L. R. A. 177, and *note*.
60 L. R. A.

So far as Congress has failed to legislate with reference to insolvents, state laws relating to them are operative.

Bradenburg, Bankr. 2d ed. p. 10; *Black*, Bankr. pp. 271, 272; *Parmenter Mfg. Co. v. Hamilton*, 1 Am. Bankr. Rep. 42, note, 172 Mass. 178, 51 N. E. 529; *Baldwin v. Hale*, 1 Wall. 223, 229, 17 L. ed. 531, 534; *Tua v. Carriere*, 117 U. S. 201-210, 29 L. ed. 855, 858, 6 Sup. Ct. Rep. 565; *Ex parte James*, 2 Story, 322, Fed. Cas. No. 4,237; *R. H. Herron Co. v. San Francisco City & County Super. Ct.* 136 Cal. 279, 68 Pac. 814; *Shepardson's Appeal*, 36 Conn. 23; *Geary's Appeal*, 43 Conn. 289, 21 Am. Rep. 653; *Simpson v. City Sav. Bank*, 56 N. H. 466, 22 Am. Rep. 491; *Steelman v. Mattia*, 36 N. J. L. 344; *Van Nostrand v. Carr*, 30 Md. 132; *Judd v. Ives*, 4 Met. 402; *Derby v. Worcester County*, 42 C. C. A. 637, 102 Fed. 808; *Re Smith*, 92 Fed. 135; *Bump*, Bankr. 1st ed. pp. 7, 8, notes.

The involuntary feature of a bankrupt law is its most important feature.

Sturges v. Crowninshield, 4 Wheat. 193-195, 4 L. ed. 548; *Collier*, Bankr. § 12, pp. 116, 117, note; 2 Kent, Com. 304; *Sackett v. Andross*, 5 Hill, 327.

Messrs. S. A. Williams and F. R. Williams, for appellees:

Congress, by the act of 1898, intended to legislate for "a person engaged chiefly in farming or the tillage of the soil," by including him within the scope of its voluntary provisions, and by expressly excluding him from its involuntary features.

Congress, by its exceptions, intends a national bankrupt scheme, which shall include farmers, but shall not subject them to the severity of its involuntary features.

Parmenter Mfg. Co. v. Hamilton, 172 Mass. 178, 51 N. E. 529.

Section 71, subs. b, act 1898, though not essential to complete the uniformity of the bankrupt system, clearly shows an intention

to supersede existing systems, and to test by the requirement of this act all matters relating to bankruptcies.

Shryock v. Bashore, 13 Nat. Bankr. Reg. 486, Fed. Cas. No. 12,820; *VanNostrand v. Carr*, 30 Md. 129; *Lavender v. Gosnell*, 43 Md. 159.

Fowler, J., delivered the opinion of the court:

This is an appeal from the circuit court for Harford county. On the 22d May, 1901, the Old Town Bank of Baltimore filed a petition in insolvency against J. Lawrence McCormick and others under the provisions of article 47, §§ 22, 23, of our Code, relating to insolvents, as amended by the Acts of 1896, chap. 446. The defendants each pleaded to the jurisdiction of the court. Their pleas are identical. The plea is as follows: "(1) That this court has no jurisdiction in these proceedings, because the insolvency laws of the state of Maryland have been suspended, superseded, or rendered inoperative by the passage of a national bankrupt law by the Congress of the United States, and this defendant pleads the said bankrupt law in bar of the jurisdiction of this court in the premises." The plaintiff bank demurred to these pleas, but the learned judge below overruled the demurrers, and his certificate states the question raised and decided on the demurrers as follows: "That the enactment of the act of Congress approved July 1, 1898 [30 Stat. at L. 544; U. S. Comp. Stat. 1901, p. 3418], entitled 'An Act to Establish a Uniform System of Bankruptcy throughout the United States,' and supplements and additions thereto, suspended the operation of article 47 of the Code of Public General Laws of Maryland of 1888, entitled 'Insolvents,' and all amendments thereof, and especially suspended the operation of § 22, as repealed and amended by the act of 1896, chap. 446, and § 23 thereof, including the operation of said article on persons 'engaged chiefly in farming and tillage of the soil,' and the class of persons to which the defendant J. Lawrence McCormick is alleged in the petition to belong, and that this court is without jurisdiction to grant any of the relief prayed for in said petition." From the order dismissing its petition, the plaintiff has appealed. The issue thus presented is clear, and well defined. The defendants contend that the enactment of the national bankrupt act suspended the operation of the whole insolvent law of this state, while the plaintiff maintains the position that the passage of this national law by Congress suspends the operation of our insolvent law only so far as our law conflicts with the national law, and that, inasmuch as the present bankrupt law (act of Congress of 1898 [30 Stat. at L. 544; U. S. Comp. Stat. 1901, p. 3418]) contains no provision for involuntary bankruptcy of persons engaged chiefly in the tillage of the soil, the provisions of our state insolvent law, so far as they apply to that excepted class, remain in full force and effect. The 60 L. R. A.

question presented must depend, in the first place, upon the provisions of the bankrupt law applicable here. Section 4, "Who may become bankrupts" (subsection "a"), provides that "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." And by subsection "b" it is enacted that "any natural person, except a wage earner or a person engaged chiefly in farming or the tillage of the soil . . . may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. . . ."

1. From the year 1819, when Chief Justice Marshall delivered the opinion of the Supreme Court of the United States in the leading case of *Sturges v. Crowninshield*, reported in 4 Wheat. 122, 4 L. ed. 529, it has been held that the provision of the Constitution of the United States (art. 1, § 8, subd. 4) providing that "Congress shall have power to establish uniform laws on the subject of bankruptcy," does not in itself inhibit the states from passing valid insolvent laws. In the case just cited it was said: "It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the states." And so, also, there has been a uniform line of decisions to the effect that, so far as Congress has failed to legislate with reference to insolvents, state laws relating to them are operative. Thus, in *Sturges v. Crowninshield*, 4 Wheat. 196, 4 L. ed. 548, it is said that if it is not the mere existence of the power, but its actual exercise by the Congress of the United States, which prevents the operation of state insolvent laws, it is obvious that much inconvenience would result from that construction of the Constitution which should deny to the legislatures of the states the power of acting on this subject in consequence of the grant to Congress. "It may be thought more convenient," continued the court, "that much of it should be regulated by state legislation, and Congress may purposely omit to provide for many cases to which its power extends. It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the land may not reach." But in *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606, the rule is explicitly laid down that the power of Congress to establish uniform laws on the subject of bankruptcy does not exclude the rights of the states to legislate on the same subject, except when the power has been actually exercised, and the state laws conflict with those of Congress. And to the same effect are *Baldwin v. Hale*, 1 Wall. 229, 17 L. ed. 531; *Tua v. Carriere*, 117 U. S. 210, 29 L. ed. 855, 6 Sup. Ct. Rep. 565; *Ex parte Eames*, 2 Story, 322, Fed. Cas. No. 4,237. In the recent case of *R. H. Herron Co. v. San Francisco City & County Super. Ct.*, decided in April of last year by the supreme court of California, and reported in 136 Cal. 279, 68 Pac. 814,

it was held that, "though the Federal bankruptcy acts suspend the operation of any state laws of insolvency where there is any conflict between the two, the state laws remain in full force in so far as there is no conflict; and, as the bankruptcy act of 1898 expressly exempts all corporations from voluntary bankruptcy, and only makes subject to involuntary bankruptcy 'corporations engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits,' the provisions of the state law applicable to a corporation engaged principally in mining [as was the California corporation] are not suspended." In the course of its opinion the court said: "If the bankruptcy act excepts a class of cases from its operation, either in express terms or by necessary implication, it must be considered that it was the intention of Congress not to interfere in that class of cases with the laws of the several states in reference thereto." A number of cases are cited by Justice Harrison, who delivered the opinion of the court, and among them is that of *Clarke v. Ray*, 1 Harr. & J. 318, Chief Justice Chase delivering the opinion of the court. He said: "The legislatures of the several states have competent authority to pass laws for the relief of all persons who are not comprehended within the act of Congress." See also *Van Nostrand v. Carr*, 30 Md. 131. It should be remarked, however, that the situation in the California case just cited somewhat differs from the one here presented. For there the insolvent proceeded against under the California insolvent law was expressly excepted from the provisions relating to the voluntary system, and was not included within, and therefore excepted by implication from, the class of corporations made subject to the involuntary system, while here the defendant who is sought to be declared an insolvent under our insolvent law is included under the general terms of the voluntary system, and expressly excepted from the involuntary system. See also *Shepardson's Appeal*, 36 Conn. 23; *Geery's Appeal*, 43 Conn. 289, 21 Am. Rep. 653; *Steelman v. Mattiz*, 36 N. J. L. 344; 16 Am. & Eng. Enc. Law, 2d ed. p. 642.

2. This brings us to the real question in the case, namely, Is there any conflict between our insolvent law and the Federal bankruptcy law? We have already transcribed the provisions of § 4, by which it appears that the defendant is expressly excepted from the provision of the act relating to involuntary bankruptcy, and therefore as to this class to which the defendant belongs (i. e., farmers or tillers of the soil) the Federal power has not been exercised. And it therefore follows that, if this class is not within the state law, there is no existing provision under which those embraced within it can be compelled to distribute their assets fairly and equally among their creditors. In *Geery's Appeal*, 43 Conn. 289, 21 Am. Rep. 653, it was said: The benefit of this principle [the equal distribution of a debtor's property without preference] cannot be denied to a creditor without doing

him injustice. It is a remedy which he relied on in giving credit, and to which he is fairly entitled. If that remedy is not to be found in the bankrupt act, it will not be presumed that Congress intended to take away the remedy provided by the state. Congress having limited and restricted the operation of the bankrupt act, leaving a number of cases to which it does not apply, it will not be presumed that it was thereby intended to leave creditors in such cases entirely without remedy, as must be the case if the state law is entirely inoperative. But can it be properly or correctly said that any conflict can exist between the state and the Federal law so long as the latter by express terms excludes from its operation the subject or class of persons expressly provided for by the state law? The power to enact insolvent or bankrupt laws is vested in the states, and it cannot be extinguished except by the establishment of a Federal system in conflict with the state law. And this Federal system of bankruptcy must be a genuine bankrupt law (*Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529), or, in other words, as expressed in *Ogden v. Saunders*, 12 Wheat. 213, 6 L. ed. 606, the power to pass a uniform system of bankruptcy must be actually exercised, and the state law must be in conflict with it in order to render the latter inoperative. The question, therefore, logically arises, Does the present Federal bankrupt law actually provide for involuntary proceedings against farmers? And the answer must be that it does not, but the answer of the defendant goes further and necessarily must do so in order to save his case. He says it is true that while this class is not included in, and is expressly excepted from, the involuntary feature of the system, yet it is included in the voluntary feature, and therefore it is within the scope of the national system. We cannot approve of this method of reasoning, not only because it would seem to be a "contradiction in terms to say that cases excepted from the operation of the most important part of the act are included in its scope," but because it would seem to involve the proposition that the Federal power can render inoperative the state insolvent laws applicable to involuntary insolvency, without establishing a genuine bankrupt law to take the place of the state law. As we have already seen, it has been held from an early day that it is only to the extent that Congress has actually legislated upon the subject that the statutes of the several states are suspended by its legislation. How, then, can it be said that a failure to legislate—in other words, an express exclusion—raises a conflict? But without pursuing this question further, it seems to us that the position taken by the defendant must necessarily lead to the conclusion that if the Congress of the United States can, by including this class in the voluntary part of the system, and excepting it from the involuntary part, withdraw it from the operation of our state insolvent law, it can do the same in regard to any two or more classes (as, for instance,

merchants, traders, and corporations); and the result would be that, in spite of the failure on the part of Congress to establish a bankrupt law (that is, to actually exercise the power conferred by the Constitution to pass a genuine bankrupt law), state legislation would become inoperative, and creditors would be deprived of a remedy to which, as was said in *Gerry's Appeal*, 43 Conn. 289, 21 Am. Rep. 653, they are fairly entitled.

But it was forcibly argued on the part of the defendants that § 70, subsec. "b," of the bankrupt act of 1898 [30 Stat. at L. 565, 566, U. S. Comp. Stat. 1901, p. 3452], shows that it was the intention of Congress to substitute that act for every provision of every insolvent law of the several states. It provides as follows: "Proceedings commenced under state insolvent laws before the passage of this act shall not be affected by it." To sustain their view, the case of *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178, 51 N. E. 529, decided in 1898, was relied on. But all this case decides is that the Federal act deprives the state court of jurisdiction to entertain jurisdiction in insolvency proceedings filed after 1st July, 1898, when the Federal act went into force. Or as the court said: "The act is to go into full force and effect upon its passage. That is to say, the rights of all persons, in the particulars to which the act refers, are to be determined by the act from the time of its passage." After mentioning a number of the rights which are determined by the act, the opinion continues: "These various provisions affecting the rights and conduct of debtors and creditors are different from those previously existing in most of the states, and perhaps different from those found in the laws of any state, and they supersede all conflicting provisions." In the concluding part of the opinion the distinguished judge who has recently been appointed chief justice of the supreme judicial court of Massachusetts said that the language of § 70, subsec. "b," "was chosen to make clear the purpose of Congress that the new system of bankruptcy should supersede all state laws in regard to insolvency from the date of the passage of the act;" but necessarily this language means only that all conflicting provisions of the state law were thus superseded, for this is the well-settled proposition which he had just announced in a preceding sentence, and which we have quoted above. If, therefore, we are correct in the conclusion already reached, that there is no conflict between the provisions of our insolvent law and the present bankrupt law, it follows that the language of § 70 relied on by the defendant can have no influence upon our conclusion in this case.

But again, it was urged that there is a distinction between this case and cases which arose under laws which did not include the class within its scope,—as, for instance, where the bankrupt act applied only to debtors whose debts exceeded \$300. It was held in *Shepardson's Appeal*, 36 Conn. 23, that in cases where the debts were less than \$300 the state law was not suspended, and debt-

ors of that class could be proceeded against under state laws. But the true rule was laid down by Chief Justice Marshall in *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529, that the power of the state continues to exist over such cases as the Federal law does not reach. And therefore, if cases involving involuntary proceedings against a class are not provided for by the Federal law, such cases are within the reach of the state law, in spite of the fact that the members of this same class may avail themselves of the voluntary feature; otherwise the rule laid down by Chief Justice Marshall would have to be changed so as to read that the power of the state exists only over such cases as are against natural persons or corporations not within any class provided for by any provision of the Federal law. If this were the rule, then, of course, it would follow, as contended, that the defendant being of the class called "farmers," and the bankrupt act having provided that he may avail himself of the voluntary feature, no case against him could be reached by the state law. But in our opinion, this is not the proper view, for, as we have already said, it is not within the power of Congress to render inoperative the involuntary feature of state insolvent laws as to any particular class by excepting that class from the involuntary part of the national law. Otherwise the result would be that the state laws as to involuntary insolvency would become inoperative by the mere existence of the power of the United States to establish a system of involuntary bankruptcy. We have seen, however, that it is not the mere existence, but the exercise of the power to establish a genuine bankrupt law in conflict with the state laws, which renders the latter inoperative. *Sturges v. Crowninshield*, 4 Wheat. 122, 4 L. ed. 529.

In conclusion, it may be proper to say that if it is the policy of our state to render farmers and tillers of the soil like other persons subject to the involuntary system of our insolvent laws, as it is declared to be by the provisions of our Code (article 47, §§ 22, 23), we should not by any strained construction of an act of Congress, or by a course of ingenious reasoning, attempt to thwart this purpose.

From what we have said, it will be seen that we are of opinion that the order appealed from should be reversed.

Order reversed and new trial awarded.

Katie M. THOMPSON, Appt.,
v.

Augustus D. CLEMENS, Jr.

(96 Md. 196.)

1. Mere failure of a landlord to comply with his agreement to make repairs on the leased premises will not render him

NOTE.—As to liability of landlord for injury to tenant or his family from defects in premises, see also, in this series, *Hines v. Willcox* (Tenn.)

liable for personal injuries suffered by a member of the tenant's family because of want of repair.

2. Failure of a landlord who has agreed to make repairs, to send a carpenter to repair a porch, for a week after receiving notice that some boards in it were bulging, is not such negligence as to charge him with liability for injury to a member of the tenant's family by the giving away of boards in another place, which were not known to be defective, merely because the latter defect might have been discovered while the repairs were in progress, where the known defect was not of such a nature as to call for such speedy action.

(January 15, 1903.)

APPEAL, by plaintiff from a judgment of the Court of Common Pleas in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Gans & Haman, W. Calvin Chesnut, and Stuart S. Janney**, for appellant:

To justify the court in taking the case from the jury, it must present some feature of recklessness, leaving no room for difference of opinion as to its imprudence in the minds of ordinarily prudent men.

Baltimore & O. R. Co. v. State, 72 Md. 36, 6 L. R. A. 706, 18 Atl. 1107; *Baker v. Maryland Coal Co.* 84 Md. 19, 35 Atl. 10; *Cooke v. Baltimore Traction Co.* 80 Md. 551, 31 Atl. 327.

Knowledge of such a defect is not in law knowledge of danger which may possibly result from the defect.

Winkelmann & B. Drug Co. v. Colladay, 88 Md. 78, 40 Atl. 1078; *Wise v. Ackerman*, 76 Md. 375, 25 Atl. 424; *Johnson v. Collins*, 98 Ga. 271, 26 S. E. 744; *Cook v. St. Paul, M. & M. R. Co.* 34 Minn. 45, 24 N. W. 311; *Dumas v. Stone*, 65 Vt. 442, 25 Atl. 1097.

Even with knowledge that the whole porch was in a dangerous condition, plaintiff's action would not *per se* be contributory negligence. It would be a question for the jury.

Magaha v. Hagerstown, 95 Md. 62, 51 Atl. 832; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *Dollard v. Roberts*, 130 N. Y. 269, 14 L. R. A. 238, 29 N. E. 104; *Peil v. Reinhart*, 127 N. Y. 381, 12 L. R. A. 843, 27 N. E. 1077.

Defendant assumed the risk from the condition of the porch.

Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; *Cooley, Torts*, p. 559; *Stillwell v. South Louisville Land Co.* 22 Ky. L. Rep. 785, 52 L. R. A. 325, 58 S. W. 696.

An action of tort will lie.

Smith v. Walsh, 92 Md. 518, 51 L. R. A. 772, 48 Atl. 92.

The landlord is liable to the tenant or his family for injuries due to a neglect to repair, when, by the terms of the lease, that

was his duty; and the action of case is the proper remedy.

Hines v. Willcox, 96 Tenn. 148, 34 L. R. A. 824, 33 S. W. 914; *Sontag v. O'Hare*, 73 Ill. App. 432; *Gridley v. Bloomington*, 68 Ill. 47; *Stillwell v. South Louisville Land Co.* 22 Ky. L. Rep. 785, 52 L. R. A. 325, 58 S. W. 696; *Cornish v. Ross*, 2 H. Bl. 350; *Moore v. Steljes*, 69 Fed. 518; *Perez v. Rabaud*, 76 Tex. 191, 7 L. R. A. 620, 13 S. W. 177; *Schwandt v. Metzger Linseed Oil Co.* 93 Ill. App. 365; *Campbell v. Portland Sugar Co.* 62 Me. 558, 16 Am. Rep. 503; *Gorman v. Budlong* (R. I.) 40 Atl. 704; *Sieber v. Blanc*, 76 Cal. 173, 18 Pac. 260; *Frank v. Conradi*, 50 N. J. L. 23, 11 Atl. 480; *Sinton v. Butler*, 40 Ohio St. 158; *Harpel v. Fall*, 63 Minn. 520, 65 N. W. 913; *Kahn v. Love*, 3 Or. 206; *Brewster v. De-Fremery*, 33 Cal. 341; *Roehrs v. Timmons*, 28 Ind. App. 578, 63 N. E. 481; *Baltimore & O. R. Co. v. Carr*, 71 Md. 135, 17 Atl. 1052; *Philadelphia, W. & B. R. Co. v. Constable*, 39 Md. 149; *Burnett v. Lynch*, 5 Barn. & C. 589; *Brown v. Boorman*, 11 Clark & F. 1; *Godefroy v. Jay*, 7 Bing. 413.

The right of the tenant's family to recover is coextensive with that of the tenant himself.

Smith v. State, 92 Md. 518, 51 L. R. A. 772, 48 Atl. 92; *McKenzie v. Cheetham*, 83 Me. 543, 22 Atl. 469; *Mehr v. McNab*, 24 Ont. Rep. 653; *Boue v. Hunking*, 135 Mass. 380, 46 Am. Rep. 471.

Notice to the appellee of the particular defect in the porch was sufficient to carry with it notice of the condition of the whole porch, and to give rise to his duty to examine and repair the whole.

Rouillon v. Wilson, 29 App. Div. 307, 51 N. Y. Supp. 430; *Wolf v. Frank*, 92 Md. 143, 52 L. R. A. 102, 48 Atl. 132; *Samarzovosky v. Baltimore City Pass. R. Co.* 88 Md. 480, 42 Atl. 206.

Messrs. **Richard Bernard & Son**, for appellee:

The evidence is clear that the defect which caused the accident was unknown to all the parties; and, if the danger was unknown to both landlord and tenant, upon no principle can there be a recovery.

Smith v. State, 92 Md. 518, 51 L. R. A. 772, 48 Atl. 92; *Albert v. State*, 66 Md. 325, 59 Am. Rep. 159, 7 Atl. 697; *State use of Bashe v. Boyce*, 73 Md. 469, 21 Atl. 322; *Owings v. Jones*, 9 Md. 108.

Even where the defect which caused the accident was known to the plaintiff and defendant, and the latter had promised to repair it, the plaintiff cannot recover in a case like this.

McAdam, Land. & T. p. 438; 18 Am. & Eng. Enc. Law, p. 234; *Taylor, Land. & T.* 8th ed. § 330; *Middlekauff v. Smith*, 1 Md. 329; *Cooke v. England*, 27 Md. 35, 92 Am. Dec. 618; *Biggs v. McCurley*, 76 Md. 409, 25 Atl. 466; *Cook v. Soule*, 56 N. Y. 420;

34 L. R. A. 824, and note, 41 L. R. A. 278; *Olson v. Schultz* (Minn.) 36 L. R. A. 790; *Rallton v. Taylor* (R. I.) 39 L. R. A. 246; *Stillwell v. South Louisville Land Co.* (Ky.) 52 L. R. A. 325, 58 S. W. 696.

325; *Smith v. State* (Md.) 51 L. R. A. 772; *Moore v. Parker* (Kan.) 53 L. R. A. 778; *McGinley v. Alliance Trust Co.* (Mo.) 56 L. R. A. 334.

Heater v. Knox, 63 N. Y. 561; *Myers v. Burns*, 35 N. Y. 269; *Wallace v. Lent*, 29 How. Pr. 289; *Tuttle v. George H. Gilbert Mfg. Co.* 145 Mass. 169, 13 N. E. 465; *Smith v. State*, 92 Md. 518, 51 L. R. A. 772, 48 Atl. 92; *Robbins v. Jones*, 15 C. B. N. S. 221; *Arnold v. Clark*, 13 Jones & S. 252; *McGinn v. French*, 107 Wis. 54, 82 N. W. 724; *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. 48; *Sanders v. Smith*, 5 Misc. 1, 25 N. Y. Supp. 125; *Town v. Armstrong*, 75 Mich. 590, 42 N. W. 983; *Schick v. Fleischhauer*, 26 App. Div. 210, 49 N. Y. Supp. 962; *Kabus v. Frost*, 18 Jones & S. 72; *Miller v. Rinaldo*, 21 Misc. 470, 47 N. Y. Supp. 636.

Boyd, J., delivered the opinion of the court:

The appellant sued the appellee for injuries sustained by her in falling through the floor of a porch attached to a house rented by her husband from the appellee. The declaration alleges that the defendant had promised "to keep and maintain the premises in good, safe, and perfect condition," and that the porch, on account of its defective condition, known to the defendant, and of which he had been specifically notified, and which he had, in consideration of further payment of rent, promised to repair, but negligently failed to do so, gave way, so that the plaintiff fell through the opening and sustained serious injuries. At the conclusion of the plaintiff's testimony the court granted a prayer that there was no evidence legally sufficient to entitle the plaintiff to recover under the pleadings.

In the case of *Smith v. State*, 92 Md. 518, 51 L. R. A. 772, 48 Atl. 92, we had occasion to determine how far a landlord, as a general rule, was liable to a subtenant, and incidentally to a tenant, for injuries sustained by reason of the defective condition of the property; and we held that the landlord was not responsible under the circumstances of that case. From what we there said, it can be seen that a member of a family of the tenant would occupy no better position; but it is sought to distinguish this case from that by reason of the fact that there was no contract to repair in that case, while in this it is claimed there was, and in considering that question it will be well to at once see what the record discloses on that subject. The husband of the plaintiff testified that he rented the premises on May 21, 1901, and paid one month's rent; that before doing so he and the appellee went through the house and yard; that he objected to the fence being down, and to some banisters being out of the front porch; that the appellee said: "All is right, but I will fix the fence for you immediately,—next week,—and the front porch; and any necessary repairs I will do." He remained in the property during that month, but no repairs were made. On the 28th of June he told the appellee he was not going to stay there, as he had not fixed the fence, the door had fallen off the hinges, and the back porch was opening. They then went out to the back porch, and

he showed him "where the loose place was," and he promised to send a man there the next morning to fix it, and said he would put in a bathtub and fix the fence the following week. He then paid the second month's rent. The porch where the injury occurred was at the kitchen door, and "was about 4 or 5 feet square, and elevated about 1½ feet from the ground." It had a railing on two sides, "four or five steps going down to the yard," and the other side was against the house, about 10 inches below the level of the kitchen floor. The platform consisted of boards about 4 inches wide, laid from a joist on the outside to the house, where they were supported under the weatherboarding by another joist fastened to the house. He said that the defect in the porch he pointed out to the appellee "was a swelling or bulging of two of the boards on the north end of the porch, which were loose, and when wet they would bulge up and open somewhat near the house, and that he told Mr. Clemens there was danger of some of the children getting hurt, or getting their legs through the opening; that the boards that actually went through with his wife were on the south side of the porch, just opposite the door, and were not the ones that were loose." The appellant testified substantially to the same effect, and added that the appellee said: "Those boards are dangerous, and I will send a man in the morning to fix it." On the 5th of July she was going into the yard, and as she stepped on the platform some of the boards on the south end gave way, and she went through, causing her serious injury; she being at the time in a delicate condition.

Having thus stated such of the facts as are necessary to show the undertaking of the appellee, we will determine what his responsibility to the appellant was. It is contended for her that he assumed the risk of damages sustained by the tenant or his family, due to the condition of this porch, while the appellee contends that "a landlord who has covenanted to repair is not liable in tort for personal injuries resulting from the want of repair." The appellant's attorneys, if we understand the position taken by them, concede that such damages are not recoverable in an action *ex contractu*, on the contract to repair, but say this is "an action on the case, founded on the negligent failure of the landlord to perform a duty which he had assumed by the terms of the letting. The fact that that duty has its foundation in the contract does not preclude the plaintiff from suing in tort." They contend that this court has, in the case of *Smith v. State*, impliedly recognized the right of the tenant, or a member of his family, to sue for such injuries, when by the terms of the lease there is a duty resting on the landlord to make repairs. In that case we held that the landlord was not liable to the tenant or the subtenant for personal injuries due to the want of repairs of the property; and after quoting from Taylor, Land. & T. § 175a, and referring to other authorities, we said: "The reason of the rule is perfectly apparent. If

the lessee knows the condition of the premises, and rents it without requiring the owner to repair it, he takes it as he finds it, and has no right to complain of injuries sustained on account of its condition. The owner not being compelled to keep it in repair, if the tenant desires to require that of him he should so bind him by contract. In the absence of that, he must protect himself against dangers which are apparent to him." We were not called upon in that case to determine whether damages for personal injuries could be recovered by the tenant, or anyone on the premises under the tenant's right, when the landlord was under contract to make the repairs; but many of the decisions we there referred to, and others that might be cited, in announcing the general rule as to the landlord's liability to the tenant, do qualify it by referring to the absence of an agreement on the part of the landlord to repair, and imply that when there is such an agreement the landlord may be liable to damages for personal injuries, at least under some circumstances. In 18 Am. & Eng. Enc. Law, 2d ed. p. 216, it is said "that, in the absence of any agreement on the part of the landlord to repair, a tenant cannot recover from the landlord the costs of repairs made by him, nor can the tenant recover from the landlord for injuries to his property or person, or to the property or person of his family, caused by the defective condition of the demised premises;" but on page 234 of that volume it is stated that "damages for personal injuries to the tenant resulting from the failure of the landlord to repair are deemed too remote and consequential, and not in contemplation of the parties, and therefore not recoverable, though in an Illinois case a recovery for such injuries has been allowed." The case referred to is *Sontag v. O'Hare*, 73 Ill. App. 432; and the same view has been adopted in *Schurundi v. Metzger Linseed Oil Co.* 93 Ill. App. 365, and to some extent in *Moore v. Steljes*, 69 Fed. 518; *Stillwell v. South Louisville Land Co.* 22 Ky. L. Rep. 785, 52 L. R. A. 325, 58 S. W. 696; *Perez v. Rabaud*, 76 Tex. 191, 7 L. R. A. 620, 13 S. W. 177; *Campbell v. Portland Sugar Co.* 62 Me. 552, 16 Am. Rep. 503; and other cases. The doctrine stated by the Encyclopædia of Law has been announced in a number of cases cited in note 7 to the above quotation; and in *McAdam, Land. & T.* 438, it is said: "A landlord who has covenanted to repair is not liable in tort for personal injuries resulting from the want of repair;" citing *Schick v. Fleischhauer*, 26 App. Div. 210, 49 N. Y. Supp. 962; *Flynn v. Hatton*, 43 How. Pr. 333; *Spellman v. Bannigan*, 36 Hun, 174; *Miller v. Rinaldo*, 21 Misc. 470, 47 N. Y. Supp. 636; *Sanders v. Smith*, 5 Misc. 1, 25 N. Y. Supp. 125; *Tuttle v. George H. Gilbert Mfg. Co.* 145 Mass. 169, 13 N. E. 465. In the note to *Hines v. Wilcox* (Tenn.) 34 L. R. A. 824, there is a valuable collection of authorities on the "liability of landlord for injury to tenant from defect in the premises;" but it is impossible in an opinion of anything like a reasonable length to undertake to discuss 60 L. R. A.

the numerous cases on that subject, and it would be useless to attempt to reconcile the expressions used in many of them. We have no doubt, however, that no action, either in contract or in tort, by a tenant, or one of his family, against a landlord, to recover damages for personal injuries, should be sustained merely because the latter has been guilty of a breach of contract to make necessary repairs in the premises demised. It is not denied by counsel for the appellant that such damages are too remote, and not in contemplation of the parties, to be recovered in an action *ex contractu*; and to permit a recovery for such damages based on the contract, simply because it is in form an action of tort, would be making a distinction that could not be justified by reason or authority. There must be something more than a mere failure on the part of the landlord to make the repairs he has agreed to make. As was said in *Baltimore & O. R. Co. v. Pumphrey*, 59 Md. 398: "The suit was brought for a wrong, dependent upon a contract; and the first question we have to decide is, What is the true measure of damages in such a case? It makes no difference whether the form of the action is *ex delicto* or *ex contractu*. The real and substantial gravamen of the complaint is the alleged breach of the contract, and in such a case the same law is applicable to both classes of action. In actions like the present, against common carriers, the suit may be framed either *ex contractu*, upon the breach of the engagement, or *ex delicto*, upon the violation of the public duty; but whether the action be assumptit on the contract, or case for the violation of duty, the measure of damages is equally a question of law, and as much under the control of the court as if the right rested in agreement, merely." And in *Baltimore & O. R. Co. v. Carr*, 71 Md. 141, 17 Atl. 1052, relied on by the appellant, the same doctrine was, in effect, announced. That was a suit for the wrongful refusal of the admission of the appellee to the cars of the appellant. This court said: "But this is in form an action of tort. The contract, it is true, entitled the plaintiff to admission to the cars, and gave rise to the duty on the part of the defendant to allow such admission, under proper circumstances; but, in cases of the class to which this belongs, the refusal or neglect to perform that duty, as well as the negligent performance of it, furnishes a ground of action in tort. In such case, both the nonfeasance and the misfeasance constitute a wrongful act, for which the remedy may be either by action on the contract or in tort, at the option of the party injured." But in passing on the question of damages we said the rule by which damages are to be estimated is, as a general principle, a question of law, to be decided by the court; and "in a case like the present the rule for measuring the damages is fixed and determinate, and should be applied in all cases alike, except in those cases where there may be malice or circumstances of aggravation in the wrong complained of, for which the damages may be enhanced."

Without citing other authorities, it may be conceded that in this state, when a landlord has agreed to make repairs, there is a duty resting on him to do so, and upon his failure the tenant may either sue on his contract, or bring an action on the case, founded in tort, for neglect of that duty; but, as was said in *Pumphrey's Case*, 59 Md. 398: "There are many actions nominally in tort, which, in respect to the measure of relief, are treated as virtually *ex contractu*, and in these cases a fixed rule of damages is adhered to." The familiar cases of *United States Tel. Co. v. Gildersleve*, 29 Md. 232, 96 Am. Dec. 519, and *Hadley v. Baxendale*, 9 Exch. 341, were cited as furnishing the true measure of damages. So it seems to us that the correct rule in a case such as the one under consideration is that the mere failure of the landlord to make repairs which he had agreed to make cannot make him responsible to the tenant, or a member of his family, for damages for personal injuries sustained by reason of the defective condition of the premises, whether such suit be in *assumpsit* or in case, but, in order to recover such damages, there must be shown some clear act of negligence or misfeasance on the part of the landlord, beyond the mere breach of contract. The declaration seems to have adopted that theory, as it alleges that the defendant "had negligently failed" to repair the porch. Assuming, as we must as the case is presented, that the appellee had agreed to make all necessary repairs, and that this porch was out of repair, and in consequence of that the appellant was injured, that, of course, would not be sufficient to hold the appellee responsible for such injuries. In the first place, it is well settled that, as a general rule, there must be a notice by the tenant to the landlord of the need of repairs, in order to put the latter in default. 18 Am. & Eng. Enc. Law, 2d ed. p. 229, where a number of cases are cited, including *Cooke v. England*, 27 Md. 14, 92 Am. Dec. 618. And after the landlord is notified, he has a reasonable time in which to make them. Id. 230. As to what is a reasonable time, must depend upon circumstances. Not only the extent of repairs to be made must be considered, but, what is a much more material question in this case, the apparent necessity for prompt action; and that brings us to what we deem the crucial point in this case, as reflecting upon the question of negligence *vel non* of the appellee, which must determine the right of recovery for the injuries sued for.

If the appellee knew of the defect in this porch that caused the injuries, and had reason to believe that it was likely to produce such results if not repaired, then it was negligence on his part, in view of his agreement to repair, not to do so promptly, or at least to take some steps to protect the tenant and his family from injury. Of course, whether there could be a recovery, on account of the contributory negligence or other default of the party injured, would present another question, which is not now being considered. But although it is alleged in the first part

of the declaration that the defect was "known to the defendant, and of which he had specifically been notified theretofore by the plaintiff and her husband," it is subsequently alleged that it was "entirely unknown to the plaintiff and her husband." If the latter was the fact, it was impossible for either of them to have so notified the defendant, and the testimony which we have already stated shows that it was not known to the plaintiff or her husband, and the only notice they or either of them gave the defendant was as to the condition of the north end of the porch, where two of the boards were bulging. The plaintiff was injured by the boards at the south end giving way, and there was probably no reason for the defendant to suppose that any serious injury was likely to result from the two boards which had been called to his attention; and, if there was, the injury complained of was in fact not so caused. If the use of that part of the porch was dangerous, the plaintiff knew it, and, if she had been injured in the use of that, would clearly have been guilty of contributory negligence. But although she and her husband had better opportunity to know the real condition of the porch than the defendant had, as they had been living on the premises for more than a month, she seeks to hold the appellee responsible because he promised to send a carpenter there the day after the two boards were called to his attention (June 28th), but had not done so on July 5th, when the accident happened. It was argued that, if the appellee had sent the carpenter there, he could have discovered the dangerous condition of the part of the porch that caused the injury. He might or might not, but that is not the test we deem proper to apply in such cases. The question is whether the appellee had reason to believe from the information he received from the plaintiff and her husband, and what he saw himself, that there was such imminent danger in the condition of the porch as to make him responsible for negligence in not having it repaired within the week (including a Sunday and a legal holiday), and we think the plaintiff's proof fell far short of establishing that. If there was reason to suppose that the porch was in such a dangerous condition as to call upon the appellee to take immediate action, why did not the plaintiff and her husband know it? If she did know its condition, and, notwithstanding such knowledge, used it without any more necessity for doing so than is disclosed by this record, then, unquestionably, she would have been precluded from recovery on the ground of contributory negligence. But as she and her husband disclaim all knowledge of the defect that caused the injury, why should the landlord have imputed to him such knowledge as would justify a court in declaring him guilty of negligence for not sending a carpenter there at once to repair it? It will not do to say that as he had agreed to make necessary repairs, and had had the defective condition of the other end of the porch called to his attention, which he had promised to have

repaired the next day, a duty rested on him to have it repaired, and, having violated that duty, therefore he is responsible. That would be equivalent to saying that he was liable for such damages as are sought to be recovered in this case simply because he had violated his contract, which we have said was not sufficient. There is no reason for holding landlords to such a harsh rule of law as that. The tenant has the right to make repairs, and charge his landlord with the cost of them, when he is under obligation to keep the premises in repair; and, when the expense is as trivial as this would likely have been, it is his duty to do so, rather than risk the life or limb of his family. *Middlekauff v. Smith*, 1 Md. 343; *Biggs v. McCurley*, 76 Md. 415, 25 Atl. 466; *Lawson v. Price*, 45 Md. 136; *McGinn v. French*, 107 Wis. 54, 82 N. W. 724. If the landlord is under contract to keep the premises in repair, and, although notified of the need of them, he fails to make them, if the property cannot be safely occupied the tenant can or-

dinarily abandon it. If, with knowledge of such condition, he still remains in the property, he, and others having such knowledge, would, as a general rule, be denied the right to recover, on the ground of contributory negligence, even if the landlord was negligent.

So, although we are of opinion that a landlord, under contract to repair, may, under some circumstances, be liable for damages for personal injuries by reason of a negligent failure to make repairs, his negligence must be clearly established as the foundation for such liability, and, under the facts disclosed by this record, there was not such legally sufficient evidence of it as would have justified the court below in submitting the case to the jury; and therefore, without discussing the question of the contributory negligence of the plaintiff, we will affirm the judgment.

Judgment affirmed; the appellant to pay the costs.

WISCONSIN SUPREME COURT.

W. D. KUHN, *Resp.*,

v.

SOL HEAVENRICH COMPANY, *Appt.*

(.....Wis.....)

1. No implied contract obligation rests upon the owner of a building leased in separate sections to keep the portion remaining in his possession in repair, so that damages resulting to property through breach of it can be set up as a counterclaim in an action for rent.
2. On a motion for judgment, where plaintiff's claim is admitted, and no facts are stated to defeat it, the court is not required to permit an amendment of the answer.

(October 21, 1902.)

A PPEAL by defendant from a judgment of the Circuit Court for Ashland County in favor of plaintiff in an action brought to recover rent alleged to be due and unpaid, in which defendant sought to set off injuries alleged to have been caused by want of repair of portions of the property remaining in possession of the landlord. *Affirmed.*

Statement by **Marshall, J.:**

Action by a landlord to recover \$225, past-due rent, from his tenant. The leased

premises consisted of the ground floor and part of the basement of a three-story building, the rest of the room therein being leased to various tenants, each having a specific portion thereof. There was no express covenant to keep the building or any part thereof in repair. The complaint was in the usual form. Defendant admitted the indebtedness, and counterclaimed for damages to the amount of \$378 upon the following alleged facts in addition to those before stated: In the building there was a shaft reaching from the surface of the roof to the ceiling above the first floor. The top, bottom, and sides of the shaft were of glass. The purpose thereof was to light the various parts of the building. When defendant entered upon the enjoyment of his lease, the roof of the shaft was in a good state of repair. It was the landlord's duty to keep it so. May 25th, in the nighttime, there was a severe rain storm, and, because of the then defective condition of the lighting shaft, a large quantity of water was admitted into the building, and found its way to defendant's stock of clothing on the first floor, damaging the same to the amount of \$378. The roof of the shaft where the water entered was out of repair, to the knowledge of plaintiff, before such occurrence. He endeavored to repair it, but failed to do so efficiently, by reason whereof the damage to defendant's property was caused.

Plaintiff moved for judgment on the pleadings, and the motion was granted. Defendant duly excepted to the ruling.

Mr. B. Sleight, for appellant:

Where the landlord leases separate portions of the same building to different tenants, and reserves under his control those parts of the building or premises used in

NOTE.—For other cases in this series as to liability of landlord for condition of part of premises remaining in his possession, or not controlled by tenant, see *Dollard v. Roberts* (N. Y.) 14 L. R. A. 238, and *note*; *Jones v. Millsaps* (Miss.) 23 L. R. A. 155, and *note*; *Gleason v. Boehm* (N. J. L.) 32 L. R. A. 645; *Olson v. Schultz* (Minn.) 36 L. R. A. 790; *Railton v. Taylor* (R. I.) 39 L. R. A. 246; *Springer v. Ford* (Ill.) 52 L. R. A. 930; and *McGinley v. Alliance Trust Co.* (Mo.) 56 L. R. A. 334, 60 L. R. A.

common by all the tenants, he is under an implied obligation to use reasonable diligence to keep in a safe condition the parts over which he reserves control.

18 Am. & Eng. Enc. Law, 2d ed. p. 220, ¶ (3); *Lichtig v. Poundt*, 23 Misc. 632, 52 N. Y. Supp. 136; *Rauth v. Davenport*, 60 Hun, 70, 14 N. Y. Supp. 69; *Bold v. O'Brien*, 12 Daly, 160; *Eagle v. Swayze*, 2 Daly, 140; *Bissell v. Lloyd*, 100 Ill. 214; *Payne v. Irvin*, 44 Ill. App. 105; *Toole v. Beckett*, 67 Me. 544, 24 Am. Rep. 54; *Sawyer v. McGillicuddy*, 81 Me. 318, 3 L. R. A. 458, 17 Atl. 124; *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295; *McGinley v. Alliance Trust Co.* 168 Mo. 257, 56 L. R. A. 334, 66 S. W. 153.

A landlord having control of the roof is generally liable to the tenant below for damages from the defective condition of the same, or for negligently leaving the conductor pipe so as to flood the premises below, or for exposing goods of the tenant by uncovering the roof.

Krueger v. Ferrant, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158.

There is a marked distinction between these cases and cases where the premises were out of repair at the time of the leasing, and in which action was brought to impose a liability upon the theory that there was a breach of an implied covenant of fitness of the premises for the purposes intended.

Clifton v. Montague, 33 L. R. A. 449, note, 40 W. Va. 207, 21 S. E. 858; *Smith v. State* use of *Walsh*, 92 Md. 518, 51 L. R. A. 775, 48 Atl. 92; *Hines v. Willcox*, 34 L. R. A. 824, note, 96 Tenn. 148, 33 S. W. 914; *Dolard v. Roberts*, 14 L. R. A. 239, note, 130 N. Y. 269, 29 N. E. 104.

Messrs. Sanborn & Sanborn, for respondent:

In the absence of any secret defect, or deceit, or warranty, or agreement on the part of the landlord to repair, the tenant takes the leased premises in the condition in which they happen to be at the time of the leasing; and in such a case the landlord is not liable to the tenant for an injury caused by their being out of repair during the term.

Cole v. McKey, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279; *Humphrey v. Wait*, 22 U. C. C. P. 580; *Dowling v. Nuebling*, 97 Wis. 350, 72 N. W. 871; *Jones v. Millsaps*, 71 Miss. 10, 23 L. R. A. 155, 14 S. W. 440; *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47.

Without an agreement, the landlord would not be bound to repair the roof, nor subject to an action for not so doing.

Pomfret v. Ricroft, 1 Wms. Saund. 323, note; *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158.

There is no implied covenant on the part of the landlord to make repairs, or that the premises are, or will prove, suitable for the tenant's use or business.

Foster v. Peyser, 9 Cush. 247, 57 Am. Dec. 43; *Witty v. Matthews*, 52 N. Y. 512; *Howard v. Doolittle*, 3 Duer. 474; *Wilkinson v. Clauson*, 29 Minn. 91, 12 N. W. 147.

There seems to be no sound reason why 60 L. R. A.

this rule should not extend, in like manner, to portions of the premises not expressly demised to the tenant, but which are necessary for his use or protection.

Chauntler v. Robinson, 4 Exch. 163; *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47; *Brewster v. De Fremery*, 33 Cal. 341; *Walker v. Gilbert*, 2 Robt. 220; *Taylor, Land. & T.* 7th ed. §§ 175a, 428.

Marshall, J., delivered the opinion of the court:

The trial court granted the motion, supposing the common law that, in the absence of an express agreement to the contrary, a landlord is under no obligation at all to his tenant to keep the leased premises in repair, ruled the case. Appellant contends that the rule is not universal; that it does not apply where there are several tenants in a building, each having a distinct part thereof, except as to each tenant for his particular part; that as to those portions of the building necessary for the protection or convenience of all of the tenants in the enjoyment of their respective holdings and used by them in common, such as the stairways, the halls, and the roof,—portions which do not pass under the control of any particular tenant,—the landlord is bound by an implied promise, forming part of the leasehold contract, to keep the same in repair; and that such exception entitled appellant to recover on its counterclaim.

The position urged upon our attention is not entirely without authority to support it, though counsel is in error, we think, in the idea that the weight of authority is that way. The question is interesting and important. It has not been decided here, that we are aware of, in a case exactly like this, though it has been in principle, as we shall see later. That there is a duty resting on the landlord in such a situation, not to cause injury to his tenant, and to prevent such injury, has been held in many jurisdictions in actions grounded on negligence. But there is no authority, worthy of our consideration, to support the idea that the duty is one resting in contract. The distinction between the obligations of a contract and the obligation which one owes to another respecting that other's personal safety and the safety of his property has been many times lost sight of in considering this question, as what follows will demonstrate.

This language from 18 Am. & Eng. Enc. Law, 2d ed. p. 220, is called to our attention: "The rule laid down by the weight of authority is that, where the landlord leases separate portions of the same building to different tenants, and reserves under his control those parts of the building or premises used in common by all the tenants, he is under an implied obligation to use reasonable diligence to keep in a safe condition the parts over which he so reserves control."

The writer of that text, as is indicated, not only by the language used, but by the authorities cited, did not use the term "obligation" in a contractual sense, but in that of the duty which, in certain situations, one

owes to avoid injuring another, a violation of which constitutes a tort, and is actionable as such. In one of the leading cases referred to it was expressly stated that the responsibility of the landlord "cannot be based upon any contract obligation, but must rest entirely upon the element of *delictum*." *Edwards v. New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659. In speaking of the contract relations between landlord and tenant, the writer of the quoted language, at page 218, vol. 18, says: "The general rule that the landlord is under no implied obligation to keep the demised premises in repair is, in most jurisdictions, held equally applicable where only a part of a building is demised; and the landlord is held to be under no implied obligation to keep the portion of the building not demised to the tenant in repair, so as to render tenantable and secure the portion demised to the tenant."

The writer, like many courts that have treated the subject, failed to bring out clearly the distinction before mentioned,—that between implied covenant springing from the lease, and liability for a tortious violation of that duty one person owes to another as regards safety of his person and property.

The cases cited in support of the declaration that, in the circumstances under discussion, the landlord owes his tenant a duty, went, it will be discovered, as a rule, upon the doctrine of *Sic utere tuo ut alienum non lædas*, though there is reason to say that in some of them the legitimate scope of the maxim was misconceived. There can be no reasonable controversy but that it cannot properly be applied to an obligation resting merely in contract. The idea of it is that no one has a legal right to so use his own property as to injure, in a physical sense, the property of another.

Toole v. Beckett, 67 Me. 544, 24 Am. Rep. 54, is confidently referred to by appellant's counsel. It is sufficient for this case to say of that one that the action was not to recover on contract, but for a tortious act. True, the nature of the wrong complained of was failure to repair a roof under very much the same circumstances as those we have before us; and if this were an action for damages for negligent inattention to the roof, *Toole v. Beckett* would be in point for what it is worth, though it has been pronounced unsound by most courts that have considered it. Certainly, none of the authorities cited by the learned court in support of its decision involved an implied contract as between landlord and tenant, or any other obligation especially applicable to that relation. To illustrate: *Kirby v. Boylston Market Asso.* 14 Gray, 249, 74 Am. Dec. 682, was an action for personal injuries caused by a sidewalk being unsafe for travel by reason of an accumulation of snow and ice thereon. It was claimed that such unsafe condition was produced by the improper discharge of water upon the walk from the defendant's building, the rooms in which were occupied by numerous tenants, each

having a specific part thereof. The defendant retaining charge of the passageways and roof and general care of all parts of the building necessary for the common use of the tenants. The court held that, if the defendant's structure produced the nuisance which caused the injury, he was liable. It will be easily seen that the principle involved is familiar, and has nothing to do with the contractual duties of the owner of a building to his tenants. *Priest v. Nichols*, 116 Mass. 401, was an action sounding in tort. It did not involve any question whatever as to the duty of a landlord specially to his tenant to repair. The wrong complained of would have been actionable had it been committed to another tenant in the building or by a stranger. The landlord used a part of the structure as an engine room. He operated the engine in such a negligent manner as to permit water from the waste pipe thereof to escape and reach the plaintiff's property. In *Gray v. Boston Gas-light Co.* 114 Mass. 149, 19 Am. Rep. 324, the controversy was between the landlord and a stranger, the latter being a sufferer from the negligence of the former in permitting a chimney to fall from his building. In *Norcross v. Thomas*, 51 Me. 503, 81 Am. Dec. 588, defendant was held guilty of maintaining a nuisance to the injury of the plaintiff in that he so conducted a blacksmith shop as to cause dust and ashes to pass therefrom to the plaintiff's property to its injury. The relation of landlord and tenant was not involved directly or indirectly.

Where there is any support in the cases above referred to for the decision in *Toole v. Beckett*, we are unable to understand. Many courts have expressed the same views. *Jones v. Millsaps*, 71 Miss. 10, 23 L. R. A. 155, 14 So. 440; *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158; *Ward v. Fugin*, 101 Mo. 669, 10 L. R. A. 147, 14 S. W. 738; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255. In *Looney v. McLean*, 129 Mass. 33, 37 Am. Rep. 295, like the other cases upon which counsel relies, the landlord was held liable to his tenant for negligence upon the same principle that he would have been to a stranger for inducing a tenant to use a portion of the building which he undertook to keep in order, knowing that it was unsafe.

Argument seems unnecessary to show that, if we were to concede that *Toole v. Beckett*, and *Looney v. McLean* were correctly decided, they are not authority for a recovery by a tenant upon an implied contract to repair. In *Tuttle v. George H. Gilbert Mfg. Co.* 145 Mass. 169, 13 N. E. 465, *Looney v. McLean* was considered, it being particularly pointed out that it went on negligence, not on contract. Text writers generally do not recognize the exception for which counsel contends. Chaplin, Land. & T. § 247; 1 McAdan, Land. & T. 436; Hall, Land. & T. (Mass.) § 25; Taylor, Land. & T. p. 316, note 2. In Woodfall, Land. & T. 173, 174, note, a misconception of principles and authorities is observable. The writer says there is no implied covenant on the part of

a landlord to repair where the whole building is leased, while there is such a covenant where the building is leased to several tenants. Many cases are cited which turned on the general common-law rule under discussion, and others on liability for negligence, the writer failing to discover the distinction between the two classes. That confusion easily led to the error of supposing that the rule holding the landlord liable for negligence is necessarily an exception to the common-law exemption of the landlord from any liability by implied covenant or contract. No better illustration of the writer's confusion can be given than to call attention to the fact that *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255; *Doupe v. Genin*, 45 N. Y. 119, 6 Am. Rep. 47, and other cases expressly holding that there is no exception to the common-law rule as to liability upon implied contract, are cited in close connection with *Scott v. Simons*, 54 N. H. 426; *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279, and other cases where a recovery was sought for actionable negligence.

The only case of consequence that we are aware of, where an action to recover damages upon an implied contract to repair in circumstances similar to those here was sustained, is *Rissell v. Lloyd*, 100 Ill. 214. No authority is cited to support the decision. As said of it in *Jones v. Millsaps*, 71 Miss. 10, 23 L. R. A. 155, 14 So. 440, "it is the naked assertion of a court of last resort," that is all. Even as such it would, of course, be entitled to respect if the question treated was doubtful and the indications were that the court fully grasped the principles involved. The indications in the Illinois case are to the contrary. It is quite plain that the court confused liability resting purely on negligence and liability resting in contract. If there was doubt about that it would be solved by the later case of *Payne v. Irvin*, 144 Ill. 482, 33 N. E. 756, an action sounding in tort, where the former case, and the leading cases to which we have referred, grounded on negligence, were cited in support of the result reached.

Enough has been said, even if the question were entirely new in this state, to demonstrate that the common-law rule, that there is no implied covenant on the part of a landlord of fitness, present or future, of leased premises, forming a part of the contract between him and his tenant, is universal; that it applies as well to a lease of part of a structure, other parts being let to others in severalty, and to parts thereof common to all, as to leased premises constituting an entire building. But it is not entirely a new question here. It was considered in *Cole v. McKey*, 66 Wis. 500, 57 Am. Rep. 293, 29 N. W. 279, and *Douling v. Nuebling*, 97 Wis. 350, 72 N. W. 871. *Cole v. McKey*, rightly understood, declares the law in perfect harmony with *Krueger v. Ferrant*, 29 Minn. 385, 43 Am. Rep. 223, 13 N. W. 158, and it is often referred to in connection with such case, as will be observed L. R. A.

served by referring to the authorities we have cited. We might have satisfactorily decided this case by the mere statement that it was ruled by *Cole v. McKey*, were it not for the fact that it seems to be misunderstood by counsel for appellant. That probably comes from the fact that the action was grounded on negligence, and the court, in disposing of it, said there might be a liability in case of the breach of a positive duty to the tenant, without any extended discussion of the matter to render it plain that the duty spoken of was not of a contractual nature. However, why the position of the court on the subject should be misunderstood, when the opinion is read with proper attention to the subject under discussion, is not easily perceived. While it is recognized that a person standing in the relation of landlord to another may be liable to such other for a wrong done to him in respect to the subject of the tenancy, in the opening lines of the opinion it was in effect stated that there was no contract liability on the facts presented by the record, a situation similar to the one before us. This language was used:

"The rule seems to be well settled that, in the absence of any secret defect or deceit or warranty or agreement on the part of the landlord to repair, the tenant takes the leased premises in the condition they happen to be in at the time of the leasing, and that in such case the landlord is not liable to the tenant for an injury caused by the premises being out of repair during the term."

True, the court did not in terms say, in the circumstances mentioned, that there is no contractual liability, and, when it came to speak of liability growing out of a breach of duty on the part of the landlord, the term "duty" was not so used as to expressly negative any idea that an obligation resting in contract was meant; but that one, the violation of which constitutes a tort—actionable negligence—was in mind, seems perfectly plain. The relation of landlord and tenant is essential to render active the principle spoken of in the opening part of the opinion, while it is not as to the one which was later discussed, and the real vital principle in the case. If courts and text writers had been more careful in pointing out the distinction between breach of implied contract to repair and breach of duty involving a wrong of a tortious character, and not fallen into the error of confusing the two, many of the apparent conflicts to which we have referred, necessarily tending to useless litigation, would not exist.

Enough has been said to demonstrate that the trial court rightly decided that respondent failed to state in his answer a right to recover for breach of implied covenant to repair, which, it is conceded, is the sole ground for recovery pleaded. It is suggested that the court should have permitted an amendment, instead of rendering judgment after deciding that the pleading was insufficient. To that there are two satisfactory answers: First, there was nothing in the situation to render it probable that the counterclaim

could have been made good by amendment. If facts exist, not pleaded, sufficient to make out, with those contained in the defective paper, a cause of action for negligence,—which, it seems, is doubtful,—it does not constitute “a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff’s claim;” nor one “connected with the subject of the action,” within the meaning of subdivision 1, § 2050, Rev. Stat. 1898; nor one satisfying any other statutory definition of “counterclaim.” Looking at appellant’s claim from the standpoint of what constitutes a pleadable cause of action in his situation, we readily see that it is entirely independent of the respondent’s claim. If a person, while in the store of another by that other’s implied invitation, received an injury by the latter’s negligence, and sued to recover therefor, no one would claim, we apprehend, that such other could counterclaim for an indebtedness contracted by such person to him on the occasion of the injury. The two would have no necessary legal or equitable connection. They would constitute two entirely independent claims. Therefore, neither could be said to grow out of, or be connected with, the subject-matter of the other. The illustration fits the situation under consideration.

2. But the conclusive answer to the suggestion that the court erred in not permitting an amendment is that permission was not asked, and that on a motion for judgment, where the plaintiff’s claim is admitted by the answer and no facts are stated therein to defeat such claim, the court is not bound to permit an amendment, regardless of the defendant’s attitude in the matter.

The judgment appealed from is affirmed.

Dan McMILLAN, Admr., etc., of John McMillan, Deceased, *Appt.*,

v.

SPIDER LAKE SAWMILL & LUMBER COMPANY, *Respt.*

(.....Wis.....)

1. One engaged in unloading logs from cars onto a landing assumes the risk of injury from a hole in the landing 3 or 4 feet across the top and 3 or 4 feet deep, into which he steps and is killed by a rolling log.
2. General statutory language providing indemnity to the next of kin of a person negligently killed does not apply in favor of nonresident aliens in case deceased is instantly killed, or dies without conscious pain.

(October 21, 1902.)

A PPEAL by plaintiff from a judgment of the Superior Court for Douglas County in favor of defendant in an action brought

NOTE.—As to right of alien nonresident to maintain statutory action for death of other party, see *Mulhall v. Fallon* (Mass.) 54 L. R. A. 934, and note.

60 L. R. A.

to recover damages for the alleged negligent killing of plaintiff’s intestate. *Affirmed.*

Statement by **Cassoday**, Ch. J.:

This action was commenced August 21, 1901, to recover damages for the alleged negligent killing of the plaintiff’s intestate July 7, 1900. The complaint alleges, in effect, that, prior to July 6, 1900, the deceased was in the employ of the defendant as a teamster; that on that day the defendant put him to work unloading logs, which were brought from the woods and hauled on cars by an engine to the mill of the defendant; that on the following day the deceased was engaged in unloading such logs, and, while in the act of so doing, he fell into a hole about 2 feet deep, and before he could get up the logs rolled against and over him, injuring him so that he died from the effects thereof on the same day; that for three months prior to the accident the hole had been there, and its existence was well known to the defendant and its servants; that there was slippery bark around the hole into which the deceased stepped; that it was the duty of the defendant to furnish the deceased with a reasonably safe place to work, and that the defendant was negligent in failing to do so, and that it was also negligent in failing to inform the deceased that the place was dangerous and unsafe. The complaint also alleges “that plaintiff’s intestate at the time of his death was an unmarried man, thirty-six years of age, and left him surviving, his mother as next of kin, who was entirely dependent upon him for her support; that plaintiff’s intestate at and prior to said injury was a strong, healthy, able-bodied, industrious man, earning and capable of earning \$50 per month; that for many years prior to his death he was continuously employed, and, but for his death, he would have, out of his earnings, provided for the support of his mother during the remainder of her life; that, by reason of the aforesaid, plaintiff has sustained damages in the sum of \$2,000.” The defendant answered by way of admissions, denials, and counter allegations, and, among others, that the plaintiff was injured by, through, and on account of his own negligence or the negligence of his fellow servants. At the close of the testimony on the part of the plaintiff the court granted a nonsuit, and dismissed the complaint, with costs. From the judgment entered thereon accordingly, the plaintiff brings this appeal.

Messrs. W. P. Crawford and Crownhart & Foley, for appellant:

The fact that the beneficiary is a nonresident alien does not defeat the recovery.

Mulhall v. Fallon, 176 Mass. 266, 54 L. R. A. 934, 57 N. E. 386; *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L. R. A. 579, 77 N. W. 748, 78 N. W. 771; *Lehmann v. Farwell*, 95 Wis. 185, *sub nom. Lehmann v. Denster*, 57 L. R. A. 333, 70 N. W. 170; *Vetalaro v. Perkins*, 101 Fed. 393; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N. E.

94; *Knight v. West Jersey R. Co.* 108 Pa. 250, 56 Am. Rep. 200; *Augusta R. Co. v. Glover*, 92 Ga. 132, 18 S. E. 407; *Philpott v. Missouri P. R. Co.* 85 Mo. 164; *Chesapeake, O. & S. W. R. Co. v. Higgins*, 85 Tenn. 620, 4 S. W. 47; *Luke v. Calhoun County*, 52 Ala. 115.

Messrs. Ross, Dwyer, & Hile, for respondent:

Deceased assumed the risk incident to the work he was performing at the time of the injury.

Jones v. Sutherland, 91 Wis. 590, 65 N. W. 496; *Sladky v. Marinette Lumber Co.* 107 Wis. 260, 83 N. W. 514; *Hasen v. West Superior Lumber Co.* 91 Wis. 208, 64 N. W. 857; *Erdman v. Illinois Steel Co.* 95 Wis. 11, 69 N. W. 993; *Larsson v. McClure*, 95 Wis. 533, 70 N. W. 662; *Osborne v. Lehigh Valley Coal Co.* 97 Wis. 27, 71 N. W. 814; *Powell v. Ashland Iron & Steel Co.* 98 Wis. 35, 73 N. W. 573; *Dahlke v. Illinois Steel Co.* 100 Wis. 431, 76 N. W. 362; *Dugal v. Chippeewa Falls*, 101 Wis. 533, 77 N. W. 878.

The mother, for whose benefit this action is prosecuted, was and is a nonresident alien. She has no vested property rights.

Schmidt v. Menasha Woodware Co. 99 Wis. 300, 74 N. W. 797.

This action cannot be maintained except on the theory that the general terms of our statutes include all nations.

Generally speaking, express statutory words are necessary to create rights in a nonresident alien.

Orr v. Hodgson, 4 Wheat. 453, 4 L. ed. 613; *Opinion of the Justices*, 7 Mass. 525; *McDonald v. Mallory*, 77 N. Y. 550, 33 Am. Rep. 664; *Deni v. Pennsylvania R. Co.* 181 Pa. 525, 37 Atl. 558; *Brannigan v. Union Gold-Min. Co.* 93 Fed. 164; *Adams v. British S. S. Co.* 8 Aspinwall, N. S. 420; *Colquhoun v. Heddon*, 62 L. T. N. S. 853, L. R. 25 Q. B. Div. 135; *The Zollverein*, Swabey, Adm. 96; *Jefferys v. Boosey*, 4 H. L. Cas. 815; *Rose v. Himely*, 4 Cranch, 279, 2 L. ed. 620; *Story*, Conf. L. §§ 7, 20, 98, 278; *Endlich*, Interpretation of Statutes, §§ 169-176.

Cassoday, Ch. J., delivered the opinion of the court:

It appears from the record, and is undisputed, that the deceased was thirty-six years of age, and a strong, healthy man, and had worked in the woods for about sixteen years, and had been in the employ of the defendant in the logging business as a teamster for a year. On the morning of July 6, 1900, he was set at work unloading logs from the cars upon the landing, and continued such work until he was killed in the forenoon of July 7, 1900. During that time he had assisted in unloading something like a dozen train loads of logs. The cars were 20 feet or more long, and the logs were about the same length. The facts attending the accident, as stated by the plaintiff's counsel, are to the effect that at the time of the accident four cars were brought in the train; and that, as the train was being pulled onto the banking ground, the deceased hooked the trip line onto the fit hook so as to unfasten

the wrapper chain, and then when the car was pulled ahead and set in place to be unloaded, he walked forward, and took hold of the trip line, and, while standing near the end of the car next to the engine, he gave the trip line a jerk, unfastening the wrapper chain, and, while stepping back to get out of the way, he stepped into a hole about 3 or 4 feet deep, and fell to the ground, and before he could get up the logs rolled off the car and over him, and injured him so that he died about three hours afterwards. The soil appears to have been a sandy slope from the railroad track back to the mill pond. The hole was 3 or 4 feet across the top, and 3 or 4 feet deep, and about 2 feet wide at the bottom. A brother of the deceased, who was sworn as a witness in behalf of the plaintiff, testified to the effect that anybody who looked at the hole could see it; that it was at least 2 feet down to the bark, and that anybody could see that who looked at it. The law applicable to such a state of facts is too well settled to require discussion. *Sladky v. Marinette Lumber Co.* 107 Wis. 250, 260, 261, 83 N. W. 514, and cases there cited; *Williams v. J. G. Wagner Co.* 110 Wis. 456, 86 N. W. 157; *Kreider v. Wisconsin River Paper & Pulp Co.* 110 Wis. 645, 657-659, 86 N. W. 662. We must hold that the deceased assumed the risk. *Ibid.*

2. It also appears from the testimony of the deceased's brother that the deceased left no issue, and was unmarried, and that his father was dead; that his mother was still living in Canada, where she had lived for many years; that she had no property; that the deceased had been accustomed to send his mother \$10 a month, when he could spare it; that she never lived in, nor became a citizen of, the United States; that his father lived nearly all his life at the same place where his mother did, and that he did not think he was ever a citizen of the United States. Upon such undisputed evidence it is claimed on the part of the defendant that, under our statute, this action cannot be maintained for the benefit of the mother of the deceased, a nonresident alien. The plaintiff claims the right to recover under §§ 4255, 4256, of the statute. The true meaning of those sections has been so fully and so recently considered by this court as to require nothing further to be here said, except to state the result and the application to the case at bar. Thus it has been held that "the right of action given by" those sections "to certain beneficiaries therein named is personal, and the damages are limited to a mere indemnity for the pecuniary injury resulting therefrom to such beneficiary, and the action therefor does not survive the death of such beneficiary, but abates upon his death, and cannot be revived in favor of his administrator." *Schmidt v. Menasha Woodware Co.* 99 Wis. 300, 74 N. W. 797. So, it has been held that "the liability created by § 4255, Rev. Stat. 1898, in case of the death of a person by an actionable injury for which such person could have recovered damages if death had not ensued, is for the benefit of certain relatives of the decedent men-

tioned in § 4256, Rev. Stat. 1898, and in default of such relatives there is no liability." *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L. R. A. 579, 77 N. W. 748, 78 N. W. 771. In that case it was further held that such right of action is separate and distinct from "the right of action for an injury to the person which survives under § 4253," even though death ensue from the injury. *Ibid.* See also *Hubbard v. Chicago & N. W. R. Co.* 104 Wis. 160, 80 N. W. 454; *Staefler v. Menasha Woodware Co.* 111 Wis. 483, 487, 87 N. W. 480. Here the contention is that the plaintiff, as the personal representative of the deceased, has the right to recover damages for the pecuniary loss which his mother sustained by reason of his death, notwithstanding such right of action did not survive under § 4253. Did the sections of the statutes thus relied upon give such right of action for the benefit of such nonresident alien? The question is not whether the legislature had power to give such right of action, but whether the sections relied upon did give such right of action. It is claimed that the right "to maintain an action and recover damages" is given by the statute in general terms, and is broad enough to include aliens. The Constitution declares that "no distinction shall ever be made by law between resident aliens and citizens, in reference to the possession, enjoyment, or descent of property." § 15, art. 1. As indicated, the sections in question have no reference to the possession, enjoyment, or descent of property, nor the rights of property, where the death is instantaneous or without conscious pain, but simply give a new right of action, outside and independent of property. It has been held in England that "prima facie, and unless the contrary be expressed, or be implied from the absolute necessity of the case . . . [every legislature must be presumed to have] intended by its enactments to regulate the rights which should subsist between its own subjects, and not in any way to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights." *Cope v. Doherty*, 4 Kay & J. 367. To the same effect is *The Zollverein*, Swabey, Adm. 96; *Jefferys v. Boosey*, 4 H. L. Cas. 815. "It is conceded," said Marshall, Ch. J., "that the legislation of every country is territorial; that beyond its own territory it can only affect its own subjects or citizens." *Rose v. Himely*, 4 Cranch, 279, 2 L. ed. 620. Mr. Story states the same rule thus: "It is plain that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others who are within its jurisdictional limits, and the latter only while they remain therein." Story, Conf. L. §§ 7, 20, 98, 278. The general rule is that statutes are "presumed to have no extraterritorial force." Endlich Interpretation of Statutes, § 169. The same author says that, "in general, statutes must be understood as applying to those only who owe obedience to the legislature which enacts them, and 60 L. R. A.

whose interests it is the duty of that legislature to protect; that is, its own subjects, including in that expression, not only natural born and naturalized subjects, but also all persons actually within its territorial jurisdiction; but that, as regards aliens resident abroad, the legislature has no concern to protect their interests, any more than it has a legitimate power to control their rights. In this view it would be presumed, in interpreting a statute, that the legislature did not intend to legislate either as to their rights or liabilities; and to warrant a different conclusion the words of the statute ought to be express, or the context of it very clear." *Id.* § 176. Upon this principle, and under a statute similar to ours, it was held in Pennsylvania that "a nonresident alien mother has no standing to maintain an action against a citizen of Pennsylvania to recover damages for the death of her son." *Deni v. Pennsylvania R. Co.* 181 Pa. 525, 37 Atl. 558. In that case the court used this language: "Our statute was not intended to confer upon nonresident aliens rights of action not conceded to them or to us by their own country, or to put burdens on our own citizens to be discharged for their benefit. It has no extraterritorial force, and the plaintiff is not within the purview of it. While it is possible that the language of the statute may admit of a construction which would include nonresident alien husbands, widows, children, and parents of the deceased, it is a construction so obviously opposed to the spirit and policy of the statute that we cannot adopt it." *Id.* pp. 528, 529, 181 Pa., p. 559, 37 Atl. So, it has been held in a case arising in Colorado that "nonresident aliens are not entitled to the benefit of the Colorado statute giving a right of action for death by wrongful act to the next of kin of the deceased, and cannot maintain an action thereunder." *Brannigan v. Union Gold-Min. Co.* 93 Fed. 164. Counsel for the plaintiff cite and rely upon *Mulhall v. Fallon*, 176 Mass. 266, 64 L. R. A. 934, 57 N. E. 386; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 63 N. E. 94; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Vetaloro v. Perkins*, 101 Fed. 393. In the first of these cases it was held that "a statute cannot impose duties upon a nonresident alien, but it may confer rights upon him." It is conceded by all that the legislature may confer such right of action upon nonresident aliens, but the question is, Has it done so by the general language employed in the statutes relied upon? In that case, Holmes, Ch. J., uses this language: "Under the statute the action for death without conscious suffering takes the place of an action that would have been brought by the employee himself if the harm had been less, and by his representative if it had been equally great, but the death had been attended with pain. . . . In the latter case there would be no exception to the right of recovery if the next of kin were nonresident aliens. It would be strange to read an exception into general words when the wrong is so nearly identical,

and when the different provisions are part of one scheme." *Id.* p. 269, 176 Mass., 54 L. R. A. 939, and p. 387, 57 N. E. In other words, that learned court puts such right of action in favor of the surviving relative, having no reference to the possession, enjoyment, or descent of property, upon the same footing with a right of action for damages which the deceased might have maintained had death not ensued, and which would have survived his death for the benefit of his estate; and hence has reference to the enjoyment or descent of property. As indicated, this is in direct conflict with the ruling of this court, where it is held that the right of action which survives the death for the benefit of the estate of the deceased is separate and distinct from the right of action for the loss to surviving relatives. The one has reference to property, or the rights of property, of the deceased. The other has reference only to the loss sustained by the surviving relatives. The Illinois case cited follows and adopts the reasoning of the Massachusetts case cited. In *Vetaloro v. Perkins*, 101 Fed. 393, the right of action arose under the statute of Massachusetts, one section of which is quoted, from which it appears that the two rights of action are put upon the same footing. That statute declares, in substance, that, "where an employee is instantly killed or dies without conscious suffering, as the result of the negligence of an employer," the surviving relative "may maintain an action for damages therefor, and may recover in the same manner, to the

same extent as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered." *Vetaloro v. Perkins*, 101 Fed. 394. This broad difference between our statutes and the statutes of Massachusetts makes the adjudication in cases arising under that or any similar statute inapplicable to the case at bar. The cause of action in *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439, arose under a statute of New Jersey, and the action was brought in New York, and removed to the Federal court, and was otherwise distinguishable. The precise question here involved was not there considered; but it was held that the plaintiff could recover. There are, however, numerous cases to the contrary. A few only are cited. *Woodward v. Michigan S. & N. I. R. Co.* 10 Ohio St. 121; *Texas & P. R. Co. v. Richards*, 68 Tex. 375, 4 S. W. 627; *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, 1 L. R. A. 804, 9 S. W. 540; *De Harn v. Mexican Nat. R. Co.* 86 Tex. 68, 23 S. W. 381; *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 31 L. R. A. 276, 33 S. W. 857.

We must hold that the sections of the statutes relied upon do not give to nonresident alien relatives of one who is instantly killed, or who dies without conscious pain, a right of action for the loss sustained by reason of such death.

The judgment of the Superior Court for Douglas County is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Re MUNICIPAL FUEL PLANTS.

(.....Mass.....)

Municipalities have authority to provide fuel for paupers; but they cannot be given power by the legislature to buy and sell fuel in competition with private enterprise, although it is scarce and high in price and the cost to consumers may be thereby reduced, unless there is such a scarcity as to create a general and wide-spread distress in the community, which cannot be met by private enterprise.

(*Loring, J., dissents in part.*)

(January 28, 1903.)

QUESTION submitted by the house of representatives for the opinion of the Supreme Judicial Court as to the power of the

NOTE.—For a case in this series holding that the purchase of coal or wood by a municipality for resale is not a public purpose for which public money may be expended, see *Opinion of the Justices (Mass.)* 15 L. R. A. 800.

As to right of municipality to incur debt for purpose of caring for inhabitants in time of epidemic, see *Thomas v. Mason* (W. Va.) 28 L. R. A. 727, and *note*, 60 L. R. A.

legislature to authorize municipal corporations to establish and operate fuel plants. *Power denied.*

The facts are stated in the opinion.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

In reply to your order of January 14, 1903, a copy of which is annexed, the justices of the supreme judicial court respectfully give the following opinion:

The first three questions submitted to us are substantially the same as the three submitted to the justices on April 12, 1892, the answers to which appear in 155 Mass. 601, 15 L. R. A. 809, 30 N. E. 1142. We adopt and reaffirm the doctrines stated in the first of the opinions then submitted to the house of representatives. A separate opinion, then submitted by another of the justices, rests upon the same principles as the first. We do not deem it necessary to restate the reasons and arguments which have led legislatures and courts to nearly, if not quite, uniform conclusions in regard to the attitude which the government should maintain, under existing constitutions, towards the transaction of common kinds of business

which can be conducted successfully by individuals without the use of any governmental function. These can be found in numerous published opinions of the courts, some of which are cited in the opinion first above mentioned.

It is established that under our Constitution private property cannot be taken from its owner except for a public use. This is equally true whether the property is a dwelling house, taken by right of eminent domain, or money demanded by the tax collector. The establishment of a business like the buying and selling of fuel requires the expenditure of money. If this is done by an agency of the government, there is no way to obtain the money except by taxation. Money cannot be raised by taxation except for a public use. Until within a few years, it generally has been conceded, not only that it would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing or selling goods in competition with individuals, but also that it would be a perversion of the function of government for the state to enter as a competitor into the field of industrial enterprise with a view either to the profit that could be made through the income to be derived from the business or to the indirect gain that might result to purchasers if prices were reduced by governmental competition. There may be some now who believe it would be well if business was conducted by the people collectively, living as a community, and represented by the government in the management of ordinary industrial affairs. But nobody contends that such a system is possible under our Constitution. It is plain, however, that taxation of the people to establish a city or town in the proprietorship of an ordinary mercantile or manufacturing business would be a long step towards it. If men of property, owning coal and wood yards, should be compelled to pay taxes for the establishment of a rival coal yard by a city or town, to furnish fuel at cost, they would thus be forced to make contributions of money for their own impoverishment; for, if the coal yard of the city or town was conducted economically, they would be driven out of business. A similar result would follow if the business of furnishing provisions and clothing, and other necessities of life, were taken up by the government; and men who now earn a livelihood as proprietors would be forced to work as employees in stores and shops conducted by the public authorities. Except for the severely onerous conditions from which we are now suffering, the causes of which arose outside of this state, beyond the reach of our legislative enactments, there is nothing materially different between the proposed establishment of a governmental agency for the sale of fuel and the establishment of a like agency for the sale of other articles of daily use. The business of selling fuel can be conducted easily by individuals in competition. It does not require the exercise of any govern-

mental function, as does the distribution of water, gas, and electricity, which involves the use of the public streets and the exercise of the right of eminent domain. It is not important that it should be conducted as a single large enterprise, with supplies emanating from a single source, as is required for the economical management of the kinds of business last mentioned. It does not even call for the investment of a large capital, but it can be conducted profitably by a single individual of ordinary means. We therefore have no hesitation in answering the first three questions in the negative.

The fourth question presents greater difficulties. Evidently it is suggested by the painful experiences in attempting to procure fuel, from which we have lately been suffering. The questions are accompanied by copies of bills and resolves pending before the general court, one of which is entitled "An Act to Authorize Cities and Towns to Buy and Sell Fuel in Certain Emergencies." This question must be interpreted in reference to the conditions to which it refers and in reference to the remedy which it suggests. The only proposed remedy to which it relates is the establishment by a city or town of fuel or coal yards, or the purchase of coal, wood, or other fuel for the purpose of selling it to the inhabitants of the city or town, or to others: The only condition referred to in the question is "an extraordinary emergency," and the conditions referred to in the accompanying bill are "a scarcity of fuel, and a pressing need thereof," and "a reasonable ground of belief that such a condition will occur in the near future." It hardly can be contended that the remedy suggested by the question can have any effect upon the primary cause of all our troubles in this particular. That cause relates to sources of supply beyond the boundaries of this state. There is no reason to expect that any similar cause will arise within this state to affect such small sources of supply as exist here. If it is possible to conceive of the existence of such a cause arising hereafter in this commonwealth, it can be dealt with effectually, not by the establishment of municipal yards for the sale of fuel at retail, but by some different kind of legislation which will make it impossible for either of two parties to a controversy like that which lately existed in a neighboring state to refuse all proposals for an equitable determination of the rights of the parties, and thus to bring both to the verge of ruin, and to imperil the industries, and to some extent the lives and health, of communities far away from the neighborhood of the conflict.

Looking to the possible consequences of the emergency for which a remedy is desired, they can be divided into four classes: First, an increase of the number of those who fall into distress and are in need of relief from the public authorities, because they have no means to buy fuel at a greatly increased price; secondly, increased expenditure, to their serious detriment, by those who have the means to buy; thirdly, a pos-

ability of a famine in fuel, such as to make it impossible reasonably to supply the needs of the community for comfortable living; fourthly, a scarcity falling short of a famine, but yet so great as to create widespread and general distress in the community, which cannot be met by private enterprise. The first of these possible consequences does not call for legislation. Cities and towns now have ample power to provide in any reasonable way for paupers, whether it be by furnishing out of door relief or by support in almshouses, and whether their need of relief is permanent or caused by a temporary condition. It is equally true that the second of these consequences does not justify taxation of those who do not have occasion to buy coal for the benefit of those who do. The use of the money of taxpayers for such a purpose would not be a public use, but a use for the special pecuniary benefit of those who happen to be affected by the state of the coal market. The third possibility—that of an absolute famine in fuel because of the lack of a supply and the impossibility of obtaining a sufficient quantity reasonably to satisfy the needs of the community—would be a condition which would warrant the expenditure of the public money under appropriate legislation, if the legislature could discover a way through public agencies to supply the people. But it is difficult to see how the method referred to in the question could produce this result. If at any time there was an impossibility of obtaining supplies because the supplies were not here, and could not be bought elsewhere, the opening of a city coal yard would furnish no relief. Such an establishment could not work a miracle of creation. In reference to an anticipated possible famine, the procurement and storage of a supply in time of plenty might be a remedy or an alleviation if the dread anticipation should become a reality, but the maintenance of a city fuel yard to conduct the business of buying and selling in a time of plenty would have no tendency to avert a famine, or to relieve from its consequences if one should come. We are not called upon to consider whether the legislature would deem it advisable, if it has the power, to authorize cities and towns to build storehouses in which to keep large quantities of fuel in anticipation of a possible famine. In regard to the fourth of the possible consequences,—a condition in which the supply of fuel would be so small, and the difficulty of obtaining so great, that persons desiring to purchase it would be unable to supply themselves through private enterprise,—it is conceivable that agencies of government might be able to obtain fuel when citizens generally could not. Under such circumstances we are of opinion that the government might constitute itself an agent for the relief of the community, and that money expended for the purpose would be expended for public use.

We do not think that we are expected to determine whether there might be any other conceivable emergency which would call for
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an affirmative answer to this question. Considering the question only in reference to the accompanying bills and the conditions to which we suppose it relates, our answer is in the negative, except in reference to the fourth of the above-mentioned possible consequences. As to that we are of opinion that, if the supposed conditions exist in any city or town, it may be authorized, under proper legislation, to sell fuel, with the limitations above stated, so long as these conditions continue.

MARCUS P. KNOWLTON.
JAMES M. MORTON.
JOHN LATHROP.
JAMES M. BARKER.
JOHN W. HAMMOND.
HENRY K. BRALEY.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

I concur with my brethren in the above opinion, excepting only in the answer given in case of the fourth possible consequence of a scarcity of fuel therein described. I have not been able to persuade myself that, under the circumstances there supposed, a city or town could get any fuel to sell, if action were taken in the way in which, in the opinion of my brethren, it is permissible to proceed. The question is the question of the absence of heat to support life in this latitude without a readjustment of the means of heating now generally in use. Coal in cities and wood or coal in towns may be taken to be a necessity of existence at the present time. Oil, or electricity developed by water power, until time for readjustment has come, cannot be taken to be an adequate method of heating. Were Massachusetts a coal-producing state, it may well be that to prevent such a scarcity of fuel as is described in the supposed case the state could intervene by regulating the business of mining coal, or other similar action, and thereby get coal for its inhabitants. But where there is such a scarcity of coal that individual enterprise is not able to buy it, with all the powers which are attendant on organizations of individuals and with the foresight in buying before the event which prospective profits and a due consideration for their fellows would dictate, it is inconceivable that any coal could be got by cities or towns, which could be sold by them, if the course of action were taken which my brethren are of opinion is open to the legislature to take. I understand that in the opinion of my brethren the authority cannot be given until the scarcity referred to has been found by the legislature to exist, and that the legislature cannot authorize a city or town to buy the fuel which it is to sell when the city or town is of opinion that the scarcity referred to exists, or is likely to exist. In my opinion, such a remedy is purely theoretical, and for that reason should not be considered in answering the questions which have been submitted to us. Necessity is the only ground for justifying the government in entering upon the busi-

ness enterprise of buying and selling coal. It is said that that necessity does not arise until it has been ascertained by the legislature that the situation is so desperate that individual enterprise has failed to provide coal for the public to buy. Where the situation is so desperate, I cannot conceive how the interference of government, which is not to exercise any governmental function, can hope to be successful.

In answer to the third possibility, my brethren have demonstrated that establishing a coal yard will not meet the necessity produced by a famine. The same argument applies to the remedy of the government's setting up a coal yard in case of the fourth possibility. The only other thing the government can do in that contingency is to pay the difference between the price which has to be paid to the dealers and the reasonable price which is within the means of some members of the public. Such a payment is not, in my opinion, a payment for a public use, unless made in the exercise of the right to care for paupers. I concur with my brethren that, fuel being a necessity, the state can provide its inhabitants

with it in case of a famine, in the exercise of the power which makes it its duty to take care of paupers. I also concur in their opinion that the state cannot authorize its cities or towns to go into the coal business because the price of fuel is likely to be high. Practically, the question must, in my opinion, be one of these two, and there is no middle course open.

The fourth question submitted is "pounded with a view to legislation upon the subjects therein mentioned, and in respect of divers bills and resolves pending before the general court, copies whereof are hereby ordered to be transmitted herewith." The bills and resolves transmitted with the question do not contemplate a famine in fuel, or a reasonable apprehension of a famine in fuel. For that reason the fourth question does not call for the expression of an opinion upon what can be done by the state under the power of assisting paupers in case of a famine in fuel, or an apprehension thereof. And, answering the fourth question as it was put, I answer it in the negative.

WILLIAM CALES LORING.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

581 DIAMONDS (Charles B. VAN ANTWERPEN *et al.*, Claimants, *Pliffs. in Err.*)

v.

UNITED STATES of America.

(119 Fed. 556.)

The attempted smuggling of goods into the United States will justify their forfeiture, as against the claims of one from whom they were obtained by the smuggler by a fraudulent purchase, which remains unrescinded.

(January 6, 1903.)

ERROR to the District Court of the United States for the Eastern District of Michigan to review a judgment condemning certain diamonds which were alleged to have been fraudulently imported without entry in the customhouse. *Affirmed.*

Statement by **Day**, Circuit Judge:

On the 6th of July, 1899, the district attorney of the United States for the eastern district of Michigan filed an information seeking to condemn 581 diamonds, alleged to have been forfeited. The record discloses that these goods were seized when about to be unlawfully imported and smuggled into the United States on June 28, 1899, at Detroit, Michigan, by one Louis Bush. Proceedings were duly had resulting in a judgment of forfeiture, which, so far as Bush is concerned, is not now contested. On the 22d

of January, 1900, the firm of Van Antwerpen & Van Den Bosch were allowed to intervene and plead in the case. These parties claimed the diamonds as against the right of the government to forfeit the same, and after further proceedings (not necessary to set out), were allowed to file an amended answer in the case, setting up their claim, which is as follows:

The amended answer of Charles B. Van Antwerpen and Jean C. Van Den Bosch, the respondents to the above action, and intervening therein, now and at all times hereinafter saving to themselves any and all manner of benefit and exception that can or may be had or taken to the errors, uncertainties, and imperfections in the libel of information filed herein, for answer thereto, or to so much thereof as these defendants are advised is material and necessary to make answer to, answering say:

First. That they are now, and were at all times hereinafter set forth, copartners doing business in the city of Antwerp, Kingdom of Belgium, under the firm name and style of Van Antwerpen & Van Den Bosch, dealing in diamonds, cut and uncut.

Second. That on or about the 6th day of June, in the year 1899, one Max Hurvich called upon respondents and stated that he desired to purchase diamonds from respondents.

Third. Said Hurvich represented to respondents that he had been theretofore engaged in the clothing business in the city of New York, United States of America, but had given up said business and was about to engage in the purchase and sale of dia-

NOTE.—As to right to recover for goods sold to smuggler, see some cases in *note* to *Graves v. Johnson* (Mass.) 15 L. R. A. 834.
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monds in said city of New York, and would make his office and place of business at the premises number nine (9) Maiden Lane, in said city; that he had considerable means, and was worth over and above all liabilities upwards of the sum of forty thousand dollars (\$40,000), and desired to purchase from respondents diamonds on credit, and was making these representations as to his financial standing for the purpose of inducing respondents to give him a line of credit.

Fourth. That for the purpose of inducing respondents to give him a line of credit he did then and there further represent to respondents that he had theretofore had business dealings with certain persons residing in the city of New York, and that all his dealings with such persons had been satisfactory to such persons; that so far as respondents can remember the persons so referred to by said Hurvich are Roseman, Maiden Lane, New York.

Fifth. As a further inducement why respondents should sell diamonds to said Hurvich, he represented to respondents that, in order to prepare to conduct and carry on the business in which he was about to engage, he needed large sums of cash, and therefore was not able to pay cash to respondents for all the goods which he at that time desired to purchase.

Sixth. Said Hurvich further represented to respondents that within six or seven months he would realize cash from some of his other property, and would be in a position to pay whatever there might be due on the unpaid purchase price of whatever diamonds he might purchase of respondents, and that his property was amply sufficient to enable him to raise all the funds that he might need for that purpose.

Seventh. Respondents, further answering, show that they believed each and every of said representations so made by said Hurvich to be true, and in reliance thereon, did on said 6th day of June, 1899, sell and deliver to said Hurvich, at said city of Antwerp, a large number of diamonds, to wit, upwards of five hundred and twenty-five (525) diamonds of various weights and measurements, to the value of four thousand two hundred and seventy-seven (4,277) pounds, twelve (12) shillings, and six (6) pence in English money, and in reliance upon the truth of said statements so made as aforesaid by said Hurvich did give said Hurvich credit on the purchase price of said diamonds to the extent of two thousand two hundred and seventy-seven (2,277) pounds, twelve (12) shillings, and six (6) pence in English money, and did agree to allow said Hurvich until the 18th day of December, 1899, to pay said last-mentioned sum, which said last-mentioned sum it was agreed said Hurvich should pay at London, England.

Eighth. Respondents, further answering, show that since the aforesaid purchase from respondents said Hurvich has admitted that at the time of said purchase he had formed the purpose of obtaining said diamonds without paying therefor the said sum of two thousand two hundred and seventy-seven

(2,277) pounds, twelve (12) shillings, and six (6) pence so remaining unpaid as aforesaid on the purchase price; and, further, that prior to the purchase of said diamonds, and at the time of the purchase thereof, he had formed the purpose of obtaining said diamonds without paying the full purchase price thereof, and with the intention and purpose of raising money on them by pledging or selling them to pawnbrokers or other persons who might be found willing to lend money thereon, or to purchase them at prices below their market value.

Ninth. Respondents, further answering, show that in furtherance of said fraudulent purpose and design said Hurvich did not pay said sum of two thousand two hundred and seventy-seven (2,277) pounds, twelve (12) shillings, and six (6) pence when the same became due as aforesaid, at the city of London, England, on the said 18th day of December, 1899.

Tenth. Respondents, further answering, say that they are advised and believe, and upon such information and belief they charge the fact to be, that said Hurvich, with said diamonds in his possession, proceeded directly from said city of Antwerp to the Dominion of Canada, and there met one Louis Bush, who, your respondents charge, was a confederate of said Hurvich, and did then and there turn over and deliver to said Bush the said diamonds so as aforesaid obtained from respondents.

Eleventh. Respondents, further answering, say that since their former answer herein said Hurvich has admitted that the said diamonds now in the possession of the said court are a portion of those so obtained as aforesaid from respondents.

Twelfth. Respondents, further answering, say that, had they known at the time said representations so made as aforesaid by said Hurvich to them to be untrue, they (said respondents) would not have surrendered and delivered up said diamonds to said Hurvich.

Thirteenth. Respondents, further answering, say that the said representations made by the said Hurvich to said respondents, and upon which said respondents relied in making the sale and delivery of said diamonds, were each and every of them false and untrue, and respondents show that said Hurvich was not on said 6th day of June, 1899, worth over and above all liabilities upwards of the sum of forty thousand dollars (\$40,000); and respondents further show that the dealings of said Hurvich with the persons mentioned in the fourth paragraph of this answer had not been satisfactory to said persons; and respondents, further answering, deny that said Hurvich on said 6th day of June, 1899, had any property whatsoever from which he could realize cash within six or seven months after said last-mentioned date, as he told respondents he would be able to do; and respondents deny that he had any property sufficient to enable him to raise all the funds that he might need for the purpose of paying these respondents.

Fourteenth. Respondents, further answer-

ing, show that said representations so made as aforesaid by said Hurvich were false and untrue, and made for the purpose of inducing these respondents to part with said diamonds to said Hurvich without receiving full payment therefor, and in furtherance of a fraudulent scheme and purpose theretofore entered into by and between said Hurvich, one Louis Bush, and one Louis Rosenberg of said city of New York, wherein and whereby it was agreed that said Hurvich should obtain said diamonds of your respondents by fraud and deceit, and when obtained he, with said Bush and said Rosenberg, should dispose of the same and the proceeds therefrom share with said Bush and Rosenberg.

Fifteenth. Respondents, further answering, say that they have been told that said Louis Rosenberg, named in the answer filed by said Louis Bush herein, is a pawnbroker in the city of New York, and they deny that said Louis Rosenberg is the owner of said diamonds, or any or either of them.

Sixteenth. Respondents, further answering, show that said five hundred and eighty-one (581) diamonds seized by the officers of the United States government, and which are the diamonds now being proceeded against in this honorable court, are some of the same diamonds so fraudulently obtained from them by said Hurvich.

Seventeenth. Respondents, further answering, show that they are prepared to repay, and do now tender, to this honorable court, or to such person as this court may determine to be entitled thereto, the said sum of two thousand (2,000) pounds, so paid as aforesaid by said Hurvich to respondents as a part of the purchase price of said diamonds.

Wherefore respondents pray that upon the final hearing herein this honorable court may order and decree that the diamonds seized herein be, and are, the rightful property of the respondents, and that the same be restored to them free of duty; and they pray for such other and further relief as this honorable court may deem just and proper under the circumstances.

The district attorney filed exceptions raising the question of the sufficiency of this answer to entitle the claimants to the relief prayed for. These exceptions were sustained by the district judge, who found that Van Antwerpen & Van Den Bosch were not entitled to the goods, but the same were adjudged forfeited to the United States. From this order and judgment a writ of error is taken to this court.

Argued before *Lurton, Day, and Severens*, Circuit Judges.

Mr. Peter Zucker, with *Messrs. Bowen, Douglas, & Whiting*, for plaintiffs in error:

Van Antwerpen & Van Den Bosch claim the right to rescind the sale and recover the diamonds.

Mechem, Sales, § 892; *Kirschbaum v. Jasspon*, 123 Mich. 314, 82 N. W. 69; *Turner v. Ward*, 154 U. S. 618, and 23 L. ed. 60 L. R. A.

391, 14 Sup. Ct. Rep. 1179; *Morris v. Posner*, 111 Iowa, 335, 82 N. W. 755; *Reid v. Cowdroy*, 79 Iowa, 169, 44 N. W. 351; *Fargo Gas & Coke Co. v. Fargo Gas & Electric Co.* 4 N. D. 219, 37 L. R. A. 593, 59 N. W. 1066.

Claimants had a right to rely upon the express statements made by Hurvich, and they were under no obligation to investigate and verify his statements.

Mead v. Bunn, 32 N. Y. 275; *McBeth v. Craddock*, 28 Mo. App. 380.

It will not do to insist that these representations must have been such as to deceive a man of ordinary care and prudence.

Chamberlin v. Fuller, 59 Vt. 247, 9 Atl. 832.

As these false statements were matters peculiarly within the knowledge of Hurvich and were positive affirmations, plaintiffs in error had the right to rely upon them.

Rorer Iron Co. v. Trout, 83 Va. 397, 2 S. E. 713; *Gammill v. Johnson*, 47 Ark. 335, 1 S. W. 610; *Endsley v. Johns*, 120 Ill. 469, 60 Am. Rep. 572, 12 N. E. 247.

A false statement as to debts and means, made to induce credit, is fraudulent.

Johnson v. Peck, 1 Woodb. & M. 334, Fed. Cas. No. 7,404; *Nichols v. Michael*, 23 N. Y. 264, 30 Am. Dec. 259; *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *McClellan v. Scott*, 24 Wis. 81; *Cooley, Torts*, § 487.

The fraud in such cases consists in the act or intent to deceive, accompanied by the insincerity of the promise.

Clarke, Constables' Manual, 327, 328, 333; *Crowley v. Langdon*, 127 Mich. 51, 86 N. W. 393; *Wells, Replevin*, p. 181.

A person who buys goods upon credit impliedly, if not expressly, represents that he intends to pay for them. If, therefore, he has then no such intention, and, *a fortiori*, if he has then a present intention not to pay for them, and conceals this fact from the seller, there is such a misrepresentation of a material fact as will entitle the seller, either to avoid the sale, or to maintain an action for deceit.

The condition of insolvency does not seem, upon principle, to be necessary.

Mechem, Sales, §§ 901-903; *Donaldson v. Farwell*, 93 U. S. 631, 23 L. ed. 993; *Watson v. Silsby*, 166 Mass. 57, 43 N. E. 1117; *Dow v. Sanborn*, 3 Allen, 181; *Reid v. Lloyd*, 67 Mo. App. 513; *Sprague, W. & Co. v. Kempe*, 74 Minn. 465, 77 N. W. 412; *Syracuse Knitting Co. v. Blanchard*, 69 N. H. 448, 43 Atl. 637; *Talcott v. Henderson*, 31 Ohio St. 162, 27 Am. Rep. 501; *Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L. R. A. 417, 6 C. C. A. 508, 18 U. S. App. 250, 57 Fed. 685.

Even though the United States might be said to have acquired title without notice of the defects in Hurvich's title to the diamonds, it can hardly be said that the United States has parted with value upon the faith of Hurvich's title, and upon the faith of his right to dispose of the diamonds.

Barnard v. Campbell, 58 N. Y. 76, 17 Am. Rep. 208.

No act of the fraudulent purchaser could

forfeit the goods as against plaintiffs in error, the true owners.

The Lady Essex, 39 Fed. 765; *United States v. 1,150½ Pounds of Celluloid*, 27 C. C. A. 231, 54 U. S. App. 273, 82 Fed. 627; *United States v. 208 Bags of Kainit*, 37 Fed. 326.

Obtaining goods under color of a purchase, by a dishonest concealment of an intent not to pay for them, is a fraud in law.

Syracuse Knitting Co. v. Blanchard, 69 N. H. 449, 43 Atl. 637; *Stewart v. Emerson*, 52 N. H. 301; *Mulliken v. Millar*, 12 R. I. 296; *Morris v. Talcott*, 96 N. Y. 100; *Hotchkiss v. Third Nat. Bank*, 127 N. Y. 329, 27 N. E. 1050; *The Lady Essex*, 39 Fed. 765.

Messrs. William D. Gordon and James V. D. Willcox, for defendant in error:

Hurvich acquired an absolute title to the diamonds, and the possession of the same with the consent of the claimants.

Leonard v. Davis, 1 Black, 476, 17 L. ed. 222; *Hatch v. Standard Oil Co.* 100 U. S. 124, 25 L. ed. 554; *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 27 L. ed. 319, 1 Sup. Ct. Rep. 178.

The title of the United States to the diamonds vested at the time of the unlawful importation.

Thacher's Distilled Spirits, 103 U. S. 682, sub nom. *Thacher v. United States*, 26 L. ed. 535.

The effect of unlawful importation, where the statute provides for a forfeiture, is to divest the owner of all property in the goods seized, and to vest the title to the same in the United States.

Henderson's Distilled Spirits, 14 Wall. 44, sub nom. *United States v. 100 Barrels Distilled Spirits*, 20 L. ed. 815; *Stevenson v. Neucham*, 13 C. B. 285; *Pease v. Gloahce*, L. R. 1 P. C. 222; *Oakes v. Turquand*, L. R. 2 H. L. 325; *Clough v. London & N. W. R. Co.* L. R. 7 Exch. 26.

The claimants had no right to rescind the contract, after an innocent third party had acquired an interest in the goods.

Donaldson v. Farwell, 93 U. S. 631, 23 L. ed. 993.

The United States had seized the goods, and the title thereto had become vested in the United States, before the claimants had even attempted a rescission of the contract of sale. The United States had, therefore, on June 28, 1899, as an innocent third party, acquired an interest in and a complete title to the diamonds, and the interest and title of the United States so acquired were and are superior to those of a bona fide purchaser.

Henderson's Distilled Spirits, 14 Wall. 44, sub nom. *United States v. 100 Barrels Distilled Spirits*, 20 L. ed. 815; *Origet v. United States*, 125 U. S. 240, 31 L. ed. 743, 8 Sup. Ct. Rep. 846; *United States v. The Three Friends*, 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495; *United States v. Stowell*, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244; *United States v. Certain Diamonds*, 30 Fed. 364; *United States v. A Lot of Jewelry*, 60 L. R. A.

59 Fed. 688; *Oliquot's Champagne*, 3 Wall. 114, 144, sub nom. *125 Baskets of Champagne v. United States*, 17 L. ed. 116, 121; *Stockwell v. United States*, 13 Wall. 546, 20 L. ed. 491.

Claimants sold the diamonds to Hurvich, and intrusted him with the possession of them for the purpose of bringing the same into the United States, and his relation to the claimants while proceeding to and into the United States with the diamonds in his possession would be that of an agent for the claimants for that purpose.

Agency may be implied from the relation of the parties.

Williams v. McKinley, 65 Fed. 4; 1 Am. & Eng. Enc. Law, 2d ed. p. 957.

The principal would be liable to third persons for all acts of an agent in his behalf.

1 Am. & Eng. Enc. Law, 2d ed. p. 1151; *Heenrich v. Pullman Palace Car Co.* 20 Fed. 100; *American Fur Co. v. United States*, 2 Pet. 358, 7 L. ed. 450; *Philadelphia & R. R. Co. v. Derby*, 14 How. 480, 14 L. ed. 502; *Higgins v. Watervliet Turnp. & R. Co.* 46 N. Y. 24, 7 Am. Rep. 293; *George v. Gobeys*, 128 Mass. 289, 35 Am. Rep. 376; *People v. Longwell*, 120 Mich. 311, 79 N. W. 484; *Atty. Gen. v. Siddon*, 1 Cromp. & J. 229.

Claimants placed it within the power of Hurvich to commit the unlawful acts complained of in this case, and gave him full power and authority to import the diamonds into the United States; and the liability of the claimants for his illegal acts in causing the diamonds to be smuggled into the United States is complete.

Reynolds v. Witte, 13 S. C. 5, 36 Am. Rep. 678; *Stockwell v. United States*, 13 Wall. 545, 548, 550, 20 L. ed. 494-496; *Dobbins Distillery v. United States*, 96 U. S. 401, 24 L. ed. 637; *United States v. The Malek Adhel*, 2 How. 210, 11 L. ed. 239; *United States v. Stowell*, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244; *United States v. The Three Friends*, 166 U. S. 50, 41 L. ed. 897, 17 Sup. Ct. Rep. 495.

Day, Circuit Judge, delivered the opinion of the court:

As between the government and Bush there can be no question that the right to forfeit the goods seized has been fully and clearly made out. Bush was caught with the diamonds concealed in his shoes. He denied all knowledge of how he came to be thus possessed of the gems when entering the port of Detroit. On his way to the prison he practically confessed his offense in saying to the officer: "Now, if you have got all that you are looking for, let me go." The only question of importance in the case is as to the sufficiency of the amended answer of Van Antwerpen & Van Den Bosch to require the diamonds to be returned to them, instead of forfeited to the government. If the diamonds were imported in violation of the statute, it is established law that the forfeiture dates from the time of the commission of the wrongful act, and binds the goods from that date. *Henderson's Distilled Spirits*, 14 Wall. 44, sub nom.

United States v. 100 Barrels Distilled Spirits, 20 L. ed. 815. For the purposes of this inquiry we may regard the amended answer of the claimants as true. Thus treated, it makes allegations sufficient to establish the fraudulent character of the purchase of the diamonds by Hurvich. It is distinctly averred that not only did Hurvich make false statements to induce the sale as to his financial responsibility, but it is alleged that the goods were purchased in furtherance of a fraudulent scheme not to pay for them. In such case there can be no doubt of the right of the vendor to rescind the sale and recover the goods in the hands of the vendee, or from others than innocent purchasers for value. The rule is thus tersely stated by Mr. Justice Davis, in *Donaldson v. Farrell*, 93 U. S. 631, 23 L. ed. 993; "The doctrine is now established by a preponderance of authority that a party not intending to pay, who, as in this instance, induces the owner to sell him goods on credit by fraudulently concealing his insolvency and his intent not to pay for them, is guilty of a fraud which entitles the vendor, if no innocent third party has acquired an interest in them, to disaffirm the contract and recover the goods. *Byrd v. Hall*, 2 Keyes, 647; *Johnson v. Monell*, 2 Keyes, 655; *Noble v. Adams*, 7 Taunt. 59; *Kilby v. Wilson*, Ryan & M. 178; *Bristol v. Wilsmore*, 1 Barn. & C. 514; *Stewart v. Emerson*, 52 N. H. 301; *Benjamin, Sales*, § 440, note of the American editor, and cases there cited."

In *Morrow Shoe Mfg. Co. v. New England Shoe Co.* 24 L. R. A. 417, 6 C. C. A. 515, 18 U. S. App. 256, 57 Fed. 693, it is said: "The seller, on discovering the fraud, may affirm the sale and sue for the price, or he may disaffirm it and reclaim the goods, or he may proceed criminally."

Notwithstanding the fraud, if there is an intention to part with the title, as well as the possession, the title passes subject to the right of the vendor to rescind the sale and reclaim the property. *Benjamin, Sales*, § 517. It is the intent of the law, so far as the forfeiture feature is concerned, to work that result only in cases where the owner, or some of those named in the statute, in his interest, are guilty of the attempt to defraud the revenue. *Origet v. United States*, 125 U. S. 240, 31 L. ed. 743, 8 Sup. Ct. Rep. 846; *United States v. 1,150½ Pounds of Celluloid*, 27 C. C. A. 231, 54 U. S. App. 273, 82 Fed. 627. The contention in this case is that neither Hurvich nor Bush were the owners of the goods, and that the real ownership as against the government's claim was in the claimants. When the goods were delivered to Hurvich under the circumstances detailed in the amended answer, he became the owner of them. He had the unqualified right to the possession thereof. He might lawfully remove them. That he intended to import them into the United States was well known to the vendors; not, it is true, with authority of the sellers to smuggle them into the country, but the control and possession of the property was delivered up, leaving the vendors to the right 60 L. R. A.

to rescind if they chose and recover the property. But there was always the chance that before the vendor became acquainted with the facts, or after knowledge and before action was determined upon, the one who had the ownership and control of the property might change its status so as to render ineffectual the right to rescind. The authorities agree that this would be the result of a sale to an innocent purchaser. It might be encumbered in favor of one who dealt in good faith on the strength of the apparent ownership and title.

The question made is: Can the vendor assert this right against the right of the United States to forfeit the goods, when the one thus clothed with title and possession has attempted to smuggle them into the country in violation of its revenue laws? The statute under which forfeiture is claimed by the government is as follows: "That if any owner, importer, consignee, agent, or other person shall make, or attempt to make, any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise, or the value thereof, in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates. And such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court." Act June 10, 1890, § 9, 1 Rev. Stat. Supp. p. 749 [U. S. Comp. Stat. 1901, p. 1895].

Statutes to prevent frauds upon the revenue are considered to be enacted for the public good, and therefore, although they impose penalties or forfeitures, are not to be construed like penal laws generally, but are to be fairly and reasonably construed, so as to carry out the legislative intent. *United States v. Stowell*, 133 U. S. 1, 33 L. ed. 555, 10 Sup. Ct. Rep. 244. It will be observed that the wrongful act, in order to work the forfeiture, must be done by "the owner, importer, consignee, agent, or other person." It is the attempt of this class of persons to evade the revenue laws of the United States; that is, to deprive the owner of his property as a punishment for such unlawful practice. In *United States v. 1,150½ Pounds of Celluloid*, 27 C. C. A. 231, 240, 54 U. S. App. 273, 82 Fed. 627, this court held that the descriptive words following the term "owner," to wit, "importer, consignee,

agent," all describe some person having a relation to the owner, and for whose conduct in respect to his goods he may be responsible. It was further held that "other person," as here designated, meant some one of the same general class as those described in the associated terms used in the statute. It is, then, primarily the "owner" who is to be reached and punished by the forfeiture. When these goods were attempted to be smuggled in by Bush, it is directly averred that he was acting in collusion with Hurvich. If the averments of the amended answer are true, the latter, the legal owner of the goods, was deep in this scheme to defraud the revenue.

The statute is plain and clear in visiting the penalty of forfeiture upon the owner and his importer, consignee, or agent. Are we at liberty to so modify the statute as to qualify this right by reading into it an exemption of property, which, though fraudulently imported by the owner, is in such situation as to title that, because of the fraud of the owner, another might have claimed the property and divested the title? We cannot perceive on what principle we may do this. When an act comes within the terms of the statute, working a forfeiture which may entail a hardship, it is nevertheless to be enforced, not repealed or modified, by the courts. The right of Congress to pass suitable revenue laws is conceded. It is the business of the courts to enforce such as are constitutionally passed. "Congress possesses the power to levy taxes, duties, imposts, and excises, and it is as clear that Congress may enact penalties and forfeitures for the violation of such laws as it is that Congress may levy the taxes or duties or pass laws for their collection, safe-keeping, and disbursement." *Henderson's Distilled Spirits*, 14 Wall. 44-59, *sub nom. United States v. 100 Barrels Distilled Spirits*, 20 L. ed. 815-817.

So frequent are attempted frauds upon revenue laws that the wisdom of Congress cannot be doubted in making strict regulations, which shall preserve the revenue of the government and prevent undue privileges to those who seek to enter the markets against the honest importer with the unlawful advantage of free goods gained by fraudulent acts and practices. When the owner has forfeited the goods by the unlawful acts shown in this case and admitted in the answer, the operation of the statute seems clear, and the only judicial function is to enforce the law. To permit secret claims of ownership to be asserted after forfeiture would be in plain violation of the written law.

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We have been unable to find any reported case which goes the length asked by the plaintiffs in error here. Two of those relied upon were reviewed by this court in *United State v. 1,150½ Pounds of Celluloid*, 27 C. C. A. 231, 54 U. S. App. 273, 82 Fed. 627. Of them Judge Lurton said: "In *United States v. 208 Bags of Kainit*, 37 Fed. 326, there was no doubt of the intent with which the trespasser had made the unlawful removal of the merchandise involved in that case. The forfeiture was defeated because the owner had not done or authorized these acts, and could, therefore, have had no guilty intent; and the case was decided against the government because it was necessary to show an actual intent on the part of the owner, or some person acting under his authority, or under whom he derived title. So, in the case of *The Lady Essex*, 39 Fed. 765, there was no doubt of the intent of the master of the *Lady Essex*. But the owner of the merchandise had not attempted to smuggle the goods into the United States, nor authorized the acts of those who had made such an attempt, and therefore could have no intent to defraud; and the language of §§ 12 and 16 of the act of [June 22] 1874, was construed by Judge Brown to 'apply to the owner of the goods, or his authorized agent, and not to a mere trespasser.'"

In *The Celluloid Case* the claim was made that the act of June 10, 1890 [Rev. Stat. § 2839, U. S. Comp. Stat. 1901, p. 1886], was broad enough to require the forfeiture of the goods, although the owner was wholly guiltless of any participation in the attempted fraud. In that case the celluloid was stored in Windsor. It was attempted to be smuggled into Detroit by an employee, who was acting without authority and for his own unlawful gain. It was held that this did not forfeit the goods as against the innocent owner. In all the cases cited the goods were not given over by the owner, but were taken wholly without authority and by acts which practically amount to theft or trespass. In holding against the claim of forfeiture the courts have construed the statute as not intending to take the property of the owner for the wrongful or criminal acts of others wholly unauthorized in the premises. In the present case, while there may have been the right to rescind this sale for fraud, it was the act of the owner in attempting to defraud the revenue which brings the case within the terms of the statute.

We find no error in the proceedings in the District Court, and its judgment will be affirmed.

MINNESOTA SUPREME COURT.

Fred J. FEWINGS, *Respt.*,

v.

Luther MENDENHALL, Receiver of Duluth
Street Railway Company, *Appt.*

(.....Minn.....)

*1. A carrier of passengers is charged with the highest degree of care and foresight consistent with the orderly conduct of its business, in respect to the protection of its passengers from injuries resulting from its acts or omissions, from the acts or omissions of its servants, and from the acts of strangers, who are under its control or direction; but it is charged with ordinary care and prudence only to guard against the lawless acts of third persons not under its direction or control.

2. Defendant was engaged in operating a street-car system, and his employees had inaugurated a general strike, which was bitterly contested, and resulted in much violence on the part of the lawless element among the strikers and their sympathizers. Defendant continued to operate his cars, and plaintiff was injured, when a passenger on one of them, by being struck upon the head by a stone thrown from the street into the car by a strike sympathizer, a person in no way under the control or direction of defendant. In this action to recover damages for such injury, it is held: (1) That defendant was not guilty of negligence in attempting to operate his cars during the strike; and (2) that the evidence is insufficient to justify a finding of actionable negligence against defendant as respects the act resulting in plaintiff's injury.

3. The rule of ordinary care and prudence is not so exacting as to require the person charged with its exercise to take unreasonable or extremely doubtful precautions to guard against the wilful and lawless acts of strangers. The failure of defendant to pull down the blinds of the car in which plaintiff was riding, or stretch a heavy canvas over the windows outside the car, was not negligence justifying a recovery against him.

(January 23, 1903.)

A PPEAL by defendant from an order of the District Court for St. Louis County denying a motion for new trial after verdict in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Greene & Wood, for appellant:

Contributory negligence in its legal significance is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is the proximate cause or occasion of the injury complained of.

*Headnotes by BROWN, J.

NOTE.—For former appeal in the above case, see *Fewings v. Mendenhall* (Minn.) 65 L. R. A. 713, and also note thereto on *Carrier's Liability for assault upon passenger by strikers*. 60 L. R. A.

Beach, *Contrib. Neg.* § 7; 21 Am. & Eng. Enc. Law, 2d ed. p. 457.

Assumption of risk and contributory negligence are not identical.

Olmscheid v. Nelson-Tenney Lumber Co. 66 Minn. 62, 68 N. W. 605; *Smith v. E. W. Backus Lumber Co.* 64 Minn. 447, 67 N. W. 358; *Lawson v. Truesdaile*, 60 Minn. 410, 62 N. W. 546; *McDonald v. Chicago, St. P. M. & O. R. Co.* 41 Minn. 439, 43 N. W. 380; *Mincer v. Connecticut River R. Co.* 153 Mass. 398, 26 N. E. 994; *Mellor v. Merchants' Mfg. Co.* 150 Mass. 362, 5 L. R. A. 702, 23 N. E. 100; *Thomas v. Quartermaine*, L. R. 18 Q. B. Div. 685; *Mundle v. Hill Mfg. Co.* 86 Me. 400, 30 Atl. 16; *Rogers v. Leyden*, 127 Ind. 50, 26 N. E. 210; *Narramore v. Cleveland, C. C. & St. L. R. Co.* 48 L. R. A. 68, 37 C. C. A. 499, 96 Fed. 298; *Limberg v. Glenwood Lumber Co.* 127 Cal. 598, 49 L. R. A. 33, 60 Pac. 176; *Alcorn v. Chicago & A. R. Co.* 108 Mo. 81, 18 S. W. 188.

Contributory negligence is exposing oneself to danger in a manner which a reasonably prudent man would not have done under like circumstances.

Berg v. Great Northern R. Co. 70 Minn. 272, 73 N. W. 648; *Flannagan v. St. Paul City R. Co.* 68 Minn. 300, 71 N. W. 397; *Pruke v. South Park Foundry & Mach. Co.* 68 Minn. 305, 71 N. W. 276; *Britton v. Northern P. R. Co.* 47 Minn. 340, 50 N. W. 231; *Hutchinson v. St. Paul, M. & M. R. Co.* 32 Minn. 398, 21 N. W. 212; *Taylor v. Manakato*, 81 Minn. 276, 83 N. W. 1084.

If the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in the injury of others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen.

Wallin v. Eastern R. Co. 83 Minn. 149, 54 L. R. A. 481, 86 N. W. 76; *Christianson v. Northwestern Compo-Board Co.* 83 Minn. 25, 85 N. W. 826; *Graney v. St. Louis, I. M. & S. R. Co.* 140 Mo. 89, 38 L. R. A. 633, 41 S. W. 246; *Ehrgott v. New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Lowery v. Manhattan R. Co.* 99 N. Y. 158, 52 Am. Rep. 12, 1 N. E. 608; *Bohrer v. Dienhart Harness Co.* 19 Ind. App. 489, 49 N. E. 299; *Gibney v. State*, 137 N. Y. 1, 19 L. R. A. 365, 33 N. E. 142; *Hoeppe v. Southern Hotel Co.* 142 Mo. 378, 44 S. W. 257; *Shearm. & Redf. Neg.* §§ 21, 61; *Beach, Contrib. Neg.* §§ 6, 7; *Pollock, Torts*, §§ 537, 566.

A party guilty of negligence may be responsible for consequences which he could not have foreseen. As contributory negligence is only a species of negligence, a party guilty of contributory negligence may be liable for consequences which he could not foresee.

A common carrier is not responsible for an injury caused, without negligence on his part, by the act of a stranger.

Pennsylvania R. Co. v. MacKinney, 124 Pa. 402, 2 L. R. A. 820, 17 Atl. 14.

And a railroad company is not required to have its car windows covered with wire screens to keep out missiles thrown by trespassers.

Missimer v. Philadelphia & R. R. Co. 17 Phila. 172.

As to actions of outsiders, the passenger is as well advised as the carrier, and has as much control.

Chicago & A. R. Co. v. Pillsbury, 123 Ill. 21, 14 N. E. 22; *Fredericks v. Northern C. R. Co.* 157 Pa. 103, 22 L. R. A. 306, 27 Atl. 689; *Thomas v. Philadelphia & R. R. Co.* 148 Pa. 180, 15 L. R. A. 416, 23 Atl. 989; *Illinois C. R. Co. v. Minor*, 69 Miss. 710, 16 L. R. A. 627, 11 So. 101.

The rule that the happening of an accident raises a presumption of negligence does not apply to a case where the accident results from the act of a stranger.

Smith v. St. Paul City R. Co. 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827; *Watson v. St. Paul City R. Co.* 42 Minn. 46, 43 N. W. 904; *Lucy v. Chicago G. W. R. Co.* 64 Minn. 7, 31 L. R. A. 551, 65 N. W. 944; *Mullan v. Wisconsin Central Co.* 46 Minn. 474, 49 N. W. 249; *Tall v. Baltimore Steam Packet Co.* 90 Md. 248, 47 L. R. A. 120, 44 Atl. 1007; *Shearn & Redf. Neg.* § 501.

The test of the utmost human care and foresight has never been adopted by the supreme court of this state as the rule of the duty of a carrier of passengers towards the passengers.

Dougherty v. Missouri P. R. Co. 97 Mo. 659, 11 S. W. 251; *Fordyce v. Withers*, 1 Tex. Civ. App. 540, 20 S. W. 766; *Louisville City R. Co. v. Weams*, 80 Ky. 420; *International & G. N. R. Co. v. Welch*, 86 Tex. 203, 24 S. W. 390; *Oviatt v. Dakota C. R. Co.* 43 Minn. 300, 45 N. W. 436.

It is not the duty of a common carrier of passengers to protect such passengers from such condition of violence as is alleged by the plaintiff in this case to have existed in Duluth during the few days succeeding the strike.

Green v. Ashland Water Co. 101 Wis. 258, 43 L. R. A. 117, 77 N. W. 722; *Barney v. Winona & St. P. R. Co.* 117 U. S. 228, 29 L. ed. 858, 6 Sup. Ct. Rep. 654; *Sours v. Great Northern R. Co.* 81 Minn. 337, 84 N. W. 114; *Clark v. Hershey*, 52 Ark. 473, 12 S. W. 1077; *Hughes v. Detroit, G. H. & M. R. Co.* 78 Mich. 399, 44 N. W. 396; *Union School Twp. v. First Nat. Bank*, 102 Ind. 472, 2 N. E. 194; *Wisson v. Devine*, 80 Cal. 385, 22 Pac. 224; *McGrath v. Great Northern R. Co.* 76 Minn. 146, 78 N. W. 972, 80 Minn. 452, 83 N. W. 413.

Mr. John Jenswold, Jr., for respondent:

Assumption of risk, properly speaking, exists where the plaintiff "consents to waive a duty or a breach of duty, and undertakes whatever risk there is, without hope of compensation if the risk results in loss; whereas contributory negligence is some careless act or omission which brings about, and is the proximate cause of, an injury.

Dresser, Employer's Liability, §§ 82, 86.

Assumption of risk is regarded as a special

of contributory negligence, the expressions being used interchangeably.

Hazen v. West Superior Lumber Co. 91 Wis. 208, 64 N. W. 857; *Darcey v. Farmers' Lumber Co.* 87 Wis. 249, 58 N. W. 382; *Clark v. St. Paul & S. C. R. Co.* 28 Minn. 123, 9 N. W. 581; *Wright v. St. Cloud*, 54 Minn. 94, 55 N. W. 819.

Before an employee can be held to have assumed an unusual and extraordinary risk, he must know, or have reasonable means of knowing, the precise danger to which he is exposed, and which he thus assumes; and the mere vague surmise of the possibility of danger is not enough to take the case from the jury.

Kennedy v. Lake Superior Terminal & Transfer R. Co. 93 Wis. 32, 66 N. W. 1137; 20 Am. & Eng. Enc. Law, 2d ed. p. 122; *Russell v. Minneapolis & St. L. R. Co.* 32 Minn. 230, 20 N. W. 147; *Cook v. St. Paul, M. & M. R. Co.* 34 Minn. 45, 24 N. W. 311; *Hungerford v. Chicago, M. & St. P. R. Co.* 41 Minn. 444, 43 N. W. 324; *Wuotilla v. Duluth Lumber Co.* 37 Minn. 153, 33 N. W. 551; *Bengtson v. Chicago, St. P. M. & O. R. Co.* 47 Minn. 486, 50 N. W. 531; *Newhart v. St. Paul City R. Co.* 51 Minn. 42, 52 N. W. 983; *Snedden v. Libera*, 65 Minn. 337, 68 N. W. 36; *Stiller v. Bohn Mfg. Co.* 80 Minn. 1, 82 N. W. 981; *Estelle v. Lake Crystal*, 27 Minn. 243, 6 N. W. 775; *Maloy v. St. Paul*, 54 Minn. 398, 56 N. W. 94; *Wright v. St. Cloud*, 54 Minn. 94, 55 N. W. 819.

The prior appeal furnishes the law of the case.

Hansen v. Gaar, S. & Co. 68 Minn. 68, 70 N. W. 853; *Savannah, F. & W. R. Co. v. Boyle*, 115 Ga. 836, 59 L. R. A. 104, 42 S. E. 242; *Parshall v. Minneapolis & St. L. R. Co.* 35 Fed. 649.

Brown, J., delivered the opinion of the court:

Action to recover damages for personal injuries alleged to have been occasioned by the negligence of defendant. Plaintiff had a verdict in the court below, and defendant appealed from an order denying his motion for judgment notwithstanding the verdict, or for a new trial. The case was here on a former appeal. 83 Minn. 237, 55 L. R. A. 713, 86 N. W. 96. The facts are there fully stated, but for an understanding of the questions presented at this time a restatement is necessary; but in doing so we follow substantially the statement there made. Defendant, as receiver of the Duluth Street Railway Company, has operated its street-car system since July, 1898. On May 2, 1899, a general strike was inaugurated by the employees of the company, which was maintained until after the plaintiff was injured as hereinafter stated. Defendant procured other men to take the place of the strikers, and continued to operate the street-car lines. On Sunday evening, May 7th, plaintiff took passage in a car operated by defendant, at Superior, in the state of Wisconsin, for Duluth. While the car was going northerly along Garfield avenue in Duluth, and as it approached Michigan street,

a young man, not in any way connected with the company as an employee or otherwise, not a passenger, nor in any way under the control or direction of defendant, threw a stone at the car in which plaintiff was so riding, which passed through the window thereof, and struck plaintiff on the head, whereby he was seriously injured. He brought this action to recover damages because of such injury, basing his claim to a right of recovery on the alleged negligence of defendant in failing to take proper precautions to prevent injuries from acts of this kind. The complaint alleges, among other things, that plaintiff, as a passenger, was exposed to imminent danger by reason of the violent and unlawful acts of the strikers and their sympathizers; and that defendant, in the exercise of due care and prudence, could have prevented the same and protected plaintiff and the other passengers in the car from injury; but, notwithstanding this, that he carelessly failed and omitted to warn the plaintiff of any danger, or to make any effort or take any precautions to prevent injury to him, or to provide or make use of any barriers or other means to avert injury resulting from acts of the kind complained of. It was held on the former appeal that defendant was not guilty of negligence in attempting to operate the cars during the strike, and that the trial court erred in submitting that question to the jury. The cause was remanded, and again tried, resulting in a finding by the jury that defendant was guilty of negligence in failing to take proper precautions to avert and prevent accidents of the kind complained of, and returned a verdict for plaintiff for the sum of \$10,383.33.

The principal question presented for consideration at this time is whether the evidence is sufficient to sustain a finding of actionable negligence against defendant. Other questions are discussed in the briefs of counsel, but the evidence upon this question appears to be substantially the same as on the former trial, and it is due to the parties that the question be now met and determined, that the litigation may be brought to an end, and further expense obviated. In the consideration of this question it is proper to inquire, first, the degree of care required of defendant under circumstances like those shown, for, in determining whether he was guilty of negligence, which was the proximate cause of plaintiff's injury, we must be guided by the rules of duty and care necessary to be exercised in such cases. Though no exceptions were taken to the charge of the trial court, wherein the jury was instructed that defendant was charged with the highest degree of care and foresight for the protection of plaintiff while a passenger, the question is properly presented by the errors assigned on the motion for a new trial and by the assignments of error in this court. The strike which the employees of the street railway company inaugurated was bitterly and stubbornly contested, and resulted in much lawlessness and acts of violence on the part of the strikers and their

sympathizers towards the property of the company, with the purpose in view of preventing the operation of the cars and forcing a submission to their terms. The act which resulted in plaintiff's injury was not committed by an employee, a fellow passenger, or by one having any connection or relation whatever with the company, but by a boy who was in no way under the control of the company or any of its agents. He was a sympathizer with the strikers, and by his act of lawlessness no doubt thought he was aiding their cause. The question as to the extent of responsibility of a carrier of passengers and the degree of care essential to be exercised for their protection as to acts committed by strangers to the carrier has never, prior to this case, been presented to this court for its decision. The general rule that such carrier is required to exercise the highest degree of care and foresight consistent with the orderly conduct of its business is one that has very uniformly been applied by all the courts in cases where the act or omission complained of as negligence was in respect to a matter under the control of the carrier. A carrier of passengers is required to exercise the highest care in respect to the equipment of its road and transportation facilities, in providing suitable machinery for the operation of its cars, in the employment of competent and faithful servants and agents, and generally, as to all acts pertaining in any way to the conduct of its affairs in furtherance of its undertaking as a carrier; and in respect to such matters the rule has always been very strict. It is insisted by plaintiff that the rule applies to this case, and that it was the duty of defendant, in view of the condition surrounding the strike, to exercise the utmost care and vigilance to guard and protect plaintiff, while a passenger, from acts of violence at the hands of persons, whether under the control of defendant or not, and from dangers from whatever source arising. It is insisted that the act of the boy who threw the stone in question was such as the defendant might, from the circumstances and conditions of the strike, reasonably have anticipated, and could have been guarded against and prevented. We have been cited to no case where the high degree of care essential as to matters within the control of the carrier has been extended and applied with all its force and strictness to acts of persons beyond its control, and for which it was in no way responsible, directly or indirectly. Some cases cited and relied upon by plaintiff do not sustain his position. *Easton v. Central R. Co.* 62 N. J. L. 7, 56 L. R. A. 508, 42 Atl. 486, was a case where the company had permitted hackmen to occupy its premises in soliciting trade, and a passenger was injured by their misconduct. The company was held liable; but the decision is placed upon the ground that the company had the right to control its depot grounds and buildings, and, as it permitted hackmen to occupy the same, was responsible to passengers for injuries resulting from their misconduct, if it failed to exercise proper

care to protect them. *Wright v. Chicago, B. & I. R. Co.* 4 Colo. App. 102, 35 Pac. 196, was a case where the company permitted disorderly persons to become and remain passengers, and is not in point. It was the clear duty of the company in that case to exercise the highest care to prevent injury to passengers from the acts of disorderly passengers, and the strict rule was clearly applicable to the facts there shown. It is well settled that a carrier of passengers is bound to exercise the utmost care to maintain order and guard and protect passengers from violence and insult at the hands of fellow passengers, from such injury and insult as might reasonably have been anticipated or naturally expected to occur, in view of all the circumstances and the number and character of passengers on board. *Lucy v. Chicago, G. W. R. Co.* 64 Minn. 7, 31 L. R. A. 551, 65 N. W. 944; *Mullan v. Wisconsin Central Co.* 46 Minn. 474, 49 N. W. 249. The rule is founded upon the fact that the company has control of its cars and premises, a police supervision to prevent violations of the law, and may lawfully eject and remove disorderly persons therefrom, or arrest or otherwise suppress and control them. In *Savannah, F. & W. R. Co. v. Boyle*, 115 Ga. 836, 59 L. R. A. 104, 42 S. E. 242, the employees of the company had taken two tramps, who were concealed about the train, and trespassers thereon, and placed them in the express car, tying them there with a rope about their wrists. During their struggle to escape one of them shot the express agent in charge of the car. The general principle of law was applied, and it was held that it was the duty of the railway company to protect its passengers from insult or injury at the hands of a fellow passenger, or third person, when the circumstances are such that a person in the exercise of that degree of diligence known to the law as extraordinary care would see and apprehend that the passenger was in danger of injury. It was accordingly held that, as the company had placed the tramps in the car, and assumed charge and control of them, the strict rule of care essential in such cases applied, and protected the express agent to the same extent as a passenger. *Empire Transp. Co. v. Philadelphia & R. Coal & I. Co.* 35 L. R. A. 623, 23 C. C. A. 564, 40 U. S. App. 157, 77 Fed. 919, and *Huas v. Kansas City, Ft. S. & G. R. Co.* 81 Ga. 792, 7 S. E. 629, were cases involving the liability of carriers of freight, and are not in point, for a different rule of responsibility exists as to such carriers. In respect to goods, a carrier is an insurer for the safe transportation and delivery of the property intrusted to it for carriage, and is relieved from liability only by the act of God or the public enemy. A carrier of passengers is not an insurer of their safety, and is liable to them for such injuries as result from its failure to exercise proper care for their protection. A number of other cases are cited and relied upon by counsel, wherein the general rule is stated substantially as contended for by him, namely, that a carrier

of passengers is required to exercise the utmost vigilance to protect passengers from insult and injury from whatever cause arising; but an examination of them shows that they are all cases where the carrier had permitted third persons to enter upon its premises or cars, and thereafter failed to exercise a proper degree of care to restrain them from acts of lawlessness; and there can be no question as to their soundness. The question before us is whether this strict rule applies to the act of a stranger, such as here shown. That it does not is sustained by some very respectable authorities. *Tall v. Baltimore Steam Packet Co.* 90 Md. 248, 47 L. R. A. 120, 44 Atl. 1007; *Pennsylvania R. Co. v. MacKinnon*, 124 Pa. 462, 2 L. R. A. 820, 17 Atl. 14; *Thomas v. Philadelphia & R. R. Co.* 148 Pa. 180, 15 L. R. A. 416, 23 Atl. 989; *Chicago & A. R. Co. v. Pillsbury*, 123 Ill. 21, 14 N. E. 22. In our opinion, it would be unjust to require a carrier of passengers, either a steam or a street railway company, to exercise the utmost care and vigilance to guard and protect passengers from criminal acts of strangers, persons not under its control or subject to its orders, and for whose acts it is in no way responsible. And we hold, without further discussion, as respects the acts of such strangers, that carriers of passengers are liable to the exercise of ordinary care and prudence only. Such carrier is liable for all injuries resulting from the acts of strangers which are reasonably to be anticipated under the particular circumstances, and which ordinary care and prudence, had it been exercised, would have prevented.

It remains to consider whether, within this rule, the evidence is sufficient to sustain the charge against defendant of actionable negligence, the burden to show which was upon the plaintiff. The familiar rule that evidence of an accident is prima facie proof of negligence against the carrier can have no application to this case, because the act resulting in the injury did not arise from any act or omission of defendant. The presumption of negligence in such cases arises only where the thing causing the injury complained of was under the exclusive control of the carrier or its servants or employees. The act complained of here being that of a stranger, it was incumbent upon plaintiff affirmatively to prove that defendant failed to exercise proper care to prevent it. The question arises whether the evidence was sufficient to charge defendant with negligence in this respect. What, if anything, should he have done, which he did not do, to protect plaintiff and other passengers from acts of this kind? It is claimed that he should have pulled down the blinds of the car in which plaintiff was riding. It appears that the material of the blinds inside the windows was leather, and the contention is that, had they been pulled down, the stone thrown by the boy would not have passed into the car, or in any way injured the plaintiff. It is also contended that the defendant might have protected plaintiff from this injury by stretching a heavy can-

was over the windows outside the car; and, lastly, that he should have informed plaintiff of the conditions existing during the strike, the fact that violent and lawless acts were being committed by the strikers and their sympathizers. As to the first two theories of plaintiff,—pulling down the inside blinds and stretching a heavy canvas outside the car over the windows,—we are of the opinion that the failure to do this is not sufficient on which to base a recovery. It would be unreasonable to require of defendant so to act, and though, perhaps, the suggested precaution would have prevented such an injury as that here complained of, and conceding that defendant was bound to anticipate an unlawful act of this kind, the rule of ordinary care and prudence is not so exacting as to require one charged with its exercise to take doubtful or unreasonable precautions to guard against the lawless acts of strangers. And, besides, it is reasonably clear that, had defendant pulled down the blinds of the car in question, or covered the outside of the windows with a heavy canvas, it would have provoked the strikers and their sympathizers to acts of greater violence. They would naturally have assumed, on seeing a car pass in that condition, that either the officials of the road or nonunion or scab employees were aboard, and it would have incited the lawless element to greater efforts to prevent the operation of the cars. As to the third proposition,—that defendant was in duty bound to notify plaintiff of the violent conduct of some of the strikers and their sympathizers,—we are unable to concur with plaintiff, for these reasons: He was a resident of Duluth, and had occasion daily to use the cars of defendant in passing to and from his home to his place of business. He knew that a strike had been inaugurated by the street-car employees, and the conditions surrounding it were so notorious and generally known as to preclude the possibility, even, that he was not fully aware of the lawlessness of the strikers. He was in as good a position as was defendant to anticipate dangers of this kind. Whatever defendant knew concerning the acts of the strikers was

obvious and apparent to all persons of ordinary intelligence. Defendant exercised the precaution of inducing the city authorities to swear in a large force of extra policemen to prevent criminal acts of the strikers and their sympathizers. If they were unable to control the mob and prevent acts of this kind, we are at a loss to know what defendant could have done to prevent them, short of armoring his cars, and this, of course, would be so unreasonable a requirement as not to be thought of for a moment. It is not reasonable to suppose that, had defendant giving this warning to plaintiff, it would have had the effect claimed for it,—protected him.

Our conclusions upon the whole record are that the evidence relied upon is insufficient to charge defendant with actionable negligence. The questions on which we have disposed of the case at this time were not intended to be covered by the former decision. Some expressions in that opinion may be construed as announcing the law on certain phases of the case, but they were not so intended. But one question was there decided, and any expressions therein which may be inconsistent with the conclusions now arrived at must be regarded as *obiter*. Some members of the court, when the case was here before, were in some doubt upon the principal question now decided, but those doubts have been overcome fully by the further argument and consideration of the case, and we are all agreed upon the conclusions now reached.

The action has been tried several times. The facts are practically undisputed. The only claims of negligence relied upon by plaintiff in support of the verdict are those just pointed out, and for the reason that the failure of defendant in these respects is not sufficient to charge him with negligence within the rule of ordinary care and prudence, the case should be brought to an end, and further litigation and expense obviated by a final judgment.

It is therefore ordered that the order appealed from be reversed, and the cause remanded to the court below, with directions to enter judgment for defendant.

NEBRASKA SUPREME COURT.

Harriet M. EATON, Appt.,

v.

Eli EATON.

(.....Neb.....)

- *1. There can be no valid marriage without the consent of the state, and a positive prohibition does not evidence consent.
2. It is not the policy of the divorce

*Headnotes by SULLIVAN, CH. J.

NOTE.—As to effect of right to appeal from divorce decree on party's right to remarry, see also *Re Smith* (Wash.) 17 L. R. A. 573, and note, and *McLennan v. McLennan* (Or.) 38 L. R. A. 863.

For cohabitation as proof of marriage, where 60 L. R. A.

law to encourage bigamy. Therefore a person who has been released from wedlock by judicial decision is not permitted to indulge the hope that, if he marry again in violation of the statute, the marriage will be valid unless the decision is reversed.

3. Comp. Stat. 1901, § 45, chap. 25, is preventive, and not merely repressive. It incapacitates a divorced person from contracting a valid marriage while the judgment divorcing him is subject to possible reversal.

4. In this state the only essential of a

It begins unlawfully, see *Collins v. Voorhees* (N. J. Eq.) 14 L. R. A. 364, and note; *Schuchart v. Schuchart* (Kan.) 50 L. R. A. 180; *Barker v. Valentine* (Mich.) 51 L. R. A. 787; and *University of Michigan v. McGuckin* (Neb.) 57 L. R. A. 917.

valid marriage is the free consent of competent parties to live together in the marriage relation.

5. Where a marriage contracted in good faith is void by reason of some removable impediment, the parties may, after the impediment has been removed, become lawfully united by continuing to live together with the intention of sustaining toward each other the relation of husband and wife. And even where the existence of the impediment and its removal were unknown, continued cohabitation evidences consent to live in wedlock.

6. Changes or modifications of existing statutes as an incidental result of adopting a new law, covering the entire subject to which it relates, are not forbidden by § 11, art. 3, of the Constitution.

(December 17, 1902.)

APPPEAL by plaintiff from a judgment of the District Court for Cass County in favor of defendant in an action brought to compel defendant to furnish her with maintenance and support, in which defendant, by way of cross bill, set up the nullity of the alleged marriage. *Reversed.*

The facts are stated in the opinion.

Mr. D. O. Dwyer, for appellant:

Appellee's cross bill did not pray for annulment of the marriage. The prayer was that he be divorced. Divorce and annulment of the marriage obligations are two separate and distinct reliefs. The one implies a valid marriage contract, the other just the opposite. It was necessary for appellee to pray for the relief he was seeking, and the court could not grant him another and different relief.

Neb. Code Civ. Proc. § 92; *Johnson v. Mantz*, 69 Iowa, 710, 27 N. W. 467; *Walker v. Walker*, 93 Iowa, 643, 61 N. W. 931; *Rush v. Brown*, 101 Mo. 586, 14 S. W. 735; *Johns v. Northwestern Mut. Relief Asso.* 87 Wis. 111, 58 N. W. 76.

The prayer for relief determines the character of the action.

Keens v. Gaslin, 24 Neb. 310, 38 N. W. 797.

The judgment in this case should be reversed for the reason that § 45, chap. 25, Comp. Stat., does not contain words of nullity, and consequently the marriage was not void.

Catterall v. Sweetman, 1 Rob. Eccl. Rep. 304; *State v. Walker*, 36 Kan. 297, 59 Am. Rep. 556, 13 Pac. 279.

Even if the statute against divorced persons marrying again within six months was an impediment at the time the marriage in this case was entered into, the court having found that the parties to this action lived together as husband and wife for the period of six months after such impediment had ceased, consequently the marriage is good in law, and valid.

Poole v. People, 24 Colo. 510, 52 Pac. 1025; *Renfrow v. Renfrow*, 60 Kan. 277, 56 Pac. 534; *Bishop, Marr. & Div.* § 970; *Burker v. Valentine*, 125 Mich. 336, 51 L. R. A. 787, 84 N. W. 297; *McReynolds v. State*, 5 Coldw. 18; *Williams v. Kilburn*, 88 Mich. 30 L. R. A.

279, 50 N. W. 293; *People v. Booth*, 121 Mich. 131, 79 N. W. 1100; *Gibson v. Gibson*, 24 Neb. 398, 39 N. W. 450; *University of Michigan v. McGuckin*, 62 Neb. 489, 57 L. R. A. 917, 87 N. W. 180; *Bailey v. State*, 36 Neb. 808, 55 N. W. 241.

In the absence of a direct finding that appellant had a husband living at the time of the marriage in controversy in this action, the law will presume death of a former husband or wife as against the presumption of marriage.

Johnson v. Johnson, 114 Ill. 611, 55 Am. Rep. 883, 3 N. E. 232; *Lockhart v. White*, 18 Tex. 110; *Spears v. Burton*, 31 Miss. 548; *Kelly v. Drew*, 12 Allen, 107, 90 Am. Dec. 138; *Greensborough v. Underhill*, 12 Vt. 606; *Harris v. Harris*, 8 Ill. App. 57; *Dixon v. People*, 18 Mich. 84; *Rea v. Tucyning*, 2 Barn. & Ald. 386; *Coal Run Coal Co. v. Jones*, 127 Ill. 386, 8 N. E. 865, 20 N. E. 89; *Boulden v. McIntire*, 119 Ind. 574, 21 N. E. 445; *Squire v. State*, 46 Ind. 459; *Teter v. Teter*, 101 Ind. 129, 51 Am. Rep. 742.

Mr. William Hayward, for appellee:

The trial judge, sitting as a court of equity, and having once acquired jurisdiction over the persons, as well as the subject-matter, in controversy, would have a perfect right to grant the relief found in the decree entered in this case.

Earle v. Earle, 27 Neb. 277, 43 N. W. 118; 16 Enc. Pl. & Pr. p. 804.

Specific words of nullity are in no sense essential. Our statute not only declares such remarriage unlawful, but subjects all violators thereof to all the penalties for bigamy.

Ovitt v. Smith, 68 Vt. 35, 35 L. R. A. 223, 33 Atl. 769; *Owen v. Bracket*, 7 Lea, 448; *Itc Borrowdale*, 28 Hun, 336; 14 Am. & Eng. Enc. Law, p. 504.

(On petition for rehearing.)

This case is one where the marriage was meretricious and fraudulent in its inception. Where an illicit marriage is entered into by mutual consent of the parties, cohabitation after the removal of the impediment will not ratify the previous contract and thus constitute a valid marriage by consent.

Randlett v. Rice, 141 Mass. 385, 6 N. E. 238; *Collins v. Voorhees*, 47 N. J. Eq. 555, 14 L. R. A. 364, 22 Atl. 1054; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737; *Floyd v. Calvert*, 53 Miss. 37; *Williams v. Williams*, 46 Wis. 464, 32 Am. Rep. 722, 1 N. W. 98; *Reading F. Ins. & Trust Co.'s Appeal*, 113 Pa. 204, 57 Am. Rep. 448, 6 Atl. 60.

Sullivan, Ch. J., delivered the opinion of the court:

On the 5th day of March, 1900, Harriet M. Eaton filed her amended petition in the district court of Cass county against Eli Eaton, alleging her marriage to him on March 21, 1899, alleging various acts of extreme cruelty on the part of the defendant toward her, the failure of her health in consequence thereof, and her enforced abandon-

ment of her home; that she was without means of support; that defendant was possessed of valuable property, describing it; and concluding with a prayer for maintenance and support. The defendant answered, admitting the marriage as alleged by plaintiff, and denying generally all the other allegations of the petition, and in addition pleaded, by way of cross bill, two causes of action: (1) That the marriage between himself and the plaintiff was brought about through the solicitation of the plaintiff, who made various false representations regarding herself, upon the faith of which he married her; that she was guilty of many acts of cruelty, more or less specifically set out; and (2) it was alleged that plaintiff had imposed upon the defendant in inducing him to marry her when by an act of the legislature (Comp. Stat., § 45, chap. 25), she was under a disability, having obtained a decree of divorce from a former husband, Enis Goff, on the 2d day of December, 1898, in Johnson county, Nebraska. Defendant also alleged that he was illiterate, and knew nothing of the act of the legislature referred to at the time of his marriage; that plaintiff represented herself as having been for a long time divorced from her former husband, and that she was capable of entering into a valid contract of marriage with defendant; that he first learned of the time when said divorce was obtained on March 9, 1900, and that plaintiff's marriage with the defendant was in violation of law, and therefore void. The cross bill concluded with a prayer for divorce and for general relief, but subsequently, by leave of court, the prayer was amended. It now asks "that the said unlawful marriage between this defendant and said plaintiff be decreed a nullity, and that, should said court find said marriage lawful and valid, that said defendant be granted a divorce." Plaintiff denied generally the allegation of the cross bill, and pleaded that defendant had full knowledge of the divorce proceedings in Johnson county; that plaintiff knew nothing of the statute prohibiting remarriage until the filing of defendant's cross bill; that such act was unconstitutional and void; that her marriage with defendant was in good faith, and that, for a number of months after the expiration of six months from the decree of divorce, plaintiff and defendant continued to live and cohabit together as husband and wife, and thereby the marriage contract was ratified; that defendant, having had full knowledge of the divorce proceedings in Johnson county, was estopped from alleging such matters as ground for a divorce from plaintiff; and that the district court of Johnson county had jurisdiction to grant and did grant a divorce to plaintiff, without any limitations or conditions. A trial was had, which resulted in a finding that there was no equity in plaintiff's petition, and a finding against defendant on his first cause of action. Upon defendant's second cause of action the court found that the parties were married March 21, 1899; that plaintiff, Harriet M. 60 L. R. A.

Eaton, obtained a decree of divorce from Enis Goff in Johnson county December 2, 1898; that said decree of divorce was obtained without the knowledge of Eli Eaton; that the parties to this suit lived together until November 30, 1899; that the decree of divorce from Enis Goff, the former husband of plaintiff, was obtained less than six months prior to the marriage of plaintiff and defendant; that such marriage was in violation of law and a nullity; and that defendant had no knowledge of the time when the prior divorce was procured until just prior to the commencement of this action. The marriage between plaintiff and defendant was adjudged to be null and void, and was set aside, and defendant released from all marital obligations on account of such marriage. To secure a reversal of this decree, the case has been brought to this court by appeal.

The evidence taken at the trial not having been preserved, the only question presented by the record is whether, upon the pleadings and findings of fact, the decision in favor of defendant is right.

The force and effect of the marriage ceremony performed March 21, 1899, has been much discussed by counsel, and will be first considered. *Sess. Laws 1885, §§ 1 and 2, chap. 49*, are as follows:

"Sec. 1. It shall be unlawful for any person who shall obtain a decree of divorce to marry again during the time allowed by law for commencing proceedings in error or by appeal for the reversal of such decree, and, in case such proceedings shall be instituted, it shall be unlawful for the defendant in error or appellee to marry again during the pendency of such proceedings, and a violation of this act shall subject the party violating it to all the penalties of other cases of bigamy.

"§ 2. No proceedings for reversing, vacating, or modifying any decree of divorce, except in so far as such proceedings shall affect only questions of alimony, property rights, custody of children, and other matters not affecting the marital relations of the parties, shall be commenced, unless within six months after the rendition of such decree, or in case the person entitled to such proceedings is an infant, a person of unsound mind, within six months, exclusive of the time of such disability."

The first section of this act, which is § 45 of the divorce law, has the effect, we think, of disqualifying a divorced person from marrying while the decree of divorce is subject to possible reversal. The will of the lawgiver is the law; and the avowed object of the legislature, as expressed in the title of the act of 1885, was "to prevent the marriage of divorced persons during the time allowed for proceedings to reverse the decree of divorce and during the pendency of such proceedings." As there can be no valid marriage without the consent of the state, the easy and obvious way for the state to prevent objectionable marriages is to withhold its consent. By the legislation we are considering, the state has said to divorced

persons: "Thou shalt not;" and in this we are unable to discover any implication of consent. The legislature aimed at prevention. We know this, because it has said so. But it is contended that, while aiming at prevention, it fell short of its object, and achieved only repression, and that the law, instead of putting an end to obnoxious practice, acts as a mere deterrent,—a check and curb on the matrimonial impulse. Public policy no doubt favors the marriage contract, but it will not do to distort a plain statute in order to bring it into harmony with what the court may conceive to be the sound policy. The legislature determines the policy of the state, and, it having declared in express terms that it intended by the act of 1885 to stop an evil practice, the courts are not warranted in holding that the object of the law was, after all, not to stop the practice, but only to discourage it. The legislative intent is no less clearly expressed in the body of the act than in the title. "A violation of this act," it is declared, "shall subject the party violating it to all the penalties as in other cases of bigamy." The use of the word "other" in this clause is significant. It plainly implies that, notwithstanding the divorce, the former relation is regarded as still continuing. It implies that a divorced person, until his status becomes unalterably fixed, is to be considered and dealt with as though the decree of divorce had not been rendered. The statute, as we interpret it, is in harmony with the trend of modern legislation, and promotive of social order and sound morality. It is important—it is, indeed, of the highest importance—that the civil and social condition of every person be at all times fixed and certain. There should be no needless uncertainty about the status of any individual. Whether a person is capable or incapable of contracting a valid marriage should be clearly understood, and should not be made to depend upon a judicial decision to be rendered at some indefinite time in the future. The validity of a divorce depends ultimately, at the option of the defeated party, upon the decision of this court. Before the case is appealed, and while it is pending here, it is uncertain whether the parties are single or married. This being so, it would be manifestly unwise, when prevention is so easy, to permit a second marriage to be contracted during the time the case is appealable or while the appeal is pending. The intention of the legislature, as evidenced by the act of 1885, is not, we think, in doubt; but, if it were, we should, for the peace of society, and on considerations of morality and convenience, resolve the doubt against the capacity of a divorced person to marry during the proscribed period. The great importance of having the social status of every person fixed and certain at all times has induced some courts (*Lucas v. Lucas*, 3 Gray, 136; *Bascom v. Bascom*, 7 Ohio, pt. 2, p. 125; *Sheafe v. Sheafe*, 29 N. H. 269) to hold that decrees of divorce are not reviewable. Others, for the same reason, have held, by strained constructions, that a stat-

ute providing for the opening of judgments rendered upon constructive service has no application to actions for divorce. *O'Connell v. O'Connell*, 10 Neb. 390, 6 N. W. 467; *Lewis v. Lewis*, 15 Kan. 181; *McJunkin v. McJunkin*, 3 Ind. 30; *Gilruth v. Gilruth*, 20 Iowa, 225. In Missouri there is an express statute providing that decrees of divorce shall not be subject to review. *Richardson v. Stowe*, 102 Mo. 33, 14 S. W. 810. Some states have statutes which declare that a divorced person shall be incapable of contracting marriage for a specified time, or while the case is appealable, and during the pendency of the appeal. Marriages contracted in violation of these statutes have been uniformly held to be null and void. *Smith v. Fife*, 4 Wash. 702, 17 L. R. A. 573, 30 Pac. 1059; *McLennan v. McLennan*, 31 Or. 480, 38 L. R. A. 863, 50 Pac. 802; *Wilhite v. Wilhite*, 41 Kan. 154, 21 Pac. 173. With respect to statutes which evidence the legislative intent only by a prohibition and a penalty, it may be said that two antithetical views find support in the adjudged cases. The supreme court of Mississippi recently reviewed these cases, and, while holding that a marriage contracted in violation of law is not void, felt constrained to admit that the weight of judicial authority was opposed to its conclusion. *Crawford v. State*, 73 Miss. 172, 35 L. R. A. 224, 18 So. 848. In reading the Mississippi case and other cases holding that the state impliedly consents to a marriage which it has forbidden, one cannot escape the conclusion that the hardship of the particular case exerted an undue influence on the decision, and that the hardships resulting from reversed sentences of divorce were altogether overlooked. It may seem harsh and cruel to render a decision which will involve an innocent person in guilt and bastardize after-begotten children, but these consequences are inevitable. They result from either interpretation of the law. A divorced person about to marry again should not be without positive knowledge of the legal consequence of his act. He should be given to understand that he is under absolute, and not under possible or probable, disability, and that any marriage which he may contract will be certainly null. He should not be encouraged to commit bigamy by being permitted to marry in the belief that the new union will be valid unless the decree by which he was divorced shall be reviewed and reversed. If we were to hold that marriages contracted in violation of the statute are valid, the decision would, in our judgment, be a powerful incentive to crime. Such marriages would be multiplied, and the evils resulting from reversed divorces would be incalculable. We have no disposition to construe the legislative interdiction as sovereign acquiescence in disguise, for, it seems to us, such a construction would be grounded neither on sound reason nor enlightened sentiment.

Another question to be determined is the legal effect of the cohabitation of the parties after the impediment to their marriage had been removed. In this state the only

thing essential to a marriage is the consent of parties capable of contracting. *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *Gibson v. Gibson*, 24 Neb. 394, 39 N. W. 450. Even a license is not indispensable. *Haggin v. Haggin*, 35 Neb. 375, 53 N. W. 209. If the parties live together, and intend to sustain towards each other the relation of husband and wife, they are, in the absence of any impediment fatal to that relationship, legally married. The marriage between the plaintiff and defendant was an attempt made in good faith to form a legal union. Both intended to live in wedlock. In the absence of an impediment to the marriage, no ceremony would have been required; the mutual consent of the parties would have been sufficient. When the impediment was removed, why may not consent be inferred from continued cohabitation? This exact question arose in the House of Lords in the case of *DeThoren v. Atty. Gen.*, reported in L. R. 1 App. Cas. 686, decided in 1876. The question turned upon the legitimacy of certain children born to a man and woman who were married in Scotland, going through a public ceremony in a church, believing the marriage a valid one. The man, however, had been divorced, and the time for appeal from the nisi decree had not expired at the time of the public marriage. In that case the contention was that the inference of marriage was rebutted, because the parties had commenced living together in pursuance of an invalid marriage, and that the consent deducible from cohabitation must be referred to the ineffectual ceremony. But it was there decided that "it must be inferred that the matrimonial consent was interchanged as soon as the parties were enabled by the removal of the impediment to enter into the contract;" and, further: "The ceremony which took place, although invalid, was undoubtedly a consent by the parties to live together as husband and wife. And their subsequent cohabitation was a proof of continued consent." In the case cited, Lord CLEMSWORTH said: "Taking the facts as they are stated in the case, and applying the law to them, the court of sessions is of opinion that, assuming the ignorance of the parties of the invalidity of the ceremony of marriage during the whole period of their cohabitation, yet, after the removal of the impediment to their marriage, and before the birth of their eldest son, they became married persons. I agree entirely with this opinion." In *Rose v. Clark*, 8 Paige, 574, Chancellor WALWORTH says: "It appears, however, from decisions in our own courts, as well as in England, that a subsequent marriage may be inferred from acts of recognition, continued matrimonial cohabitation, and general reputation, even where the parties originally came together under a void contract of marriage." *Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *Blanchard v. Lambert*, 43 Iowa, 229, 22 Am. Rep. 245. In the recent case of *University of Michigan v. McGuckin*, 62 Neb. 489, 57 L. R. A. 917, 89 N. W. 778, it was held, although the relations of the parties were originally mere-

tricious, that marriage is a social status, the existence of which may be shown by conduct clearly indicating free consent and mutual intention to live in wedlock. Upon the conceded facts in this case, our conclusion is that the parties, by continuing to live together in the matrimonial relation, contracted a valid marriage.

The contention that § 45 of the divorce law is violative of the Constitution is overruled, on the authority of *DeFrance v. Harmer* (Neb.) 92 N. W. 159.

The judgment is reversed, and the cause remanded for further proceedings.

Rehearing denied.

Peter BERLETT, *Plff. in Err.*,
v.

Edwin D. WEARY.

(.....Neb.....)

- *1. The law of this state makes no distinction as to the service of summons between members of the legislature and other persons.
2. A member of the legislature may in a proper case be served with summons while at the seat of government for the purpose of attending the legislative session.

(January 8, 1903.)

ERROR to the District Court for Lancaster County to review a judgment in favor of plaintiff in an action brought upon an account for merchandise against one who claimed that he was exempt from service of process as a member of the legislature. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. J. H. Broady and Clark & Allen, for plaintiff in error:

It is against public policy to permit an advantage to be taken of a person simply because he is in the public service.

Section 60 of the Code reads as follows: "Every other action must be brought in the county in which the defendant, or some one of the defendants, resides, or may be summoned."

A party can always "be found" where a sheriff can reach him to summon him, but he cannot always "be summoned" where he can be found. When the party is away from home in the public service, or in service only quasi public, as attending to his own cases in court, he cannot be sued and summoned so as to force him into some new litigation away from home.

Palmer v. Roican, 21 Neb. 452, 59 Am. Rep. 844, 32 N. W. 210; *Mayer v. Nelson*,

*Headnotes by LORINGIER, C.

NOTE.—As to privilege of members of Congress and state legislatures from arrest or suit, see also *Rhodes v. Walsh* (Minn.) 23 L. R. A. 632, and *note*, and *Worth v. Norton* (S. C.) 45 L. R. A. 563.

54 Neb. 434, 74 N. W. 841; *Hicks v. Besuchet*, 7 N. D. 429, 75 N. W. 793; *Cameron v. Roberts*, 87 Wis. 291, 58 N. W. 376; *Jacobson v. Hosmer*, 76 Mich. 234, 42 N. W. 1110; *Mattheus v. Tufts*, 87 N. Y. 570; *Sebring v. Stryker*, 10 Misc. 289, 30 N. Y. Supp. 1053; *Andrews v. Lembeck*, 46 Ohio St. 38, 18 N. E. 483; 16 Enc. Pl. & Pr. p. 968.

This immunity does not depend upon statutory provisions.

Mattheus v. Tufts, 87 N. Y. 570.

But upon the principles of fairness and sound policy.

Bassett v. Gunsolas, 12 Ohio L. J. 319; *Geyer v. Irwin*, 4 Dall. 107, 1 L. ed. 762; *Lyell v. Goodwin*, 4 McLean, 35, Fed. Cas. No. 8,616; *Bolton v. Martin*, 1 Dall. 301, 1 L. ed. 146.

Messrs. Love & Frampton, for defendant in error:

There is neither a rule of "public policy," nor any other rule, which exempts legislators from civil process in the absence of statute or constitutional exemption.

Rhodes v. Walsh, 55 Minn. 542, 23 L. R. A. 632, 57 N. W. 212; *Johnson v. Offutt*, 4 Met. (Ky.) 19; *Gentry v. Griffith*, 27 Tex. 461; *Howard v. Citizens' Bank & T. Co.* 12 App. D. C. 222; *Merrick v. Giddings*, MacArthur & M. 55; *Barilett v. Blair*, 68 N. H. 232, 38 Atl. 1004.

Lobingier, C., filed the following opinion:

This action was commenced in the district court of Lancaster county, December 31, 1900, on an account for merchandise alleged to have been sold by plaintiff to defendant. The latter filed objections to the jurisdiction and a motion to quash the service, alleging that he was a member of the Nebraska state senate which convened on January 1, 1901, and that he was in Lancaster county on the day previous for the sole purpose of attending the legislative session. The motion and objections were overruled, and defendant then answered, again claiming privilege from service in Lancaster county, admitting the purchase of most of the merchandise, but not from plaintiff, alleging that the items charged in the account were "unreasonable, unjust, and exorbitantly high," and that part of the goods were damaged when received. The answer also contained a general denial. There was a trial to a jury, which found for the plaintiff; but the only evidence contained in the bill of exceptions relates to the matters set forth in the objections to jurisdiction and motion to quash, and the petition in error from the judgment rendered on the verdict is restricted in its assignments to the same matters.

Defendant contends that he was not voluntarily in Lancaster county on the day when he was served, but was there in pursuance of official duty; that his presence might have been compelled by a call of the house; and that, while he might have been served at his home in Nemaha county, the service in Lancaster county was unauthorized and

invalid. This contention calls for an investigation as to the extent of a legislator's immunity from judicial process. It is conceded that there are no constitutional or statutory provisions in this state which exempt a legislator from the service of civil process, and the exemption here claimed, if it exists at all, must be derived from the common law. We are first to inquire, then, What was the common-law rule? From time immemorial members of Parliament were privileged from arrest during the sessions of that body and for a reasonable period before and after, so as to permit them to attend and return home. The privilege appears to have originated in the necessity of maintaining the independence of the legislature as against the aggressions of the Crown, and of preventing the coercion of members by the use or abuse of criminal process. The privilege was not, however, restricted to such process, but extended to all cases where the member's person might be taken into custody. So long, therefore, as imprisonment for debt was in vogue, the peers and commons were exempt from this also, and from such of the civil writs as were executed by seizing and confining the person of the defendant. Thus, as late as 1841, it was held to be irregular to issue a *capias ad satisfaciendum* (which was executed by imprisoning the defendant until the debt and costs were paid) against a member of the house of commons in an action of assumpsit. *Cassidy v. Stewart*, 2 Mann. & G. 437.

The freedom of members from process of this kind, whether criminal or civil, rests upon the highest grounds of public policy. As was said by Lord Denman, Ch. J., in *Stockdale v. Hansard*, 9 Ad. & El. 115: "The proceedings of Parliament would be liable to continual interruption at the pleasure of individuals, if everyone who claimed to be a creditor could restrain the liberty of the members." Another ground, as pointed out by a learned constitutional historian, is "the supreme necessity of attending to the business of Parliament, the King's highest court." Stubbs, Const. Hist. Eng. § 452. But this immunity and the reasons therefor appear to have existed only as to process which required the detention of the person. After a diligent search we have been unable to find a single English case which decides that a member of Parliament or other legislative officer is exempt from the service of a mere summons at any time. That such exemption was sometimes claimed by the members themselves is true, but we find no instance where it was recognized and enforced by the courts. And, as was said by the eminent chief justice in the case last cited: "When this privilege was strained to the intolerable length of preventing the service of legal process, or the progress of a cause once commenced, against any member during the sitting of Parliament, or of threatening any who should commit the smallest trespass upon a member's land, though in assertion of the clear right, as breakers of the privileges of Parliament,

these monstrous abuses might have called for the interference of the law, and compelled the courts of justice to take a part." Mr. Justice Wylie, in his learned and exhaustive opinion in *Merrick v. Giddings*, MacArth. & M. 55, mentions two cases (*Doane v. Welsh* and *Ryver v. Cosins*) in the reign of Edw. IV. (1461-1483) where "it was held that the privilege from arrest during the session of Parliament did not protect him from being impleaded, but only that he should not be arrested." In *Benyon v. Evelyn*, O. Bridg. 324, decided about the middle of the seventeenth century, it was declared to be "lawful to sue out an original against a member of the House of Commons, although Parliament is sitting." It is true that some of the text writers appear to announce a different rule as applicable to this period. In 4 Co. Inst. 24, there is a passage where the author, in speaking of a member of Parliament, says: "The serving of the said citation did not arrest or restrain his body, and the same privilege holdeth in case of subpoena." This passage, however, has been much criticized and declared to be unwarranted from the record on which the author relies. "The truth is," observed Chief Justice Bridgman in *Benyon v. Evelyn*, O. Bridg. 324, "my Lord Coke's treatise of the jurisdiction of Parliament is a posthumous work and, though I shall attribute as much to his learning in the law as to any sages in the law whatsoever, yet there not being that freedom in former times of having copies of the records at large as hath been since, when he comes to cite them he is guided by abstracts, which occasions miserable mistakes and by the *modus tenendi parliamentum*, which, as to the time of making it, was most certainly a counterfeit piece; so that there are a multitude of errors in his chapter concerning Parliaments, and in particular both these records are grossly mistaken." See also Hatsell, *Precedents*, p. 6; *Merrick v. Giddings*, MacArth. & M. 59. So, in 3 Stubbs, *Const. Hist. Eng.* §§ 452 *et seq.*, the author speaks of members of Parliament as being privileged "from being impleaded in civil suits, from being summoned by subpoena or to serve on juries," etc.; but, while he mentions many cases of exemption from criminal process, he refers to no instance of immunity from the mere service of civil process, and it is evident that he is here speaking of privileges claimed by the members, rather than those recognized and enforced by the courts.

But whatever may have been the law at this time, and whatever the claims of the members, Parliament itself at an early period undertook to restrict the exemption process which restrained the liberty of the member. In 1649 the house of commons ordered that in case of a legal proceeding against a member he should receive written notice of its pendency, and that then "the member is enjoined to give appearance and proceed as other defendants in case of like suits or actions ought to do, or, in default thereof, both their estates and persons shall

be liable to any proceedings in law or equity as other members of the commonwealth." See *Journal of House of Commons* quoted in *Hoppin v. Jenckes*, 8 R. I. 457, 5 Am. Rep. 597. In 1700 Parliament passed an act providing for the commencement of actions and the issue and service of process against members of Parliament, "at any time from and immediately after the dissolution or prorogation of any Parliament until a new Parliament shall meet or the same be reassembled, and from and immediately after any adjournment of both houses of Parliament for above the space of fourteen days, until both houses shall meet or reassemble." In 1709 a statute was enacted which provided that "any person or persons shall and may, at any time, commence and prosecute any action or suit in any court of record, or court of equity, or of admiralty, and in all causes matrimonial and testamentary, in any court having cognizance of causes matrimonial and testamentary, against any peer or lord of Parliament of Great Britain, or against any of the knights, citizens, and burgesses, and the commissioners for shires and burghs of the House of Commons of Great Britain for the time being, or against their or any of their menial or any other servants, or any other persons entitled to the privilege of Parliament of Great Britain; and no such action, suit, or any other process or proceeding thereupon, shall at any time be impeached, stayed, or delayed, by or under colour or pretence of any privilege of Parliament."

Thus the law stood at the separation of the colonies from the mother country. If, as has been declared in some jurisdictions, the English statutes enacted prior to the separation are to be treated as part of the common law (6 Am. & Eng. Enc. Law, 2d ed. p. 279; *Sedgw. Stat. & Const. Law*, p. 18; *Ex parte Blanchard*, 9 Nev. 101), it is plain that the common law of the United States affords no immunity to legislators from the service of ordinary civil process. This, at least, appears to be recognized in the authorities. In *Peters v. League*, 12 Md. 58, 71 Am. Dec. 622, where a member of the Baltimore city council claimed exemption from the service of an attachment while in the discharge of his duties, the court said: "It is worthy of remark that peers and members of Parliament were liable at common law to be sued, though they could not be arrested on writs of capias. Here the process was an attachment, with a summons to the party as garnishee. Therefore the supposed analogy between members of the Baltimore city councils and of Parliament would not aid the appellant." Judge Cooley, in his *Constitutional Limitations*, 5th ed., p. 161, says: "By common parliamentary law, the members of the legislature are privileged from arrest on civil process during the session of that body, and for a reasonable time before and after, to enable them to go to and return from the same. By the Constitutions of some of the states, this privilege has been enlarged, so as to exempt the persons of legislators from

any service of civil process." It was the view of this eminent commentator, therefore, that the common-law privilege needed to be "enlarged" before it could include exemption from the service of ordinary civil process. Among the states in which the privilege was thus "enlarged" were Connecticut, South Carolina, and Virginia, and under these remedial statutes were decided the cases of *King v. Coit*, 4 Day, 129, *Tillinghast v. Carr*, 4 McCord L. 162, and *M'Pherson v. Nesmith*, 3 Gratt. 237, though in the last named it was held that an exemption from all other process whatsoever would not prevent the issue of the writ, but merely suspend the service during the privilege. Under the Constitutions of most of the other states, as well as of the Federal government, however, the common-law rule, as Parliament had left it by the statute of 1769, was re-enacted. See 1 Stimson, Am. Stat. Law, p. 68. From the earliest Constitutions of the older states it has been carried forward until it has reached our own, where it appears as § 12 of article 3. And in *State ex rel. Benton v. Elder*, 31 Neb. 184, 10 L. R. A. 796, 47 N. W. 710, this court, in construing and commenting on that clause, declares that "the provision of the Constitution is merely a re-enactment of the common law."

We are cited to *Bolton v. Martin*, 1 Dall. 296, 1 L. ed. 144, where the court of common pleas of Philadelphia county held that a member of the convention called for the purpose of ratifying the Federal Constitution was exempt from the service of a summons during the session of that body. The opinion does not profess to follow any English case, but relies upon a passage in Blackstone's Commentaries, the status of which is thus explained in the instructive opinion heretofore quoted in *Merrick v. Giddings*, MacArth. & M. 63: "At that time seven, perhaps eight, editions of Blackstone's Commentaries had been issued. The two first editions were issued prior to the year 1770. The first was issued in 1765 from the Clarendon Press, Oxford. So, also, was the second. Both of these contain the passage as cited by Judge Shippen and quoted above; but after the passage by Parliament of the act of 10th of George III., chap. 50, in the year 1770, Mr. Justice Blackstone with his own hand struck out that passage and changed its reading to the present form, which is as follows: 'Neither can any member of either house be arrested and taken into custody, unless for some indictable offense, without a breach of the privilege of Parliament,' omitting the words 'or served with any process,' on which Chief Justice Shippen relied for his decision in *Bolton v. Martin*, eighteen years after the change had been made, and after numerous large editions of the work with the passage corrected had been given to the world. Nor was this the whole of the charge made by the eminent commentator at that time, for, immediately succeeding the sentence on which we have been remarking, he inserted an additional paragraph which is too long to quote.

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. . . It is but a reasonable exercise of charity, however, to presume that Chief Justice Shippen, in making up his decision in that case, relied upon a copy from one of the early editions of the Commentaries, which he had probably studied in his youth and believed to be as unchanged and unchangeable as the Koran."

We are also referred to a statement in the opinion in *Geyer v. Irwin*, 4 Dall. 107, 1 L. ed. 762, that "a member of the general assembly is undoubtedly privileged from arrest, summons, citation, or other civil process during his attendance on the public business confided to him." Upon examination it will be found that this passage is a mere *dictum*, for no such question is present in the case. A legislator's attorney had confessed judgment in an action pending in the former's home county, and the supreme court of Pennsylvania, on appeal, said that the action could not have been forced to trial in the member's absence, but that his attorney, by confessing judgment, had waived the privilege. No other point was involved in the case. The court nowhere referred to *Bolton v. Martin*, 1 Dall. 296, 1 L. ed. 144, and even the *dictum* that the member's absence entitled him, as a matter of right, to a continuance was disapproved in *Nones v. Edsall*, 1 Wall, Jr. 189, Fed. Cas. No. 10,290. The doctrine of *Bolton v. Martin*, above referred to, was, however, applied to members of the legislature in the subsequent nisi prius case of *Gray v. Sill*, 13 W. N. C. 59, and in *Ross v. Brown*, 7 Pa. Co. Ct. 142.

In 1840, the territorial supreme court of Wisconsin decided, in *Doty v. Strong*, 1 Pinney (Wis.) 84, that the immunity from arrest guaranteed to members of Congress by the Federal Constitution, included also exemption from service of ordinary civil process, and applied to a delegate from that territory. The writer of the opinion states that the only "authority" which he has been able to find on the subject is *Geyer v. Irwin*, 4 Dall. 107, 1 L. ed. 762, which, as we have seen, did not involve or decide the question at all. There was a dissenting opinion by the chief justice. The following year, in *Anderson v. Rountree*, 1 Pinney (Wis.) 115, the same court announced the same construction of the territorial statute which exempted members of the legislature from arrest. The opinion is written by the same judge (Miller) as in *Doty v. Strong*, and in the interval he seems to have found a reference to *Bolton v. Martin*, 1 Dall. 296, 1 L. ed. 144, which, as we have seen, was based upon a misapprehension of Blackstone. Judge Miller does not appear even to have seen a report of the case, but merely to have read a reference to it in Story's Commentaries on the Constitution. The construction of the word "arrest," so as to include the service of summons, seems to be peculiar to this territorial court, and to be without support elsewhere. Judge Cooley, in his *Constitutional Limitations*, 5th ed. p. 161, note, says: "Exemption from arrest is not violated by the service of citations or declarations in civil cases." That the construc-

tion was strained and an unnatural one, not likely to endure the test of time, seems to have been recognized even then in Wisconsin; for when the state was admitted, seven years later, the framers of its Constitution appear to have thought it necessary, in order to make it the law of that jurisdiction, to insert in that instrument an express provision that members of the legislature should not "be subject to any civil process during the session." Wis. Const. art. 4, § 15. In *Miner v. Markham*, 28 Fed. 387, the circuit court sitting in Wisconsin decided that a member of Congress was privileged from service of a summons while *en route* to the seat of government. The court conceded that the cases were not harmonious, but adopted the state court's construction, which had existed from territorial times, and which, as we have just seen, was embodied in the first Constitution.

The foregoing are all of the cases which we have been able to find, either from the aid of the briefs of counsel or otherwise, which lend any support to the doctrine that a legislator is privileged from the service of a summons. It will be seen that there is among them only one court (and that a territorial one) of last resort which has actually so decided, that its conclusion was reached with little or no opportunity for investigation of the authorities, and that its construction of the word "arrest" is unprecedented and unsound. On the other hand, the doctrine that a member of the legislature, like other citizens, is amenable to the service of a summons, finds ample support in the authorities. In *Catlett v. Morton*, 4 Litt. (Ky.) 122, the court held that, despite the constitutional guaranty of privilege from arrest, members of the legislature "are subject to the execution of any other process, as other citizens are." This case was decided nearly eighteen years before the Wisconsin cases above referred to, and, though directly opposed to their conclusions, is not noticed in either of them. The doctrine was reaffirmed in *Johnson v. Offutt*, 4 Met. (Ky.) 19, though there had meanwhile been a change in the statutes. In *Gentry v. Griffith*, 27 Tex. 461, a similar constitutional guaranty was construed with similar conclusions, and the court used the following language, which might well be applied to the reasoning of the Wisconsin case: "It would be difficult to distort any of these definitions so as to make them applicable to the simple service of citation, or giving notice to answer in a civil action." *Rhodes v. Walsh*, 55 Minn. 542, 23 L. R. A. 632, 57 N. W. 212, is also an instructive case, where the court, in an able opinion, holds that there is no exemption from ordinary process for members of the legislature. The Wisconsin decisions as to the immunity of members of Congress also seem to stand alone. The contrary was held in *Merrick v. Giddings*, McArthur. & M. 55, and *Howard v. Citizens' Bank & T. Co.* 12 App. D. C. 222, and exhaustive opinions are written in both. In *Bartlett v. Blair*, 68 N. H. 232, 38 Atl. 1004, the court, while declining to construe 60 L. R. A.

the Federal Constitution in advance of an adjudication by the supreme court, refused to quash the service of a writ at the residence of a member of Congress who was absent in attendance upon a session of that body.

But if the weight of authority were not so pronounced as it thus appears to be, and we felt at liberty to adopt the rule announced in the Pennsylvania and Wisconsin cases, we would not even then find sufficient support for plaintiff in error's contention that, though amenable to civil process, it could only be served upon him in his home county. None of the cases relied upon by him, and none of those above reviewed, so hold; nor do they, in our view, lend any support to this theory of the case. So far as they touch the question at all, they decide that the legislator is absolutely privileged from service,—not that he is privileged in one place and amenable in another. Thus, in *Gray v. Sill*, 13 W. N. C. 59, the member was served while at home during the recess of the legislature. Under the rule contended for by plaintiff in error, this would have been a valid service; but it was not so held. We see no room for any middle ground between the Pennsylvania and Wisconsin cases on the one hand and the authorities elsewhere on the other. Either the member is exempt from service or he is not. And, if he is not exempt, he is amenable to the provisions of § 60 of the Code, which, as always construed, authorizes him to be summoned in any county where he may be found. Moreover, we think that not only do the authorities relied on by plaintiff in error fail to assist him in his precise contention, but that also some of the authorities above referred to decide the exact point against him. *Johnson v. Offutt*, 4 Met. (Ky.) 19, is declared in plaintiff in error's reply brief to involve "nothing but whether the Constitution prevents any suit anywhere against a member of the legislature." But, as we read the case, it involves an additional point, and that the precise one which plaintiff in error urges here. The defendant in that case was served in Franklin county, wherein is situated Frankfort, the seat of government, and defendant, in the language of the opinion, "moved to quash the service of the summons, upon proof that he was a citizen and resident of Scott county, and representing that county as a member of the house of representatives, when the suit was brought and the summons served, and at the time of said motion, and that the legislature was then in session." This was the identical course pursued by plaintiff in error in the case before us, except that he could not show, as did the defendant in the case cited, that the legislature was in session at the time of the service. The overruling of his motion seems to us to determine the question which plaintiff in error raises here. Again, in *Rhodes v. Walsh*, 55 Minn. 542, 23 L. R. A. 632, 57 N. W. 212, the defendants were members of the legislature from various counties in Minnesota. The action was brought against them at St. Paul, in

Ramsey county, during the session of the legislature, and each defendant sought to quash the service. It is true that it does not appear that any of these defendants conceded that they might have been served in their home counties; but there was quite as much room for the contention as exists here, and, if there had been any support in the authorities for such a distinction, it seems not a little singular that the point was not suggested either in argument or opinion.

In all our search we have found but one jurisdiction where the precise rule contended for by plaintiff in error obtains, and that is in Ohio, where it exists by virtue of the following section of the Code: "A member of the senate or house of representatives, or an officer of either branch of the general assembly, shall be privileged from answering to any suit which may be instituted against him in a county other than the one in which he resides, upon a cause of action which accrued ten days before the first day of the session of the general assembly of which he is an officer or a member; and all proceedings in actions to which any such person is a party shall be stayed during such session, and during the time necessarily employed in going thereto and returning therefrom." *Bates's Anno. Stat. (Ohio) § 5031*. In pursuance of an earlier, but similar statute, one of the nisi prius courts of Ohio held, in *Orth v. McCook*, 2 Ohio Dec. Reprint, 624, that a member of the legislature could not be served at the seat of government, even though joined with other defendants who were served at their homes. As our own Code was borrowed from Ohio, the omission of the section above quoted seems doubly significant. We cannot here establish by judicial decision a rule which appears to have required legislative enactment in Ohio, especially when our own legislature has failed to adopt it.

But it is urged in plaintiff in error's briefs that the exemption of legislators rests upon grounds analogous to those which afford immunity to witnesses and suitors while in attendance upon judicial proceedings, and that considerations of public policy require us to adopt the same rule as to legislators. The immunity of witnesses in such cases is, in this state, expressly provided by statute. Code, § 363. So the immunity of suitors constitutes an ancient and well-recognized rule of the common law. In *Cole v. Hawkins*, 2 Strange, 1094, decided in 1738, it was held to be contempt to serve a suitor with process while he was in attendance upon a cause, and the court said: "The privilege was designed . . . to prevent any interruption of the business of the court." This is probably not the earliest case on the subject; but it illustrates the antiquity of the rule, which appears to prevail in all jurisdictions where the common law is in force. *Palmer v. Rowan*, 21 Neb. 452, 59 Am. Rep. 844, 32 N. W. 210. But the doctrine has never, so far as we are able to find, been extended to legislators. Even in the two jurisdictions where the immunity of legislators from the service of sum-

mons has been declared, it rests upon grounds entirely different from their supposed analogy to parties and witnesses. Indeed, while we are cited to *Jacobson v. Hosmer*, 76 Mich. 234, 42 N. W. 1110, on the point that a party has a right to be sued at his own domicile, if we were to adopt strictly the Michigan rule, and construe plaintiff in error's rights according to the analogy of parties, we would be obliged to hold that he was not in any event exempt from service while merely waiting for the legislative session to begin; for in that state a party is amenable to service while waiting for his case to be called. *Case v. Rorabacher*, 15 Mich. 537. Moreover, if we were, by judicial legislation, to extend to senators and representatives that exemption from the service of summons which is enjoyed by parties and witnesses, we would be logically bound by the same reasons and arguments to extend it, also, to the executive branch. In this state that department consists of eight officers (Const. art. 5, § 1), who remain at the seat of government at least two, and often four, years. Are we to hold, then, that each of these officials is exempt from the service of summons in the county where he is usually found during all of this period? And, if we extend the doctrine at all, why should we stop with state officers? Why do not the arguments made as to legislators apply with equal force to local executive officers, like sheriffs? Are not such officials entitled, to the same extent as members of the legislature, to immunity from civil process while attending to the public business outside of their own counties?

We do not say that it would not be desirable to adopt such a rule for all public servants. We are simply pointing out that no such rule exists, either at common law or by statute. But it may well be doubted whether the half-way doctrine contended for by plaintiff in error would at all meet the objection urged against the policy of allowing service upon legislators during the session. The objection usually made is that it diverts the attention of the member from legislative business to private matters. And this would be equally true if service were allowed at home. Indeed, the distraction would seem to be less in the case of an action pending at the seat of government, where the member could give it some attention without necessarily absenting himself from the legislative session. And as was well said in *Catlett v. Morton*, 4 Litt. (Ky.) 122: "It has been argued that considerable inconvenience might result from this doctrine to the members of the general assembly, because thereby they might be compelled to litigate their controversies at the capital, instead of in their proper counties. It may be replied that every citizen who visits Frankfort, and all the other officers of government who do not reside here, are liable to the same inconvenience." But, if the legislature deems it for the best interests of the state to exempt its members from the service of summons at the seat of govern-

ment during its sessions, the remedy is entirely in its hands. It may enact into law the rule contended for by plaintiff in error without the aid or consent of either of the co-ordinate branches of the government, and its action in this regard would be legitimate and proper. But for us to announce that rule in advance of such action, and in the face of the authorities above reviewed, would, it seems to us, be little short of rev-

olutionary. We therefore recommend that the judgment be affirmed.

Hastings and Kirkpatrick, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

NORTH CAROLINA SUPREME COURT.

Bismark SCULL et al., Appts.,

v.

ÆTNA LIFE INSURANCE COMPANY.

(.....N. C.....)

After-born children of a subsequent marriage are entitled to share in the benefit of a policy of life insurance taken for the benefit of the children of the insured.

(February 24, 1903.)

APPPEAL by plaintiffs from a judgment of the Superior Court for Bertie County denying their right to share in the proceeds of a life-insurance policy. *Reversed.*

The facts are stated in the opinion.

Mr. St. Leon Scull, for appellants:

The policy being a contract, its terms prevail as to who take as beneficiaries.

3 Am. & Eng. Enc. Law, 2d ed. p. 826, § 2; Cooke, Ins. § 57; *Wason v. Colburn*, 99 Mass. 342.

Terms of policy will prevail over application.

Hunter v. Scott, 108 N. C. 213, 12 N. E. 1027.

Courts never favor giving a generic term, such as "children," a restricted meaning, but, on the contrary, they favor a liberal one.

3 Am. & Eng. Enc. Law, 2d ed. p. 970, § e; *Klotz v. Klotz*, 15 Ky. L. Rep. 183, 22 S. W. 551.

A designation of "children" will include all of the children of insured.

3 Am. & Eng. Enc. Law, 2d ed. p. 965, § b.

If a vested remainder to children will open to let in those after-born, without doing violence to the doctrine of vested rights, the rule ought to apply here.

Ives v. Mutual L. Ins. Co. 129 N. C. 28, 39 S. E. 631.

Mr. Francis D. Winston also for appellants.

Mr. George Cowper, for appellee:

A policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as beneficiary or beneficiaries; and there is no

power in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the person named.

Bliss, Ins. 2d ed. 517; 3 Am. & Eng. Enc. Law, 2d ed. p. 985, § 2, p. 980, 4.

Beneficiaries of the insured had a vested right of property of which they could not be divested without their consent.

Herring v. Sutton, 129 N. C. 107, 39 S. E. 772; *Hooker v. Sugg*, 102 N. C. 115, 3 L. R. A. 217, 8 S. E. 919; *Connecticut Mut. L. Ins. Co. v. Baldwin*, 15 R. I. 106, 23 Atl. 105.

Walker, J., delivered the opinion of the court:

This case comes to this court by appeal from the judgment of the court below upon a case agreed on by the parties. It appears that in the year 1809 a policy of insurance was issued by the defendant company to Mrs. Nannie Walton, widow of James Walton, by which her life was insured for the benefit of her children, she then having three children, the defendants Jimmie Flythe, Lily W. Scull, and Nannie Nichols, the testate of the defendant E. L. Smith. In the year 1870 Mrs. Nannie Walton married E. D. Scull, and the issue of that marriage were Bismark Scull, born in March, 1871, and Von Moltke Scull, born in the year 1874, who are plaintiffs in this case. On the 9th day of April, 1873, Mrs. Nannie Walton, then Mrs. Scull, surrendered the said policy, and received from the company in lieu thereof a paid-up policy for the sum of \$712, which was issued in the name of Nannie Walton, although she was then Mrs. Scull, and was payable to her children within ninety days after due notice and proof of her death. She died in the month of March, 1902, her husband E. D. Scull having predeceased her. The company paid the money due upon the last policy into court, under its order and by agreement of the parties, to await the decision as to the distribution of the fund.

The plaintiffs contend upon the foregoing facts that they are each entitled to one fifth of this fund, and the defendants resist this contention and claim the whole, so that the question presented is whether the children of the first marriage are the sole beneficiaries under the policy, or are the children of the second marriage entitled to participate

NOTE.—As to right of after-born children to share in proceeds of benefit certificate, see also, in this series, *Spry v. Williams* (Iowa) 10 L. R. A. 863.

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ratably with them in the fund now in court? The court below held that the children of the first marriage were entitled to the fund to the exclusion of the children of the second marriage, and entered judgment accordingly, and in this ruling we think there was error. It was contended by counsel for the plaintiffs, on the argument before us, that Bismark Scull was surely entitled to share in the avails of the policy, as he was born before the last policy was issued, but, in the view we take of the case, it is not necessary to consider this question. A policy of insurance is essentially like a gift by will, the only difference being that in the case of a policy of insurance the beneficiary acquires a vested interest when the policy is delivered, which becomes vested in possession or enjoyment at the death of the assured; while in the case of a gift by will the interest does not vest until the death of the testator. In other respects, and for all practical purposes, they are alike. If a bequest is made to A for life, with remainder to his children, those *in esse* at the death of the testator take a vested estate, which will open, however, and let in any after-born child during the life of A; and so it is with a policy of insurance payable to children, the interests of the beneficiaries become vested at the time of the delivery of the policy, or when it takes effect as a contract between the company and the assured, as to those then *in esse*, but will open and let in any after-born children, and, in this case, whether of the first or second marriage. If they come within the general description, they will share under the policy. The interests are said to be vested, but not in the sense that the children then *in esse* will take exclusively, but rather in the sense that the interest of any one of the children, already vested, shall not be divested by his or her subsequent death, and the share of such deceased child will go to his or her personal representative. The late Chief Justice Smith evidently had this distinction in mind when, in the case of *Hooker v. Sugg*, 102 N. C. 116, 3 L. R. A. 217, 8 S. E. 919, which is relied on by the defendant's counsel, he used the following language: "So, if children be designated in a life policy as beneficiaries, the interest vesting at once is in such as then meet the description, and is not divested in favor of survivors by a death afterwards." He certainly did not intend by that language to say that after-born children would be excluded and those *in esse* at the time of the delivery of the policy would be the sole beneficiaries. This is made perfectly clear by the following passage taken from the opinion: "It is unnecessary to consider the possible effect of a future marriage upon the interests of the children, since the event did not take place." 102 N. C. 129, 3 L. R. A. 218, 8 S. E. 921. So that the question presented in this case, and stated hypothetically by the chief justice in that case, was left open for consideration and adjudication when it should arise. It seems to us that the question has virtually been settled in favor of the plaintiffs by the 60 L. R. A.

case of *Conigland v. Smith*, 79 N. C. 303, in which it is held that a policy of insurance for the benefit of children, like a gift by will to them, will vest in interest in the children then *in esse*, at the time of the delivery of the policy or when the contract of insurance is complete, but will open and let in any after-born children during the life of the assured. As in the case of wills, a policy of insurance should receive a liberal construction, so as to take in as many of the objects of the assured's bounty as possible. 3 Am. & Eng. Enc. Law, 2d ed. pp. 961, 964. This, in our opinion, is the just and reasonable rule of interpretation. The question seems to have frequently been under consideration by the courts of some of the other states. In *Koshler v. Centennial Mut. L. Ins. Co.* 66 Iowa, 325, 23 N. W. 687, the policy upon which the suit was brought was payable to the assured's wife and children, there being at the time children by a former marriage; and it was held that the children of both marriages were entitled to share in the avails of the policy. Upon a substantially similar state of facts to those in this case it was held, *McDermott v. Centennial Mut. Life Assn.* 24 Mo. App. 73, that, in the absence of an expression of a purpose to limit the benefit to a particular class of children, it was clearly the intention of the assured to extend it to all his children, and that this intention should prevail. "It would be so held," says that court, "in the interpretation of a will; and a policy of life insurance, being a post mortem provision for persons dependent upon the assured, is to be interpreted upon similar principles." In *Thomas v. Leake*, 67 Tex. 471, 3 S. W. 703, the court held that, under the construction the law gives to the word "children" as used in policies of insurance, it does not mean certain named children then in existence, but these together with such as may thereafter be born to the assured. See also *Stigler v. Stigler*, 77 Va. 163; *United States Trust Co. v. Mutual Ben. L. Ins. Co.* 115 N. Y. 152, 21 N. E. 1025; *Ricker v. Charter Oak L. Ins. Co.* 27 Minn. 193, 38 Am. Rep. 289, 6 N. W. 771.

We have carefully examined the authorities cited by the learned counsel for the defendants, and are unable to see that they militate against the views we have expressed. In the case of *Connecticut Mut. L. Ins. Co. v. Baldwin*, 15 R. I. 106, 23 Atl. 105, so much relied on by him, the policy was payable to the wife and children of the assured, and the court held that the children living at the time the policy was delivered were entitled to the money due thereon to the exclusion of after-born children, but the court placed its decision upon the ground that the wife was a joint beneficiary with the children. We do not think this fact was sufficient to change the general rule of construction in its application to the facts of that case, but, however this may be, the court clearly intimates that the decision would have been different if the name of the wife had been omitted and the policy had been payable to the children as a class.

"Possibly," says the court, "if the policy had been expressed to be for the benefit of the children only, the doctrine in respect of testamentary bequests to children payable *in futuro*, namely, that the bequests are payable to them as a class and that the class will open to let in after-born children to participate in the bequests, might be applied." This is a statement of our case, and a strong intimation that the rule of construction which we have laid down should apply to it. In *Herring v. Sutton*, 129 N. C. 107, 39 S. E. 772, also cited by defendant's counsel, the beneficiaries were designated by name, and it necessarily followed that those children who were thus named took a vested interest in the policy to the exclusion of all other children, for the intention to restrict the benefit of the policy to them was clearly expressed.

It was suggested that the assured had no legal right to surrender the old policy for the new, but we do not think that this should change the rule of construction. Indeed, if the second policy had not been issued, and the money had been paid under the first, the result would be the same. The first policy was payable to the children, and this, as we have already shown, includes after-born children. The change, therefore, from the one policy to the other, whether it was in law a continuation of the old policy or a substitution of the new one for it, is immaterial.

Upon a review of the whole matter, we think there was error in the ruling and judgment of the court below, and that judgment should be entered in that court for the plaintiffs in accordance with the agreement of the parties.

Judgment reversed.

Flora J. WATKINS

v.

KAOLIN MANUFACTURING COMPANY,
App't.

(131 N. C. 536.)

1. One who has given a deed of trust on property to secure a debt may maintain an action for an injury to it, if the security is ample for the debt, so that the loss from the injury will fall on him.
2. An allegation that plaintiff "became so nervous and frightened" by defendant's conduct "that she could not sleep at night, and was greatly disturbed in body and mind," sufficiently charges a physical injury to admit evidence that she became helpless,

NOTE.—For conflicting authorities as to right of action for damages resulting from shock or fright, see *note* to *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* (Pa.) 14 L. R. A. 666.

For cases in this series denying the right, see *Halle v. Texas & P. R. Co.* (C. C. App. 5th C.) 23 L. R. A. 774; *Mitchell v. Rochester R. Co.* (N. Y.) 34 L. R. A. 781; *Spade v. Lynn & B. R. Co.* (Mass.) 38 L. R. A. 512, 43 L. R. A. 832; *Braun v. Craven* (Ill.) 42 L. R. A. 199; and *Smith v. Postal Teleg. Cable Co.* (Mass.) 47 L. R. A. 323.
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could not go about her duties, and suffered from uterine trouble, and to warrant the submission to the jury of an issue as to what compensation she was entitled to for her "personal injuries." In the absence of anything to show that defendant was misled, or of any steps on his part to have the pleading made more definite.

3. An action will lie for physical injury or disease resulting from fright or nervous shock caused by negligent acts, when defendant should have known that such acts would, with reasonable certainty, cause such result, or the negligence was gross, showing utter indifference to the consequences which should have been contemplated by him.

(December 18, 1902.)

APPEAL by defendant from a judgment of the Superior Court for Jackson County in plaintiff's favor in an action brought to recover damages for personal injuries and for injuries to plaintiff's property, which were alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Coleman C. Cowan, for appellant:

In order to recover, the plaintiff must have been the owner at the date of the injury.

Livermon v. Roanoke & T. River R. Co. 109 N. C. 52, 13 S. E. 734; *Caldwell v. Morganton Mfg. Co.* 121 N. C. 339, 28 S. E. 476.

Evidence of menstrual irregularities of plaintiff, resulting from her fright, should not have been submitted.

There must be allegation as well as proof.

McKee v. Lineberger, 69 N. C. 217.

Damages, to be recoverable, must be the proximate consequences of the act complained of, and not the secondary result thereof.

Sledge v. Reid, 73 N. C. 440; 2 Greenl. Ev. § 256; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354; *Fox v. Borkey*, 126 Pa. 164, 17 Atl. 604; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340; *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303; *Hinson v. Smith*, 118 N. C. 503, 24 S. E. 541.

Damages, in order to be proximate and recoverable, must be the natural consequences of defendant's wrongful act.

Sledge v. Reid, 73 N. C. 440; 2 Greenl. Ev. § 356; *Smith v. Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39.

No recovery for fright, terror, alarm, anxiety, or distress of mind, even if these result in physical injury, can be had in an action for negligence, where there are no physical injuries except those caused solely by mental disturbance.

For cases sustaining right, see *Sloane v. Southern California R. Co.* (Cal.) 32 L. R. A. 193; *Mack v. South Bound R. Co.* (S. C.) 40 L. R. A. 679; *Gulf, C. & S. F. R. Co. v. Hayter* (Tex.) 47 L. R. A. 325; *Denver & R. G. R. Co. v. Roller* (C. C. App. 9th C.) 49 L. R. A. 77; *Tuttle v. Atlantic City R. Co.* (N. J. L.) 54 L. R. A. 582; *Homans v. Boston Elev. R. Co.* (Mass.) 57 L. R. A. 291; *Watson v. Dilts* (Iowa) 57 L. R. A. 559; and *Kline v. Kline* (Ind.) 58 L. R. A. 397.

Spade v. Lynn & B. R. Co. 108 Mass. 285, 38 L. R. A. 512, 47 N. E. 88; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340.

Fright which superinduces nervous shock cannot be made the basis for a liability for damage.

Braun v. Craven, 175 Ill. 401, 42 L. R. A. 199, 51 N. E. 657; *Smith v. Postal Tele. Cable Co.* 174 Mass. 576, 47 L. R. A. 323, 55 N. E. 380; *Sherrill v. Western U. Tele. Co.* 116 N. C. 655, 21 S. E. 429.

Messrs. Walter E. Moore and Shepherd & Shepherd, for appellee:

The equitable owner may sue.

Clark's Code, p. 102.

A mortgagor or trustor in possession is regarded as the owner.

Killebreck v. Hines, 104 N. C. 182, 10 S. E. 159, 251; 1 Jones, Mortg. 11.

As the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any court to lay down, as a matter of law, that, if negligence causes fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be a consequence which, in the ordinary course of things, would flow from the negligence, unless such "injury accompany such negligence in point of time."

1 Sutherland, Damages, §§ 21-23; *Bell v. Great Northern R. Co.* Ir. L. R. 26 C. L. 428; 2 Sedgw. Damages, 861; *Hatchell v. Kimbrough*, 49 N. C. (4 Jones L.) 163; *Know v. North Carolina R. Co.* 51 N. C. (6 Jones L.) 415.

COOK, J., delivered the opinion of the court:

The substantial questions raised by the defendant's assignments of error are: (1) Could the cause of action for damage done to the house and land be maintained by plaintiff, trustor? (2) Does the complaint state a cause of action for physical injury to plaintiff? (3) Does a cause of action lie for physical injury resulting from fright and nervousness caused by negligent acts?

As to the first question: It is clear that the plaintiff had the right to bring this action for damages done to the freehold. She owned the premises in fee, subject to a deed of trust executed thereon to secure a debt. The conveyance of the title to the trustee did not disturb her possession or ownership as to trespassers and tortfeasors. So long as the property was of sufficient value to secure the payment of the debt, the trustee and *cestui que trust* could sustain no loss or injury by reason of damage done to the premises. Therefore the loss by reason of the damage would fall upon the trustor, the equitable owner, and she, being the party really injured, had a right to maintain the action. She was in possession of the land, and, being the equitable owner, had the right to recover in an action of ejectment, although the legal title was in the trustee. *Murray v. Blackledge*, 71 N. C. 492; *Farmer v. Daniel*, 82 N. C. 152; *Condry v. Cheshire*, 60 L. R. A.

88 N. C. 375; *Taylor v. Eatman*, 92 N. C. 601; *Graves v. Trueblood*, 96 N. C. 495, 1 S. E. 918. The trustee, holding the legal title, might have been made a party to the action, but his recovery would have inured only to the benefit of the trustor, which could be of no concern to the trespasser or tortfeasor. A judgment in an action between the equitable owner in possession and the defendant for damages to the premises would be a bar to an action by the trustee. So no loss could befall the defendant. Had defendant deemed the trustee a necessary party to the action, it should have demurred (Code, § 239, subsec. 4), or answered (§ 241); otherwise it will be deemed to have been waived (§ 242).

As to the second question: Plaintiff alleges that she "became so nervous and frightened from the negligent and careless conduct and blasting of defendant that she could not sleep at night, and was greatly disturbed in body and mind, as well for herself and the safety of her children as the destruction of her property, to her great damage in the sum of \$1,999." To sustain this allegation she was allowed to prove that the blasting rendered her almost helpless; that she could not go about her daily duties, and could not keep on her feet to attend to her children; that it has affected her ever since, and has caused her female trouble out of its regular course. Under the old system of pleading, this variance would be fatal, but under the provisions of the Code the rule is greatly modified, and pleadings must be liberally construed for the purpose of determining their effect with a view to substantial justice between the parties. Code, § 260. From a liberal construction of plaintiff's allegation, it appears that the alleged negligent blasting greatly disturbed her in body and mind, causing her to become so nervous and frightened that she could not sleep at night, causing her great damage; and, as the result, she proves that she was physically injured as above stated, to which defendant excepted, but did not allege that it was misled by such a variance. Therefore plaintiff was not called upon to amend her complaint so as to conform to the proof, and the variance is deemed immaterial. Code, § 260; *Lilly v. Baker*, 88 N. C. 151; *Patrick v. Richmond & D. R. Co.* 93 N. C. 422; *Laurence v. Hester*, 93 N. C. 79; *Uery v. Suit*, 91 N. C. 406; *Commercial Bank v. Burgwyn*, 116 N. C. 122, 21 S. E. 202. It appearing that the defendant was not misled, the variance between the allegation and proof must be deemed to have been immaterial. *Gibbs v. Fuller*, 66 N. C. 116. Plaintiff, in her complaint, did not allege that she had been rendered almost helpless in consequence of such fright and nervousness, or that she could not go about her daily duties, and has been afflicted ever since with female trouble out of its regular course. But if defendant had alleged that it had been misled by such proof, and had proved the same to the satisfaction of the court, the judge might have ordered that the complaint be amended (§ 260, Code), for amendments to pleadings

which further justice, speed the trial of causes, or prevent circuity of action and unnecessary expense, are allowed on proper terms. *Alamance v. Blair*, 76 N. C. 136. It clearly appears from the language of the allegation that plaintiff intended to charge that physical injury was done to her,—“was greatly disturbed in body, . . . to her great damage,”—and we think it does state a cause of action for physical injury. If defendant was misled, and not put upon notice by it that plaintiff would offer evidence of injuries to her person resulting from fright, then it had its remedy under § 269 of the Code. Or, if defendant did not understand the precise nature of the charge made in the complaint, it had its remedy by applying to the court for an order to have it made more definite and certain. Clark's Code, § 261, and cases there cited. It does not appear from the record that any substantial rights of the defendant were affected by the failure to more fully set out plaintiff's cause of action, in which case the court properly disregarded the alleged defect in the pleadings. Code, § 276. Counsel having disagreed upon the issues, they were framed by the judge, and it is contended by the defendant that there was error in submitting the fourth and fifth issues, for that they were not raised by the pleadings (*Miller v. Miller*, 89 N. C. 209; *Christmas v. Haywood*, 119 N. C. 130, 25 S. E. 861); and that, where the pleadings do not distinctly and unequivocally raise an issue, it should not be submitted (*Sprague v. Bond*, 113 N. C. 552, 18 S. E. 701). But an issue was raised by the pleadings. Bearing in mind the requirement of the statute (§ 260) that “in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties,” this contention cannot be sustained. Plaintiff's allegation is that she was “greatly disturbed in body, . . . to her great damage. . . .” The fourth issue is, “Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?” and the fifth, “What compensatory damages, if any, is the plaintiff entitled to recover for her personal injuries?” Instead of alleging that she was “injured,” she alleged that she was “disturbed in body,” to her great damage. “Disturbed,” says Webster, primarily means “to throw into disorder or confusion; to derange; to interrupt the settled state of; to excite from a state of rest.” So, substituting the word “injured” for “disturbed in body,” and the words “for her personal injuries” for “the disturbance in body,” did not change the issue with respect to the damage complained of in the sense in which the words “disturbed in body” coupled with “to her great damage” are used in the allegation, which we understand to be that her body was thrown into a state of disorder and thereby injured.

As to the third question: We are of the opinion that an action will lie for physical injury or disease resulting from fright or nervous shocks caused by negligent acts.

From common experience we know that serious consequences frequently follow violent nervous shocks caused by fright, often resulting in spells of sickness, and sometimes in sudden death. Whether the physical injury was the natural and proximate result of the fright or shock is a question to be determined by the jury upon the evidence, showing the condition, circumstances, occurrences, etc. But it must also appear that the defendant could or should have known that such negligent acts would, with reasonable certainty, cause such result, or that the injury resulted from gross carelessness or recklessness, showing utter indifference to the consequences, when they should have been contemplated by the party doing such acts. As a condition precedent to recovery in such cases, it must appear that defendant must or ought to have known of plaintiff's perilous position or condition, against which he should have to exercise care, otherwise such injury could not be within the contemplation of the actor, and put him upon notice as to this special care. In the case at bar defendant company's servants acted with utter indifference to the plaintiff's safety, and knew that plaintiff was a woman, and that she and her little children lived and were in her house only 60 steps away, and exposed to the danger; and, after being asked by her to direct the blasting so as not to throw the rocks upon her house, continued to blast, throwing the stones from the size of a gallon bucket down to small stones upon and through her house and into her yard and garden (depositing as much as a wagon load of rock in her yard and several wagon loads in her garden), making it necessary for her and her children to secrete themselves in the basement behind a stack chimney, and even there they were in danger. From the fright and nervous shocks received from such blasting she testified that she was rendered almost helpless, and could not go about her daily duties, and could not keep on her feet to attend to her children, and has been affected ever since; that it has caused her female trouble out of its regular course. They, knowing that plaintiff was a woman, and knowing (or ought to have known of) the weaknesses of a woman, should have contemplated the effects likely to be produced upon her by such danger and fright. We do not wish to be understood as holding that an action in a case like this would lie for mental suffering and anguish from which no physical injury or disease directly resulted, as that question is not squarely presented in this appeal. In *Bell v. Great Northern R. Co.* Ir. L. R. 26 C. L. 428,—the leading case in support of such action,—it is held that, if such bodily injury (serious impairment to health) might be a natural consequence of fright, it might be an element of damage for which a recovery might be had. Sedgwick, *Damages*, 8th ed. § 861, in commenting upon it, says: “The principle adopted in this case would seem to be the true one. The negligence of the company being admitted, any injury directly resulting should be compensated.” In *Purcell*

v. St. Paul City R. Co. 48 Minn. 134, 16 L. R. A. 203, 50 N. W. 1034, the plaintiff, a pregnant woman, was frightened by the negligent conduct of defendant in running its cars, miscarried, and suffered permanent injury. Held, that a cause of action would lie. In *Mack v. South Bound R. Co.* 52 S. C. 323, 40 L. R. A. 679, 29 S. E. 905, the plaintiff threw himself down between and along the cross-ties just outside of the rail, bruising and injuring his person, and barely escaped being struck by the locomotive, and was terribly frightened and shocked, his mind was affected and partially destroyed, his reason unbalanced, and for a long time was made ill and sick, and suffered great mental anguish and physical pain arising from the terrible nervous shock and fright. Held, that an action would lie. *Sloane v. Southern California R. Co.* 111 Cal. 668, 32 L. R. A. 193, 44 Pac. 320, is cited as an authority, but does not apply to the principle involved. There the recovery was had for mortification, nervous effects, and injuries suffered by reason of the plaintiff being put off the car by the conductor after having purchased a proper ticket, which was taken up by the conductor before reaching the station to change cars, and he failed to give her a check to be used on the connecting line. Those which hold *contra* are *Haile v. Texas & P. R. Co.* 23 L. R. A. 774, 9 C. C. A. 134, 23 U. S. App. 80, 60 Fed. 557, which holds that where a passenger on a railroad train receives no bodily injury from an accident caused by the company's negligence, but is made insane by the excitement and suffering resulting therefrom, the company is not liable in damages, since insanity is not a probable or ordinary result of exposure to railroad accidents. *Ewing v. Pittsburgh, C. C.*

& *St. L. R. Co.* 147 Pa. 40, 14 L. R. A. 666, 23 Atl. 340: By negligence of defendant's employees a car was derailed and thrown against plaintiff's house, subjecting her to fright and nervous excitement, permanently weakening and disabling her. Exhibits no cause of action. Mere fright, occasioned by accident, producing permanent injury to the nervous system is a result too remote to be actionable. *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L. R. A. 781, 45 N. E. 354: Plaintiff was frightened by defendant's negligence in allowing its horses to nearly strike her, from the fright of which she miscarried. Held, no action lies where there is no immediate personal injury. *Victorian R. Comrs. v. Coultas*, L. R. 13 App. Cas. 222, held that damages for a nervous shock or mental injury, caused by fright at an impending negligent collision, are too remote. *White v. Sander*, 168 Mass. 298, 47 N. E. 90: Rock thrown through a window, and frightened a woman, who suffered greatly from nervousness. Held not to be actionable. *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L. R. A. 512, 47 N. E. 88: The conductor negligently put a drunken man off the car. Plaintiff became frightened by the row, and suffered mental and physical pain and anguish, and was put to great expense, but no physical injury or disease followed from it. Held, that the action would not lie. *Wyman v. Leavitt*, 71 Me. 227, 36 Am. Rep. 303, is to the like effect; but the court adds that, "whether fright of sufficient severity to cause physical disease would support an action, we do not now inquire."

After a careful examination of all of the defendant's assignments of error, we find no substantial error, and the judgment is affirmed.

OREGON SUPREME COURT.

Laura Deane COX, by J. P. Finley, Her
Next Friend, *Resp't.*,
v.
ROYAL TRIBE OF JOSEPH, *Appt.*

(.....Or.....)

1. The mere fact that the verdict of a coroner's jury must be returned to and filed with the clerk of a court of record in a state where the coroner has no judicial functions does not make it judicial in character, so as to entitle it to admission, in an action at law, as evidence of the facts found by him.
2. The inclusion of an authenticated copy of a coroner's inquest in the

NOTE.—As to admissibility of record of coroner's inquest in evidence, see also, in this series, *United States L. Ins. Co. v. Kielgast* (Ill.) 6 L. R. A. 65, and *Consolidated Ice Mach. Co. v. Kelfer* (Ill.) 10 L. R. A. 696.

As to presumption against suicide, see also *Leman v. Manhattan L. Ins. Co. (La.)* 24 L. R. A. 589; *Mutual L. Ins. Co. v. Wiswell* (Kan.) 35 L. R. A. 258, and cases in note on page 262; and *Johns v. Northwestern Mut. Relief Asso. (Wis.)* 41 L. R. A. 589.
60 L. R. A.

proofs of death of a member of a mutual benefit society does not render it admissible in evidence against the beneficiary in an action on the certificate, where the proofs were furnished by the subordinate lodge of which deceased was a member.

3. To defeat recovery upon a mutual benefit certificate because of suicide of the member, the burden of establishing suicide is upon the society.
4. To warrant the direction of a verdict for defendant in an action on a mutual benefit certificate because the death was not the result of natural causes, the testimony adduced tending to establish that fact must be such that there cannot reasonably be two opinions touching the result.
5. Words used by the court in instructing the jury must, in determining whether or not they were erroneous, be construed in the sense in which they were used.
6. The presumption of death from natural causes may be considered by the jury in determining the cause of death of a member of a mutual benefit society, who was found dead in the water, where the evidence is not such as to explain or indicate how the body came to be there.

(January 12, 1903.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to enforce payment of the amount alleged to be due on a benefit certificate. *Affirmed.*

Statement by Wolverton, J.:

This is an action to recover upon a beneficiary certificate for \$2,000, issued by the defendant to Capitola Blanche Cox, a married woman, in favor of the plaintiff, her daughter. Immediately prior to the death of Mrs. Cox, which occurred July 1, 1899, she was engaged in conducting a restaurant at No. 206 Madison street, between First and Front, in the city of Portland. She had been engaged in the business some six weeks or more, and lived in a room adjoining or over the restaurant. Early in May she had a severe attack of la grippe, was attended by a physician, and found to be suffering from intense pain in the head, and was at times, as described by the physician, "nearly wild." She apparently recovered from this trouble by the last of the month, except that it left her in a nervous condition. It was her habit to rise at 5 o'clock in the morning, or earlier, and do her marketing. On the evening of June 30th, about 9 o'clock, her daughter, who was making her home with J. P. Finley, some two and a half blocks distant, was with her at the restaurant, and testified that her mother walked part of the way home with her; that she said she did not feel like going, had to stop and rest on the way, and was so tired that the witness requested her to return, which she did; that she was with her mother the second day before her decease, and that she was light-hearted; that shortly before her death she had a slight stroke of paralysis, but that it did not amount to anything; that her financial condition was such that she had to call upon some of her friends for assistance, among whom were Miss Anna Finley and Mrs. Green, the latter living at Hamilton avenue, South Portland, from whom she borrowed something like \$100; that Mrs. Green lived south of where deceased was found, and that she could have conveniently gone that way in going to her place of residence; and that she went to see Mrs. Green frequently, going both in the daytime and the evening. Inez Jenkins testified that she had a rooming house adjoining the restaurant, and that Mrs. Cox roomed with her occasionally; that witness saw her and talked to her about 10 o'clock, after she had retired, on the evening before her death; that she said she had a great deal of trouble in her restaurant, and had just employed a married man and his wife to cook for her; that she spoke of being tired, and complained of the top of her head hurting her, and said that when she laid down at night she wrung a towel out of ice water and put it on her head; that she had been complaining of her head for about three weeks; that she said she thought her business would be prosperous if she only had the means to get ahead, and remarked 60 L. R. A.

that she had but little means with which to obtain provisions for breakfast; that she left the room about 5 o'clock in the morning; that at one time previous witness heard her say she had a notion to take a revolver and blow out her brains, but laughed when she said it, and witness thought little about the incident; that she was in the habit of carrying a revolver for self-protection, and, as a rule, she went in the morning to Duffy's market, on the corner of Front and Madison; that on the morning in question the meat was sent over to the restaurant, and that witness found her purse, after her death at the restaurant, with a little money in it. It is further shown that at 7:15 o'clock in the morning of July 1st her body was found floating in an eddy of the river at the foot of Mead street, about a mile south of her place of business. The river was high, and at the place referred to the water was from 4 to 8 or 10 feet deep. It was near the railroad track, along which the old macadamized road ran, which was usually traveled by persons going to and from parts of South Portland. When first seen, her body was 10 or 15 feet from shore, face upward, and her hair loose, and gathered about her face. On the shore, and within a few feet of the water's edge, was found her straw hat, underneath which were deposited her pistol and a note in her handwriting, written with a lead pencil on yellow paper, containing these words and figures, "Mrs. Cox, 206 Madison Street," and near by was her cape or cloak. The margin of the river, from the road down to the water, was covered with grass, and the track of a woman heading toward the stream was found at the water's edge, partly covered by the water. Her two account books, tied together with a string, which she was in the habit of carrying with her when marketing, were found in the water near the shore, and the paper upon which the note was written was apparently taken from one of these books. Examination of the body disclosed that the lungs were free from water; that sand was contained in her nostrils, that her lips were of a violet color, and that there were no bruises upon the body, or any indication of violence. Dr. Candiani, the physician who examined her at the morgue during the coroner's inquest, testified that the indications showed that she died from asphyxiation,—that is to say, on being submerged she closed her mouth, thereby excluding water from the lungs, resulting in asphyxiation; and that the body had the appearance of having been in the water a short time only,—from two to four or five hours. Mrs. Cox was about thirty-seven years of age, stout build, weighing 185 pounds and upward. The jury were taken to view the place where her body was found. During the course of the trial the record of the coroner's inquest was offered in evidence by the defendant for the purpose of showing that death was the result of suicide, there being a clause in the policy voiding it if death was so occasioned, and, upon objections interposed thereto, it was rejected by the court. The

defendant also offered in evidence proofs of Mrs. Cox's death, submitted by J. H. Bridgeford, scribe of the local lodge, to the supreme executive council, with a copy of the coroner's record attached thereto, whereupon objection was again made to the introduction of such record, but not as to the other proofs, and, defendant's counsel being unwilling to segregate it therefrom, the whole was rejected. At the close of plaintiff's case, and again at the close of the testimony, the defendant moved for a nonsuit, which motion was in each instance denied. Defendant also requested the court to direct the jury to find a verdict for defendant. This was also refused, and, the verdict and judgment being for plaintiff, the defendant appeals.

Mr. R. A. Leiter, with Messrs. **Harry B. Walker** and **William D. Fenton**, for appellant:

The verdict rendered by a coroner's jury at an inquest held over the body of a deceased person is admissible in evidence in an action to recover upon a certificate of insurance held by him. The findings of the coroner's jury were competent, but not conclusive, evidence in this case, that deceased committed suicide.

1 Hill's Code, §§ 729, 730, 734, 1027, 1660-1666; *United States L. Ins. Co. v. Vocke*, 129 Ill. 557, sub nom. *United States L. Ins. Co. v. Kielgast*, 6 L. R. A. 65, 22 N. E. 467; *Grand Lodge I. O. of M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Metzradt v. Modern Brotherhood*, 112 Iowa, 522, 84 N. W. 498; *Zimmerman v. Masonic Aid Asso.* 75 Fed. 239; *Supreme Lodge K. of H. v. Fletcher*, 78 Miss. 377, 29 So. 523; *Walther v. Mutual L. Ins. Co.* 65 Cal. 417, 4 Pac. 413; *People v. Devine*, 44 Cal. 452; *Fein v. Covenant Mut. Ben. Asso.* 60 Ill. App. 276; 1 Greenl. Ev. 15th ed. § 556; *Mutual Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380-390, 24 L. ed. 499-503.

A copy of the findings on a coroner's inquest, furnished as a part of the proofs of death of the insured, is admissible, on behalf of the defendant in an action on the policy, as prima facie evidence to establish a defense of suicide. The fact of suicide is prima facie found, and must be overcome.

Sharland v. Washington L. Ins. Co. 41 C. C. A. 307, 101 Fed. 206; *Keels v. Mutual Reserve Fund Life Asso.* 29 Fed. 198; *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Mutual Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380, 24 L. ed. 499; *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 851; *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L. R. A. 589, 15 So. 388; *Modern Woodmen v. Von Wald*, 6 Kan. App. 231, 49 Pac. 782; *Zimmerman v. Masonic Aid Asso.* 75 Fed. 236; *Dennis v. Union Mut. L. Ins. Co.* 84 Cal. 570, 24 Pac. 120; *Sackberger v. National Grand Lodge I. O. T. L.* 73 Mo. App. 38; *Lee v. George Knapp & Co.* 55 Mo. App. 390; *Knights of Pythias v. Steele*, 107 Tenn. 1, 63 S. W. 60 L. R. A.

1126; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180.

The trial court erred in failing to direct the jury to return a verdict for the defendant. The claim that deceased was accidentally drowned is the merest conjecture. Death by suicide is the only reasonable explanation of the facts in the case.

Supreme Lodge K. of H. v. Fletcher, 78 Miss. 388, 29 So. 523; *Inghram v. National Union*, 103 Iowa, 395, 72 N. W. 559; *Mutual L. Ins. Co. v. Tillman*, 84 Tex. 31, 19 S. W. 294; *Chicago Guaranty Fund Life Soc. v. Wilson*, 55 Ill. App. 138; *Kornfeld v. Supreme Lodge O. of M. P.* 72 Mo. App. 604; *Mutual L. Ins. Co. v. Haycard* (Tex. Civ. App.) 27 S. W. 36, 12 Tex. Civ. App. 392, 34 S. W. 801; *Rens v. Northwestern Mut. Relief Asso.* 100 Wis. 266, 75 N. W. 991; *Parish v. Mutual Ben. L. Ins. Co.* 19 Tex. Civ. App. 457, 49 S. W. 153; *Agan v. Metropolitan L. Ins. Co.* 105 Wis. 217, 80 N. W. 1020; *Sovereign Camp Woodmen v. Haller*, 24 Ind. App. 108, 56 N. E. 255; *Beverly v. Supreme Tent of M.* 115 Iowa, 524, 88 N. W. 1054; *Pagett v. Connecticut Mut. L. Ins. Co.* 55 App. Div. 628, 66 N. Y. Supp. 804; *Supreme Court of Honor v. Schwartz*, 96 Ill. App. 587, Affirmed in 194 Ill. 344, 62 N. E. 771; *Prudential Ins. Co. v. Breustle*, 19 Ky. L. Rep. 544, 41 S. W. 9.

Messrs. **Arthur C. Spencer** and **Chamberlain & Thomas**, for respondent:

Under the Constitution and laws of our state the office of coroner is administrative, and his duties are purely ministerial. It has been shorn of the judicial functions that attached to it at common law, and is not recognized as a court of record, like it is in England. The proceedings at an inquest are taken extrajudicially, and the verdict of the coroner's jury is inadmissible in evidence in an action between parties who were strangers to the investigation.

Or. Const. art. 6, § 6, art. 7, § 9; Hill's Code, §§ 1663, 1664, 1666-1668; *Germania L. Ins. Co. v. Ross Lewin*, 24 Colo. 43, 51 Pac. 488; *Mead v. Boston*, 3 Cush. 404; *Crisfield v. Perine*, 15 Hun, 200; *State use of Grice v. Cecil County*, 54 Md. 426; *Mutual L. Ins. Co. v. Schmidt*, 6 Ohio Dec. Reprint, 901; *Miller v. Southern P. Co.* 20 Or. 285, 26 Pac. 70; *Supreme Council of R. A. v. Brashears*, 89 Md. 626, 43 Atl. 866; 1 Greenl. Ev. § 556; *Goldschmidt v. Mutual L. Ins. Co.* 102 N. Y. 486, 7 N. E. 408; *Union Cent. L. Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277; *Ralston's Petition*, 9 Pa. Dist. R. 514; *Cook v. New York C. R. Co.* 5 Lans. 401; *State v. Turner, Wright (Ohio)* 21; *Fisher v. Fidelity Mut. Life Asso.* 188 Pa. 6, 41 Atl. 467; *Wasey v. Travelers' Ins. Co.* 126 Mich. 127, 85 N. W. 459.

The laws of the defendant society make it the duty of the subordinate lodge of the defendant, of which the deceased was a member, to notify the supreme lodge of her death, and require the subordinate lodge to furnish to said supreme lodge proofs of death on blanks furnished by the latter. The subordinate lodge is the agent of the supreme lodge, and the officers of the former

are its agents and the subagents of the supreme lodge. There is no provision requiring the beneficiary to make proofs of death. The proofs in this case, prepared by appellant itself, could not bind respondent, and the court committed no error in refusing to admit in evidence the portions of them that were objected to.

Supreme Council, C. B. L. v. Boyle, 10 Ind. App. 301, 37 N. E. 1105; *Bentz v. Northwestern Aid Asso.* 40 Minn. 202, 2 L. R. A. 784, 41 N. W. 1037; *Buffalo Loan, Trust, & S. D. Co. v. Knights Templar & M. Mut. Aid*, 56 Hun. 303, 9 N. Y. Supp. 346; *Goldschmidt v. Mutual L. Ins. Co.* 102 N. Y. 486, 7 N. E. 408; 2 Bacon, Ben. Soc. § 471; *McMaster v. Insurance Co. of N. A.* 55 N. Y. 228, 14 Am. Rep. 239; *Supreme Council of R. A. v. Brashears*, 89 Md. 626, 43 Atl. 866; *Anderson v. Supreme Council, O. of C. F.* 135 N. Y. 109, 31 N. E. 1092.

The instruction that the presumption of law is, in the absence of any evidence as to the cause of death, that it happened from natural causes, and that such death did not arise from self-destruction; but this is only a disputable presumption, and if, from all the evidence in the case, you find by the preponderance thereof that she came to her death by her own hands, whether she was sane or insane, you must find for defendant,—is a correct statement of the law.

Etna L. Ins. Co. v. Ward, 140 U. S. 76, 35 L. ed. 371, 11 Sup. Ct. Rep. 720; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 664, 32 L. ed. 310, 8 Sup. Ct. Rep. 1360; *Home Benefit Asso. v. Sargent*, 142 U. S. 693-700, 35 L. ed. 1163-1165, 12 Sup. Ct. Rep. 332; *Sharland v. Washington L. Ins. Co.* 41 C. C. A. 307, 101 Fed. 213; *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1193, 24 L. R. A. 589, 15 So. 388; *Agan v. Metropolitan L. Ins. Co.* 105 Wis. 226, 80 N. W. 1020; *Mutual L. Ins. Co. v. Wiswell*, 56 Kan. 765, 35 L. R. A. 258, 44 Pac. 996; *Metzradt v. Modern Brotherhood*, 112 Iowa, 527, 84 N. W. 498; *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 724; *Ingraham v. National Union*, 103 Iowa, 398, 72 N. W. 559; *Jones v. Brooklyn L. Ins. Co.* 61 N. Y. 79.

The evidence in this case not only fails to show voluntary self-destruction to the exclusion of all other reasonable hypotheses, but it establishes facts and conditions positively inconsistent with the theory of the defense that deceased came to her death by drowning. Any fairminded court sitting as a jury would have been compelled to have found for the plaintiff, and to have instructed the jury to find for defendant would have been a judicial outrage under the circumstances in this case.

Travelers' Ins. Co. v. Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110; *Washburn v. National Acci. Soc.* 32 N. Y. S. R. 31, 10 N. Y. Supp. 366; *Stephenson v. Bankers' Life Asso.* 108 Iowa, 637, 79 N. W. 459; *Fidelity & C. Co. v. Weise*, 80 Ill. App. 505; *Leman v. Manhattan L. Ins. Co.* 46 La. Ann. 1192, 24 L. R. A. 589, 15 So. 388; *Goldschmidt v. 60 L. R. A.*

Mutual L. Ins. Co. 102 N. Y. 486, 7 N. E. 408; *Home Benefit Asso. v. Sargent*, 142 U. S. 697, 35 L. ed. 1164, 12 Sup. Ct. Rep. 332; *Mallory v. Travelers' Ins. Co.* 47 N. Y. 54, 7 Am. Rep. 410; *Phillips v. Louisiana Equitable L. Ins. Co.* 26 La. Ann. 405, 21 Am. Rep. 549; *Supreme Lodge, K. of P. v. Beek*, 181 U. S. 49, 45 L. ed. 741, 21 Sup. Ct. Rep. 532; *Ingersoll v. Knights of G. R.* 47 Fed. 272; *Sharland v. Washington L. Ins. Co.* 41 C. C. A. 307, 101 Fed. 213; *Mutual L. Ins. Co. v. Wiswell*, 56 Kan. 765, 35 L. R. A. 258, 44 Pac. 996; *Metzradt v. Modern Brotherhood*, 112 Iowa, 522, 84 N. W. 498; *Germania L. Ins. Co. v. Ross Lewin*, 24 Colo. 43, 51 Pac. 488; *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723; *Travelers' Ins. Co. v. McConkey*, 127 U. S. 664, 32 L. ed. 310, 8 Sup. Ct. Rep. 1360; *Keels v. Mutual Reserve Fund Life Asso.* 29 Fed. 198; *Beckett v. Northwestern Masonic Accl. Asso.* 67 Minn. 300, 69 N. W. 923; *Supreme Council of R. A. v. Brashears*, 89 Md. 626, 43 Atl. 866; *Sperry v. Wesco*, 26 Or. 484, 38 Pac. 623; *Liebe v. Nicolai*, 30 Or. 365, 48 Pac. 172; *Montour v. Grand Lodge*, 38 Or. 59, 62 Pac. 524; *State v. Foot You*, 24 Or. 62, 32 Pac. 1031, 33 Pac. 537; *Hardwick v. State Ins. Co.* 23 Or. 291, 31 Pac. 656; *McBride v. Northern P. R. Co.* 19 Or. 71, 23 Pac. 814.

Wolverton, J., delivered the opinion of the court:

The first question of vital importance presented is respecting the admissibility of the record of the coroner's inquisition *super visum corporis* as independent evidence to show the fact of suicide. The contention of counsel is that defendant was entitled to have it go to the jury, not as conclusive evidence of the fact, but along with the other evidence bearing upon the subject for their consideration. Anciently, the office of coroner was of great dignity, and exercised by persons of high authority, as well as by those in lesser degree and station. Blackstone says: "There are also particular coroners for every county of England, usually four, but sometimes six, and sometimes fewer. This office is of equal antiquity with the sheriff, and was ordained together with him to keep the peace when the earls gave up the wardship of the county. He is still chosen by all the freeholders in the county court." 1 Bl. Com. *347. As ascertained in great measure from the statute (4 Edw. I. *de officio coronatoris*), the powers and duties of the coroner are both judicial and ministerial, his judicial authority extending to inquiries touching the manner of death of any person slain or dying suddenly, or in prison, which must be *super visum corporis*; and also to inquiries respecting treasure trove and shipwreck. His ministerial office is only as the sheriff's substitute. 1 Bl. Com. *349; 2 Bacon, Abr. 428. A coroner's court in England is a court of record, and upon a finding of *felo de se* the executor or administrator may remove the inquest of office into the court of the King's bench, and traverse it; for it is said: "It would be

hard that he should be concluded by an inquisition, which is nothing more than an inquest of office, taken behind his back." Starkie, Ev. 10th ed. *404; 7 Am. & Eng. Enc. Law, 2d ed. p. 604; 1 Hale, P. C. 416, 417; *Garnett v. Ferrand*, 6 Barn. & C. 611. In the United States they are generally denominated courts of inferior jurisdiction, and not of record. 7 Am. & Eng. Enc. Law, 2d ed. p. 604. But in this state the organic act does not so much as dignify the office with any judicial functions whatever. Const. art. 6, § 6; art. 7, §§ 1, 9. In the case of a *felo de se*, under the old law his goods and chattels were forfeited to the King, and his body was given over to an ignominious burial, these resultant features giving the inquisition the semblance of an action *in rem*, which determined the status both of the person of the deceased and of his goods and chattels. So it has come to be held in England that inquisitions post mortem are admissible as evidence of the status, but not conclusive. *Sergeson v. Sealey*, 2 Atk. 412; Starkie, Ev. 10th ed. *406; 1 Greenl. Ev. 15th ed. § 556. A like rule has been promulgated in some of the states of the Union, based upon the reasoning that gave rise to it in the country of its nativity. *United States L. Ins. Co. v. Vocke*, 129 Ill. 557, *sub nom. United States L. Ins. Co. v. Kielgast*, 6 L. R. A. 65, 22 N. E. 467; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Grand Lodge I. O. of M. A. v. Wieting*, 168 Ill. 408, 48 N. E. 59; *Supreme Lodge K. of H. v. Fletcher*, 78 Miss. 377, 28 So. 872, 29 So. 523; *Metzradt v. Modern Brotherhood*, 112 Iowa, 522, 84 N. W. 498. The leading case is perhaps the first cited,—*United States L. Ins. Co. v. Vocke*,—which bases the rule, not upon the ground that the coroner acts in a judicial capacity, for the organic act of the state of Illinois deprived him of any such power, but for the reason that the inquisition is made by a public officer, acting under the sanction of an official oath in the discharge of a public duty enjoined upon him, and returned to and filed in the office of the clerk of the circuit court, as required by law; Mr. Justice Baker, in his concurring opinion, affirming that such an inquisition thereby became a record of the circuit court, and as such is competent as testimony. This authority is apt under our Constitution as well, in so far as it discards the idea that a coroner's inquest is judicial in character. Under our statute the coroner has power, when informed that a person has been killed or dangerously wounded by another, or has suddenly died under such circumstances as to afford a reasonable ground to suspect that his death has been occasioned by criminal means, or has committed suicide, to inquire, by the intervention of a jury, into the cause of the death or wound, and to perform the other duties incidental thereto in the manner prescribed by statute. *Bellinger & C. Anno. Codes & Statutes*, § 1045. His duty requires him to go to the place where the dead or wounded person is, and summon six qualified persons to serve as jurors, whose duty it becomes, on being sworn, to inquire

whether the person was, and when, where, and by what means he came to his death or was wounded, as the case may be, and into the circumstances attending the death or wounding, and give a true verdict therein according to the evidence offered or arising from the inspection of the body. He must subpoena and examine as witnesses every person who, in his opinion, has knowledge of the material facts; also a surgeon or physician, who must inspect the body, and give a professional opinion as to the cause of death or wound; and, for the purpose of compelling such witnesses to attend and testify, or punishing them for disobedience, he is to be deemed a magistrate. The testimony of the witnesses and the verdict must be reduced to writing. If the jury find that a crime has been committed, the coroner must forthwith deliver the testimony and verdict to a magistrate; but, if they do not so find, he must return the same to the clerk of the county court; and, if the verdict also charge a person with the commission of the crime, the magistrate is immediately to issue a warrant for the arrest of such person as on an information, and, when brought before him, to examine into the charge contained in the verdict. Id. §§ 1683 to 1690, inclusive. According to this procedure, if the jury do not find that a crime has been committed, the testimony and verdict must be returned to the clerk of the county court, which, under the Constitution, is a court of record. This would, perhaps, include a verdict that death was self-inflicted, so that we have almost a parallel with the Illinois case. However, it seems to us that that case and those that follow it proceed upon an erroneous principle. Such a document, before it can be admissible under any of the older authorities, must be judicial in character, and we cannot think that the mere fact that it is required to be returned to and filed with the clerk of a court of record endows it with that vitality. Mr. Starkie's classification of judicial documents is: (1) Judgments, decrees, and verdicts, and (2) inquisitions, depositions, and examinations taken in the course of a judicial proceeding. A third includes writs, warrants, pleadings, etc. Of inquisitions he then says: "Such inquests as are of a public nature, and taken under competent authority, to ascertain a matter of public interest, are, upon principles already announced, admissible in evidence against all the world. They are very analogous to adjudications *in rem*, being made on behalf of the public. No one is properly a stranger to them, and all who can be affected by them usually have the power of contesting them." Starkie, Ev. 10th ed. *316, *403, *404. We have seen that when suicide was involved it was susceptible of traverse under the English system in the court of the King's bench, and had legitimate sanction of a judicial proceeding in every stage of its progress and development; and Greenleaf does not announce a different doctrine. Now, it cannot be said that a coroner's inquest under our system has the sanction or is taken in the course of any judi-

cial proceeding; much less that it is of judicial impress. The verdict of the jury, if no crime is found to have been committed, is merely returned into a court of record, with no power of revision or approval. If a crime has been committed, and a person is charged therewith, the verdict serves as an information, upon which a magistrate may issue a warrant of arrest, and examine him touching the charge; but the inquisition has no probative value in that proceeding even so that it is wholly extrajudicial, and, within itself, is void of all the essential qualities that go to make it independent evidence of homicide, self-inflicted. This view is supported by abundant authority, and we believe it to be founded upon correct legal principles. *Germania L. Ins. Co. v. Ross Lewin*, 24 Colo. 43, 51 Pac. 488; *Wasey v. Travelers' Ins. Co.* 126 Mich. 119, 85 N. W. 459; *State use of Grice v. Cecil County*, 54 Md. 426; *Union Cent. L. Ins. Co. v. Hollowell*, 14 Ind. App. 611, 43 N. E. 277; *Ralston's Petition*, 9 Pa. Dist. R. 514. The record of the inquest was, therefore, properly rejected.

The next question relates to the refusal to admit in evidence the proofs of death as a whole, which is assigned as error. A by-law of the defendant provides that upon the death of the assured the lodge of which he was a member shall at once notify the supreme executive council, giving the name of the deceased member, the number of his certificate, and shall furnish upon blanks provided for that purpose full and satisfactory proofs of death. The blank forms furnished by the supreme lodge require that, in case of a voluntary or mysterious death, a duly authenticated copy of the coroner's inquest, under his hand, must accompany the proofs. It is undoubtedly a well-established rule of law that the record of a coroner's inquest attached to proofs of death made by the beneficiary or his agent, in conformity to blanks furnished by the company, is admissible in evidence, along with such proofs, upon the ground that it contains admissions of the beneficiary against his interest as to the cause of death. *Mutual Ben. L. Ins. Co. v. Newton*, 22 Wall. 32, 22 L. ed. 793; *Mutual Ben. L. Ins. Co. v. Higginbotham*, 95 U. S. 380, 24 L. ed. 499; *Keels v. Mutual Reserve Fund Life Assn.* 29 Fed. 198; *Sharland v. Washington L. Ins. Co.* 41 C. C. A. 307, 101 Fed. 206; *Hart v. Fraternal Alliance*, 108 Wis. 490, 84 N. W. 851; *Walther v. Mutual L. Ins. Co.* 65 Cal. 417, 4 Pac. 413. But the rule can have no application where such proofs are furnished by the company's agent. When thus furnished, nothing contained therein, unless subscribed by the beneficiary or his agent, or at least with his express or implied sanction, can operate as an admission on his part, and against his interest. Such declarations, from their very nature, must necessarily be self-serving, and could hardly fail to be conducive of abuse or injustice. By § 127 of the by-laws of the order, *supra*, it is made the duty of the subordinate lodge of which the deceased was a member to notify the supreme executive

council of his death in the manner therein designated, and no duty seems to have been cast upon the claimant to furnish proofs of death as a prerequisite to maintain an action upon the certificate. The subordinate lodge is thereby made the agent of the executive council, for whom it acts in furnishing proofs of death, and not for the claimant. *Anderson v. Supreme Council, O. of C. F.* 135 N. Y. 107, 31 N. E. 1092; *Supreme Council, O. B. L. v. Boyle*, 10 Ind. App. 301, 37 N. E. 1105. The death of Mrs. Cox being admitted, the object of introducing such proofs in behalf of the defendant was solely to show the manner of her death, it having been alleged as a defense that it was the result of her own act. As we have seen, the record of the coroner's inquest is not legitimate evidence for that purpose, and it is not rendered admissible because it is sought to be introduced along with the other proofs of death made up by the agent of the defendant, and could in no way bind the plaintiff as an admission touching the manner of death. The record was, therefore, not proper for the consideration of the jury, although it constituted a part of the proofs; there being no controversy as to the fact of death. *Supreme Council of R. A. v. Brashears*, 80 Md. 621, 43 Atl. 866.

It is further insisted that a nonsuit should have been granted upon defendant's motion therefor, or that the court should have directed a verdict in favor of the defendant, as requested. As to this we are clearly of the opinion that there was sufficient evidence adduced to justify the court in letting the case go to the jury. The burden of proof was with the defendant to establish suicide, and this it has not done by such clear and convincing evidence, void of dispute and controversy, as to warrant the court in directing a verdict in its favor. There is a presumption that death is the result of natural causes which inure to the benefit of the plaintiff, and should, as the first step, be satisfactorily overcome before the defendant could have a verdict. Again, the defendant is called upon to counterbalance by such cogent and convincing proofs any testimony adduced tending to establish death from natural causes that there could not reasonably be two opinions touching the result; for, if it were otherwise, it would be an invasion of the province of the jury to take the case from them. The question here, then, is the one stated by the court in the case of *Sovereign Camp Woodmen v. Haller*, 24 Ind. App. 108, 56 N. E. 255: Are the facts proved such as to exclude any other reasonable inference than that the assured voluntarily took her own life? And this we must answer in the negative. For cases of marked analogy supporting this view, see *Beckett v. Northwestern Masonic Aid Assn.* 67 Minn. 298, 69 N. W. 923; *Supreme Council of R. A. v. Brashears*, 80 Md. 624, 43 Atl. 866; *Goldschmidt v. Mutual L. Ins. Co.* 35 N. Y. S. R. 121, 12 N. Y. Supp. 866; *Travelers' Ins. Co. v. Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Stephenson v. Bankers' Life Assn.* 108 Iowa, 637, 79 N. W.

459; *Metzgradt v. Modern Brotherhood*, 112 Iowa, 522, 84 N. W. 498; *Home Benefit Assn. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332; *Ingersoll v. Knights of G. R.* 47, Fed. 272. It cannot be said that the evidence introduced has but one tendency, and that pointing to self-destruction by the deceased. It is somewhat in conflict, to say the least, and different minds may reasonably come to different conclusions as to whether the act was her own, whether sane or insane, or whether it was the result of apoplexy or sudden sickness, causing her to fall into the water where she was found.

The court instructed the jury, among other things, as follows: "One of the defenses in this case is that the deceased, Capitola Blanche Cox, committed suicide, and you are instructed that this is an affirmative defense set up by defendant, and the burden is upon the defendant to establish same to your satisfaction by a preponderance of the testimony. When a person is found dead from unexplainable causes, the presumption is that his death was natural or accidental, if nothing appears to the contrary. Self-destruction is contrary to the general conduct of mankind. The plaintiff is therefore entitled to recover, unless the evidence introduced has overcome this presumption, and satisfied you that death was voluntary. The presumption of law is, in the absence of any evidence as to the cause of death, that it happened from natural causes, and that such death did not arise from self-destruction; and in this case, if there was no proof as to the cause or manner of death of Mrs. Cox, or if the evidence as to whether her death was caused by accident or natural causes, and not by her own hands, was evenly balanced, you would find in favor of this presumption. But this is only a disputable presumption, and if, from all the evidence in the case, you find by the preponderance thereof that she came to her death by her own hands, whether she was sane or insane, you must find for defendant." Exception was taken to this instruction on account of the use of the words "unexplainable" and "satisfied." It is suggested that Mrs. Cox was not found dead from

unexplainable causes; but it is manifest the term was employed by the trial court to define the presumption alluded to, and it was left to the jury to say whether there was any proof as to the cause or manner of her death. It is also suggested that the term "satisfied" is a much stronger one than should have been employed in that relation, signifying, as it does, to settle certainly, or fix permanently, what was before uncertain, doubtful, or disputed. It must be construed, however, in the sense in which it was used. The court explained previously that the burden of proof as to the fact of suicide, if it existed, was with the defendant, and this it must establish to the satisfaction of the jury by a preponderance of the testimony. To be "satisfied" by a preponderance of the evidence and to be "satisfied" in the general sense are entirely different conditions of the mind, and the term was, as clearly indicated by the court, employed in the former sense.

But the more serious objection seems to be that the court should not have instructed at all as to the presumption of death from natural causes, affirming that there was sufficient testimony otherwise bearing on the issue from which the jury should have made up their verdict; and citing *Sackberger v. National Grand Lodge, I. O. T. L.* 73 Mo. App. 38. In the case at bar the evidence is not such as to explain or to indicate with such probability how the body of the deceased came to be in the water as found as to render the presumption unavailable in determining the cause of death. She was found in the water, but no one saw her go in, and how she came to be there, whether of her own accord or by another cause, no one can positively say from the testimony; hence the presumption becomes a pertinent factor in determining the cause, and, we think, was properly submitted to the jury in aid of their deliberations. The instruction is in accord with rule 120, *Lawson, Presumptive Ev.* 576, and has the support of *Graves v. Colwell*, 90 Ill. 612.

These considerations affirm the judgment of the trial court, and such is the order of this court.

RHODE ISLAND SUPREME COURT.

Marjorique PEPIN

v.

SOCIETE ST. JEAN BAPTISTE of Woonsocket.

(.....R. I.....)

1. A return to a writ of mandamus to

NOTE.—As to invalidity of judicial proceedings on Sunday, see *Merchants' Nat. Bank v. Jaffray* (Neb.) 19 L. R. A. 316, and cases in note; also *Hanover F. Ins. Co. v. Schrader* (Tex.) 30 L. R. A. 498, and *Havens v. Stiles* (Idaho) 56 L. R. A. 736.

As to exception of works of charity in Sunday law, see *Bryan v. Watson* (Ind.) 11 L. R. A. 63, and *First M. E. Church v. Donnell* (Iowa) 46 L. R. A. 858.
60 L. R. A.

compel the restoration of a member of a mutual benefit society to his rights therein, which alleges that, upon evidence produced after notice to accused and an opportunity given him to be heard, the society made a judicial determination that he had been guilty of conduct which, under the rules of the association, subjected him to expulsion from the society, is sufficient, although it does not aver that the charges were true, where he presented no evidence, and the society therefore had only part of the evidence before it in reaching its conclusion.

2. Whether or not a member of a benefit society had notice of a hearing, in consequence of which he was expelled from a society for violating its rules, is a question of fact, and not of law.

3. A member of a benefit society having actual notice of the charge against him for which he is expelled from the society cannot reverse the decision because such charge is not specially stated in the form of proceedings against him.
4. Benefit societies being charitable organizations, their proceedings may be lawfully transacted on Sunday, even to the hearing and determination of charges against members which result in their expulsion.
5. The hearing of charges against a member of a benefit society, and expelling him from membership because of violation of the rules, are not a judicial proceeding within the rule which forbids such proceedings on Sunday.

(December 19, 1902.)

ON DEMURRER to the answer to an application for a writ of mandamus to compel the restoration of petitioner to membership in the defendant association. *Overruled.*

The facts are stated in the opinion.

Mr. Arthur M. Allen, for petitioner:

The respondent's answer should have alleged that the charges upon which the petitioner was expelled were true.

Pepin v. Société St. Jean Baptiste, 23 R. 1. 81, 49 Atl. 387; *Savannah Cotton Exchange v. State*, 54 Ga. 668.

The notice which the society gave to the petitioner on the question of his expulsion was insufficient. It does not specify the time when the false representations were made, nor in what they consisted. It would be impossible for a member to prepare his defense upon such a specification of charges.

Murdock, Appellant, 7 Pick. 303; *Hutchinson v. Lawrence*, 67 How. Pr. 38; *Mulroy v. Supreme Lodge, K. of H.* 28 Mo. App. 463; *Allnutt v. Subsidiary High Court, U. S. A. O. of F.* 62 Mich. 110, 28 N. W. 802; *People ex rel. Roehler v. Mechanics' Aid Soc.* 22 Mich. 86; *People ex rel. Mersheim v. Musical Mut. Protective Union*, 47 Hun, 273; *Downing v. St. Columba's R. C. T. A. B. Soc.* 10 Daly, 262; *Reynolds v. Pauctucket*, 23 R. I. 370, 50 Atl. 645; 1 Bacon, Ben. Soc. § 101; *Wachtel v. Noah Widows' & Orphans' Benev. Soc.* 84 N. Y. 28, 38 Am. Rep. 478; *People ex rel. Decker v. Hoboken Turtle Club*, 38 N. Y. S. R. 4, 14 N. Y. Supp. 76.

A member does not waive the right to object to the notice by attending the meeting.

Downing v. St. Columba's R. C. T. A. B. Soc. 10 Daly, 262.

The society had no power to expel the petitioner for the reasons and in the manner alleged in the answer. The authority for the expulsion must be a clear and definite one, to justify it.

Mulroy v. Supreme Lodge, K. of H. 28 Mo. App. 463; *People ex rel. Roehler v. Mechanics' Aid Soc.* 22 Mich. 86; *Savannah Cotton Exchange v. State*, 54 Ga. 668; *People ex rel. Gray v. Medical Soc.* 24 Barb. 570; *People ex rel. Bartlett v. Medical Soc.* 32 N. Y. 187; *Com. ex rel. Fischer v. German Soc.* 15 Pa. 251; *Schuciger v. Society*, 13 Phila. 113.
60 L. R. A.

The expulsion on Sunday was illegal.

Johnson v. Day, 17 Pick. 106; *Parsons v. Lindsay*, 41 Kan. 336, 3 L. R. A. 658, 21 Pac. 227; 24 Am. & Eng. Enc. Law, p. 574; *Broom, Legal Maxims*, *21; *Co. Litt.* 135 A.

A judgment rendered on Sunday is absolutely void.

Parsons v. Lindsay, 41 Kan. 336, 3 L. R. A. 658, 21 Pac. 227; *Baxter v. People*, 8 Ill. 368; *Ex parte White*, 15 Nev. 146, 37 Am. Rep. 406; *Davis v. Fish*, 1 G. Greene, 406, 48 Am. Dec. 387; *Arthur v. Mosby*, 2 Bibb, 589; *Story v. Elliot*, 8 Cow. 27, 18 Am. Dec. 423.

A resolution adopted by a nonreligious society is invalid because passed on Sunday.

Lansing Turnverein Soc. v. Carter, 71 Mich. 608, 39 N. W. 851.

The petitioner at the trial on the question of his expulsion was entitled to employ counsel; otherwise he would not have a fair trial as required by law.

1 Bacon, Ben. Soc. § 102; *Murdock v. Phillips Academy*, 12 Pick. 244.

Under the statute it would have been illegal for petitioner to have employed counsel to act for him on the Sabbath.

Messrs. Archambault & Gaulin for respondent.

Stiness, Ch. J., delivered the opinion of the court:

The petitioner asks for a writ of mandamus to restore him to membership in the respondent society, a corporation, from which, he avers, he has been illegally and unjustly expelled. The respondent, in its answer to the alternative writ, sets up that a complaint was made against the petitioner, which was duly heard before a committee, he being present, and referred to the society; that on September 18, 1898, the committee reported to the society the charge that the petitioner had attempted to defraud the society by drawing, or trying to draw, benefits, under false representations; that, by the record of the society, the petitioner's demand for benefits was laid upon the table, and the secretary was ordered to notify the petitioner to appear before the society to answer said charge, and that he would be stricken out of the list of membership should he fail to exculpate himself; that notice was sent to him by mail to appear on Sunday, October 2, 1898, specifying the charge; that on said day the petitioner failed to appear and to make any defense against said charge or accusation, as requested by said notice; that the accusation was then and there regularly brought before said society, and, said Pepin failing to appear and exculpate himself, and evidence being produced tending to establish the guilt of said Pepin, it was then and there decided by said society that said Pepin was guilty of said accusation, and he was then and there, by a vote regularly passed, expelled from membership. The by-laws provide that those who work against the interests of the society may be stricken off the roll of membership. The answer avers that the accusation was brought in good faith, and not

for the purpose of injuring the petitioner or of avoiding the payment of benefits to him; that he was given full opportunity to appear and to offer evidence; and that he was expelled after it had been judicially determined by the society, upon evidence, that he was guilty of the offenses charged against him. The petitioner demurs to the answer.

It was held, in *Pepin v. Société St. Jean Baptiste*, 23 R. I. 81, 49 Atl. 387, and in *Lavalle v. Société St. Jean Baptiste*, 17 R. I. 680, 16 L. R. A. 392, 24 Atl. 467, that membership in a beneficial association, where there is a contract to pay money by way of benefits or insurance, is a contract in the nature of a property right. As such, it is to be dealt with according to rules of law applicable to other cases of contract or of right. A member cannot be deprived of his membership arbitrarily or without proper cause. He is entitled to notice and opportunity for defense, which includes a specification of the charge against which he is to defend. *Sleeper v. Franklin Lyceum*, 7 R. I. 523; *Reynolds v. Pawtucket*, 23 R. I. 370, 50 Atl. 645. All of these requirements to a legal expulsion are averred in the answer, and, on demurrer, must be taken to be true.

One ground of demurrer is that the answer does not state that the charge was true. We think it states all that could properly be said in this respect. It says that evidence was produced tending to establish the guilt of the petitioner, upon which the society made a judicial determination. As testimony only on one side was before the society, it would neither be natural nor proper that the society should say that the charge was absolutely true. For the purposes of this demurrer, the society had testimony which, in its opinion, proved the charge, after notice and opportunity to the petitioner to be heard thereon.

The averment of the petitioner that he had no notice raises a question of fact, not of law. Nothing appears to show that the notice was insufficient as to time or substance. The charge, according to the by-laws, was one for which a member could be expelled, if for such a charge an authority in the by-laws was necessary. *Society for Visitation of Sick v. Com.* 52 Pa. 125, 91 Am. Dec. 139.

It is further urged that the charge as set forth was not sufficiently specific, because it does not state to what particular matters or what occasions they refer, so as to enable the petitioner to defend against them. Doubtless this would have weight if it appeared that the member was unable, for want of specification, to meet the charge, and he was thereby deprived of a chance to present his defense. But when he has actual notice of the particular charge he has all that he can claim, even though it may not be formally stated. In *Reynolds v. Pawtucket*, the petitioner protested against immediate action on that ground, but his protest was refused. In this case it appears that the petitioner was present at the hearing before the committee, and that the matter then heard was referred to the society.

He therefore knew the particular charge to be tried. We see no ground for demurrer in the substance of the answer.

Another ground for demurrer is that, as the hearing and expulsion took place on Sunday, it was illegal and void. It was a rule of the common law that Sunday is a nonjudicial day, and many cases have held that a judgment entered on Sunday was void. The petitioner argues that the trial in this case was an exercise of judicial power, and therefore void. The cases relied on by him relate to judgments of courts, where it has been held, in some upon common-law authority and in some upon statutory provisions, that judgments so entered were void. We recognize the correctness of such decisions upon common-law authority, and also upon grounds of public policy and recognition of Christian practice. The present case, however, does not come within such grounds of prohibition. While there was a trial, the respondent was not a court of law, but a benevolent association, and its action was a part of the business of such a society. Such bodies are recognized as charitable organizations because their object is not individual profit, but a provision to relieve its members and their families in cases of sickness and death. There was no rule at common law to forbid such societies to transact their business on Sunday. Possibly they are of too recent a date to have been embraced in such a rule. As said by Savage, Ch. J., in *Story v. Elliot*, 8 Cow. 27, 18 Am. Dec. 423: "By the common law, then, it appears, all judicial proceedings are prohibited. All other acts are lawful unless prohibited by statute." That case involved an award made on Sunday, and the court held it void, as a judicial proceeding, because arbitrators are not only jurors to determine facts, but judges to adjudicate as to the law; and their award, when fairly and legally made, is a judgment conclusive between the parties, from which there is no appeal. Accepting the rule thus stated, we do not think that the action here complained of was a judicial proceeding in the sense in which the term was used at common law, nor by the court in the opinion last cited. Evidently the courts of New York do not so regard it, for in *People ex rel. Corrigan v. Young Men's Benev. Soc.* 65 Barb. 357, it was held that a notice to answer charges served on Sunday, and a hearing, resulting in expulsion from a benevolent society, on the next Sunday, were not illegal because the papers were served and were returnable on Sunday, because they were not illegal at common law nor forbidden by statute. The court added: "The relator chose to belong to a society which held all its regular meetings on that day, and if, at such a meeting, he was served with notice to attend the next meeting, it does not rest with him to make the objection." In *McCabe v. Father Mathew Total Abstinence Ben. Soc.* 24 Hun, 149, it was held that a resolution of suspension was not rendered invalid by the fact that it was adopted at a meeting held on Sunday, for the reason "it is pure charity to

relieve sick members, and the passage of such a resolution on Sunday would be unobjectionable." In *Lansing Turnverein Soc. v. Carter*, 71 Mich. 608, 39 N. W. 851, under Comp. Laws, chap. 55, § 1, like our law in excepting works of necessity and charity, it was held that a resolution authorizing a mortgage by the society, passed on Sunday, was void because it was not a religious or charitable association; implying that a charitable association might have done so. No cases are cited by the petitioner, and we know of none, which hold that a society of this sort may not transact its business on Sunday. That which comes nearest to such a statement is *Society for Visitation of Sick v. Com.* 52 Pa. 125, 91 Am. Dec. 139. The court sustained the expulsion of a member of a relief association for the sick, at a meeting held on Sunday, on the ground that the question of illegality for that cause was not before the court as one of the grounds of demurrer. The court added, by way of *quere*: "It might be well to consider how far such trials on Sunday comport with the legislation of the state and the genius of our institutions." The statute was similar to ours in excepting works of necessity and charity. We think that the necessary work of charitable organizations is within the intent and words of our statute. The petitioner argues against such a construction, for the reason that he might not be able to compel the attendance of witnesses or the aid of counsel on Sunday. This consideration, however, is not raised by any facts set forth in the record. The attendance of witnesses before such a tribunal cannot be compelled at any time; but a lawyer appearing to defend might be regarded as doing work of his ordinary calling. If either witnesses or counsel should be unwilling to attend on Sunday, or for any cause tending to deprive one of a fair trial he should ask for a reasonable postponement on that account, and it should be refused, there would be strong reason for holding such an expulsion to be illegal. But no such facts appear in this case.

We decide that *the demurrer to the answer cannot be sustained upon the grounds stated.*

Christopher COX
v.

AMERICAN AGRICULTURAL CHEMICAL COMPANY.

(.....R. I.....)

1. An objection to the declaration in an action for personal injuries, based

NOTE.—As to liability of master for injury to servant from use of compressed air in tunnel when servant was ignorant of the danger, see *Turner v. St. Clair Tunnel Co.* (Mich.) 36 L. R. A. 134, and 47 L. R. A. 112.

As to effect of servant's lack of knowledge of danger on question of assumption of risk generally, see cases in *note* to *O'Maley v. South Boston Gaslight Co.* (Mass.) 47 L. R. A. 161. 60 L. R. A.

on a formal defect in that it did not set forth any duty owing from defendant to plaintiff, cannot be raised before the appellate court in the first instance.

2. A servant undertaking to clean a drain filled with decaying animal matter does not assume the risk of injuries from dangerous gases of which he has no knowledge, the effect of which it requires special scientific knowledge to measure and determine, although he knows of the character of the contents of the drain, and that it emits offensive odors.
3. It cannot be said, as matter of law, that an employer sending a servant to clean out a drain filled with decaying animal matter cannot know of the presence of noxious and deadly gases therein which might cause serious injury to the servant, so as to be charged with the duty of informing the servant of the danger, or taking measures to protect him therefrom.

(November 26, 1902.)

ON DEMURRER to the declaration in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Overruled.*

The facts are stated in the opinion.

Messrs. W. B. W. Hallett and H. W. Kimball for plaintiff.

Messrs. Edwards & Angell, for defendant:

The declaration does not set forth any duty owing from the defendant to the plaintiff, the breach of which would give rise to an action in favor of the plaintiff.

Smith v. Tripp, 13 R. I. 152; *Parker v. Providence & S. S. B. Co.* 17 R. I. 376, 14 L. R. A. 414, 22 Atl. 284, 23 Atl. 102; *Wilson v. New York, N. H. & H. R. Co.* 18 R. I. 491, 20 Atl. 258.

The defendant's negligence, as set forth in the declaration, consisted in allowing a certain pipe or drain to become full of foul, decayed, decomposed, and putrifying animal matter. The condition of this drain or pipe became known to the plaintiff when he went to clear out the same, and the risk of injury therefrom was assumed by him.

Disano v. New England Steam Brick Co. 20 R. I. 452, 40 Atl. 7; *Gulf, C. & S. F. R. Co. v. Jackson*, 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. 48; *Finalyson v. Utica Min. & Mill. Co.* 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 507; *Armour v. Hahn*, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433; *Bailey, Personal Injuries Relating to Master & Servant*, §§ 3022-3025; *Baumler v. Narragansett Brewing Co.* 23 R. I. 430, 50 Atl. 841.

The presence of noxious and poisonous gases in the pipe or drain which the plaintiff was sent by the defendant to clean was known to the plaintiff, and the risk of injury therefrom by reason of working in said pipe or drain was assumed by him.

Beittenmiller v. Bergner & E. Brewing Co. 22 W. N. C. 33, 12 Atl. 599; *Downey v. Sawyer*, 157 Mass. 418, 32 N. E. 654; *Lothrop v. Fitchburg R. Co.* 150 Mass. 423, 23 N. E. 227; *Wilson v. Massachusetts Cotton Mills*, 169 Mass. 67, 47 N. E. 506.

Tillinghast, J., delivered the opinion of the court:

This is trespass on the case for negligence, and is before us on the defendant's demurrer to the plaintiff's declaration. The declaration sets out that the plaintiff was in the employ of the defendant as a laborer at its place of business, on Mineral Spring avenue, in the city of Pawtucket,—said business being known as the L. B. Darling Fertilizer Works,—and that it was engaged in the business of preparing and pickling pigs' feet, tripe, and other meat, and about which employment the plaintiff was engaged by the defendant. And he avers that while so engaged he was, without any warning or cautioning, sent and directed by the defendant, by its superintendent and agent, to clean out and empty a certain dangerous waste pipe or drain, which had become stopped up, situate on the defendant's premises. And the plaintiff avers that he was ignorant of, and did not know and was not informed by the defendant of, the dangerous condition of said drain or pipe, and that, in accordance with the directions so received by him, he proceeded to clean out and empty said pipe or drain. And he further avers that the defendant had so carelessly and negligently allowed said pipe or drain to become full of foul, decayed, decomposed, and putrefying animal matter, that, by reason of the defendant's negligence, the animal matter in said pipe or drain, when opened by the plaintiff for the purpose aforesaid, produced noxious and poisonous gases, accompanied by a great stench, smell, and odor, and from which putrefactions there arose noxious, injurious, and deadly gases; and, while in the exercise of due care while doing said work as aforesaid, he was overcome by said noxious, injurious, and poisonous gases, and was completely prostrated, and was poisoned, and became totally blind, and otherwise sick and disordered, and suffered other injuries, all by reason of the defendant's negligence and carelessness as aforesaid. And the plaintiff avers that he had no notice of, and did not know of, the existence of said dangerous, noxious, and deadly gases in said pipe or drain, but that the defendant ought to have known and been aware that said pipe and drain had been stopped up for a long time, and that it well knew of the unfit, foul, and dangerous condition thereof, and yet carelessly and negligently set the plaintiff to work upon said pipe or drain, which it had so allowed and maintained in a foul, noxious, and deadly condition as aforesaid, whereby the plaintiff was injured, etc.

The grounds of the demurrer to the declaration are: (1) That it does not set forth any duty owing from the defendant to the plaintiff, the breach of which would give rise to an action in favor of the plaintiff. (2) That the defendant's negligence, as set forth in his declaration, consisted in allowing a certain pipe or drain to become full of foul, decayed, decomposed, and putrefying animal matter, and that the condition of this drain or pipe became known to the plaintiff 60 L. R. A.

when he went to clean out the same, and the risk of injury therefrom was assumed by him in entering upon said work. (3) That the presence of noxious and poisonous gases in the pipe or drain which the plaintiff was sent to clean by the defendant was known to the plaintiff, and the risk of injury therefrom by reason of working in said pipe or drain was assumed by the plaintiff. (4) That it appears by the plaintiff's declaration that the injury complained of was incident to the work upon which he was engaged, and was therefore assumed by him. (5) That the plaintiff alleges that "the animal matter in said pipe or drain, when opened by the plaintiff for the purpose aforesaid, produced noxious and poisonous gases." The presence of said gases could not, therefore, have been previously known to the defendant, and hence the defendant could not have informed the plaintiff of a condition which did not exist, and therefore there was no duty resting upon the defendant to the plaintiff in this particular.

The first ground of demurrer is based upon a mere formal defect in the declaration, and therefore is not properly before us. *Miller v. Boyden*, 22 R. I. 441, 48 Atl. 444.

The second, third, and fourth grounds of demurrer may properly be considered together; and the question raised thereby is whether the declaration shows that the plaintiff assumed the risk connected with the doing of the work of cleaning out the pipe or drain referred to. Defendant's counsel argues that it appears from the declaration that the condition of the drain or pipe was perfectly apparent to the plaintiff, and hence, if he chose to work under such conditions, he assumed the risk of injury from the defendant's negligence in allowing animal matter to collect in the drain, and hence he states no cause of action. We cannot assent to this. For, while the declaration shows that the condition of the pipe, as to its being filled with decaying animal matter, and as to its emitting offensive odors, was apparent to the plaintiff, it does not show that he had knowledge, or was in a position to have had knowledge, of the dangerous nature of the odors and gases in said pipe, and, moreover, the declaration expressly alleges that he had no knowledge of the presence of said poisonous gases in the pipe. Nor are these allegations necessarily inconsistent, as argued by defendant's counsel. A man may know of the existence of decaying matter, and also that it is offensive to the smell, but may at the same time be wholly ignorant of the fact that the odor is poisonous or dangerous. And when such a state of things exists, it cannot be said that a servant who is set to work by his employer in such a place, without any notice of the danger, assumes the risk thereof. He only assumes such risks as are apparent to the senses of an ordinarily intelligent person, and not those which require special scientific knowledge to measure and determine. *Smith v. Peninsular Car Works*, 60 Mich. 501, 27 N. W. 662, and cases cited. The case is therefore clearly distinguishable

from *Disano v. New England Steam Brick Co.* 20 R. I. 452, 40 Atl. 7, and *Baumler v. Narragansett Brewing Co.* 23 R. I. 430, 50 Atl. 841, relied on by defendant. In each of these cases the danger complained of was manifestly apparent to the senses of any person of ordinary intelligence; and hence, following the well-settled rule of law in such cases, the risk of personal injury was held to have been assumed by the servant. The case of *Beittenmiller v. Bergner & E. Brewing Co.* 22 W. N. C. 33, 12 Atl. 599, cited by defendant's counsel, also fails to support the position taken by him. There the plaintiff, a carpenter and foreman of a gang of men, was engaged in doing work at the defendant's brewery. They were ordered by the defendant's superintendent to put a certain stringer in place in a part of the brewery known as the "Ice-Machine House." Plaintiff and his fellows, in pursuance of the order, carried the stringer into the building, and began to raise it, but soon found that there was so much ammonia in the atmosphere of the room that they could only proceed with the work for a little while at a time; and they found that they were more affected by the ammonia as they ascended in the room, but they were ignorant of the place or places at which the ammonia escaped. They left work, but were ordered back to it by the superintendent; he saying that the ammonia was not so bad then. They returned to the work, and the plaintiff climbed to a place where he could direct it. While so engaged, he moved his head along in front of the partition, when his face suddenly came in contact with a puff or blast of ammonia vapor escaping through a hole in the partition. Plaintiff was overcome by the shock, and fell to the floor below, whereby he sustained permanent injury. At the trial of the case below the plaintiff was nonsuited, which nonsuit was sustained by the supreme court. We entire-

ly concur with the decision of the court in that case. It clearly appeared that the plaintiff knew, not only of the presence of the gas, but also its nature and effects, and hence he assumed the risk of inhaling it. In the case at bar, as already suggested, the plaintiff only knew of the presence of decaying or decomposing animal matter in the drain, from which an offensive odor or gas arose, but did not know, and, so far as appears from the declaration, was not chargeable with knowledge of, its dangerous or deadly character. In other words, the danger which the plaintiff alleges existed in connection with the doing of his work was a latent danger, and hence was not assumed by him. See *Coombs v. New Bedford Cordage Co.* 102 Mass. 572, 3 Am. Rep. 506. Moreover, it appears from the declaration that the work which the plaintiff was directed to do, and was doing or attempting to do when he sustained the injury complained of, was outside of his regular employment, and was work with which he was wholly unfamiliar.

The fifth and last ground of demurrer is untenable. We cannot say, as matter of law, that the defendant could not have known of the presence of said noxious and deadly gases in the pipe or drain, or that it was not its duty to have known thereof before directing the plaintiff to do said work. And so long as the declaration alleges that the defendant did know, or ought to have known, of the dangerous condition of said drain, we cannot say that it did not know of it. Indeed, by demurring to the declaration the defendant admits, for the purposes of the present hearing, that it did know of the dangerous condition of said drain, and also that the plaintiff was wholly ignorant thereof.

Demurrer overruled, and case remanded for further proceedings.

TEXAS COURT OF CRIMINAL APPEALS.

Ex parte Marcellus E. FOSTER.

(.....Tex. Crim. App.....)

1. The right to a writ of habeas corpus is not defeated on the ground that petitioner is not in custody, where he has been placed under arrest by the sheriff, and told that his movements must be under the control of the sheriff, although he is given the liberty of the city to aid him in procuring the writ.
2. The court cannot, of its own mo-

NOTE.—For other cases in this series as to contempt by newspaper publication pending trial, see *People ex rel. Connor v. Stapleton* (Colo.) 23 L. R. A. 787; *State ex rel. Ashbaugh v. Eau Claire County Circuit Court* (Wis.) 38 L. R. A. 554; and *State v. Tugwell* (Wash.) 43 L. R. A. 717.

As to constitutional freedom of speech, and of the press generally, see *Cowan v. Fairbrother* (N. C.) 32 L. R. A. 829, and *note*. 60 L. R. A.

tion, adjudge the publisher of a newspaper in contempt for disobeying its oral order not to publish the testimony in a case on trial, and then attach him to show cause why the judgment should not be made final.

3. The court cannot prohibit the publication of the testimony taken in a trial in which no obscenity is involved, where the Constitution guarantees a public trial and the liberty of the press.

(January 28, 1903.)

APPPLICATION for a writ of habeas corpus to procure the release of petitioner from custody to which he had been committed for alleged contempt of court. *Granted.* The facts are stated in the opinion.

Messrs. N. G. Kittrell and W. W. Walling for relator.
Mr. Robert A. John for respondent.

Henderson, J., delivered the opinion of the court:

This is an original proceeding on habeas corpus to enlarge the relator from a commitment of the district judge of the criminal district court of Harris county on an alleged contempt, for publishing the evidence in the trial in said court of *D. F. Williams et al.*, charged with murder, in the Chronicle, a daily newspaper published in the city of Houston.

The state, by her assistant attorney general, has filed a motion to dismiss this case on the ground that the relator, when he sued out the writ of habeas corpus, and thereafter since that time, was not in the legal custody or restraint of the sheriff of Harris county; and evidence has been adduced before us upon that issue. The testimony, in effect, shows that relator was allowed by the sheriff the liberty of the city of Houston; and on one occasion, it seems, he left said city for a short time without leave of the sheriff, but returned to the city. The relator testified that he was told by the sheriff to consider himself under arrest, and that his movements must be under the control of said sheriff; that the sheriff was aware of his purpose to sue out the writ of habeas corpus, and exercised toward him liberality, in enabling him to sue out the writ without confining him actually in jail; that the understanding was that he was in the custody of the sheriff, and, unless he should be released by the writ of habeas corpus, he was amenable to that custody, and would have to pay the fine. As we understand the testimony, this comes clearly within the rule laid down in *Ex parte Snodgrass* (Tex. Crim. App.) 65 S. W. 1061. A majority of the court in that case, after quoting certain articles of our Code, used this language: "We deem it unnecessary to enter into a long discussion of these articles, but suffice it to say that any character or kind of restraint that precludes an absolute and perfect freedom of action on the part of the relator authorizes such relator to make application to this court for release from said restraint." The motion of the state is accordingly overruled, and we hold that relator was entitled to the writ.

Relator has shown that no order of record was made in said case of state of Texas against *Williams et al.*, prohibiting the publication of the evidence in said case, but that the judge merely, in open court, notified and ordered relator that the court would hold him in contempt of the court if said newspaper, of which he was the publisher, should publish said testimony in said case before a verdict was had. It was further shown that no affidavit was made by anyone charging relator with a violation of said verbal order; but on information, and of the court's own motion, he entered a judgment nisi against relator as for contempt, assessing his punishment at a fine of \$100 and three days' imprisonment in the county jail. Notice was then issued, requiring him to come before said court and show why said judgment should not be made final. It is urged

by relator that this procedure was irregular and void; that, in the first place, conceding the court had jurisdiction, an order should have been made and entered of record prohibiting the publication of said evidence; that, if same was violated by the relator, then an affidavit should have been made (the contempt being a constructive one against him), and an attachment issued, requiring him to show why he should not be adjudged guilty of contempt for a violation of said order; and that it was not competent for the court, of its own motion, and without affidavit, to have in the first instance adjudged him guilty of contempt, and then attached him, to show cause why the said judgment should not be made final; and that such procedure on the part of the court was illegal and void. We are inclined to agree with this contention. 4 Enc. Pl. & Pr. p. 776, and authorities there cited.

However, a more important question is raised, and we do not see fit to rest this decision upon the illegality of the procedure which was adopted. Relator insists (and in this he is borne out by the record) that in the publication which occurred in the Houston Chronicle, of which he was the editor and publisher, there was nothing of a character reflecting on the judge or the court, but he merely published a true statement of the testimony adduced from the witnesses in the case; and he says he was authorized to do this, notwithstanding the order of the judge, because the testimony was given in the course of a public trial in a court of justice, and the Constitution guarantees a public trial, and also guarantees the freedom of the press. We have given this subject that careful examination commensurate with its importance, mindful that, on the one hand, the dignity and authority of the courts must be maintained, while, on the other, free speech, a free press, and the liberty of the citizen must be preserved. Both are equally valuable rights. If the court is shorn of its power to punish for contempts in all proper cases, it cannot preserve its authority, so that, without any constitutional or statutory guaranty, this power is inherent in the court. But the Constitution itself, in our Bill of Rights, guarantees free speech and the liberty of the press. Of course, it was never intended, under the guise of these constitutional guaranties, that the power of the court should be trenching upon. Indeed, under our system of government, it was wisely intended that the authority of the court should be safeguarded and preserved, in order that all constitutional guaranties might be upheld for the safety and protection of the liberty of the citizen. We have examined a number of text-books, and in some we find it stated in general terms that the court may prohibit the publication of testimony in certain cases, but that the publication must have a tendency to embarrass, impede, or obstruct the administration of justice, and the case must be pending at the time of the publication. *Rapalje, Contempts*, § 57; 7 Am. & Eng. Enc. Law, 2d ed. p. 60, subd. 3. And

the following cases are referred to in support of this proposition: *Tenney's Case*, 23 N. H. 162; *Sturco's Case*, 48 N. H. 428, 97 Am. Dec. 630; *United States v. Holmes*, 1 Wall. Jr. 1, Fed. Cas. No. 15,383; *State v. Galloway*, 5 Coldw. 326, 98 Am. Dec. 404; *State v. Dunham*, 6 Iowa, 245; *Shortridge's Case*, 99 Cal. 526, 21 L. R. A. 755, 34 Pac. 227; *State v. Morrill*, 16 Ark. 384; *Res v. Clement*, 4 Barn. & Ald. 218. We have not had access to the common-law case last referred to, but it would have little, if any, bearing upon the question, as it is an old English case. *Tenney's Case* is not accessible to us. However, we have examined the other New Hampshire case, reported in *Sturco's Case*, 48 N. H. 428, 97 Am. Dec. 630, as well as the other cases named, and not one of them supports the proposition that the courts in this country have the power to restrain the publication of testimony developed in the trial of a case. *Sturco's Case*, 48 N. H. 428, 97 Am. Dec. 630, was a publication, not of evidence, but language abusive and defamatory of the court, and the proceedings thereof, calculated to obstruct the administration of justice, and was properly held a matter of contempt. The Arkansas case has no particular bearing on the subject. But in *Galloway's Case*, 5 Coldw. 339, 98 Am. Dec. 404, the court says that unquestionably the power exists on the part of courts to control the publication of their proceedings while in progress, but it says, "Not, perhaps, by direct attachment of the publishing party after publication, but by the exclusion from the court of parties who are there for the purpose of reporting the testimony or proceedings of the court," etc.; following *Holmes' Case*, 1 Wall. Jr. 1, Fed. Cas. No. 15,383. But even this was not necessary to that decision, because the court held that the matter complained of was not a contempt under the statutes of the state. However, in that case, in connection with the alleged testimony, the article was denunciatory and abusive of the court. Nor was the question properly before the court in *Dunham's Case*. What was said by the court in that case was merely *dictum*. It was held in that case that the publication of the proceedings was not a contempt of the court. We also find in *Shortridge's Case*, 99 Cal. 526, 34 Pac. 227, which was a divorce case, some general expressions to the effect that the courts possess the power to prohibit the publication of testimony pending the trial, where such publication would tend to obstruct the administration of justice. But the court held in that case that the publication of divorce proceedings, notwithstanding a statute of California authorizing such proceedings to be private, did not subject the party to contempt, though he made the publication in violation of the order of the court; that the publication itself was not calculated to impede or obstruct justice. The general trend of that decision, we take it, favors the proposition that, where the proceedings are not of an obscene character (and we are not discussing that kind of a case 60 L. R. A.

here), the court has no power to prohibit the publication of testimony adduced on the trial. The fact that no decision can be found in support of the power on the part of the courts of this country to prohibit the publishing of evidence developed in the course of such trial is strongly persuasive of the absence of such power, for, if it had been assumed to exist, evidently somewhere some judge before this time would have attempted it, and we would have a report of the case. But even if it be conceded that some other court in some other state had decided in favor of the power of the courts to inhibit the publication of testimony, and to treat a violation of the order as a matter of contempt, then such decision, in order to be even persuasive, should afford some good and sufficient reason as its basis; otherwise it would be entitled to but little consideration, especially when we take into view our constitutional provisions which have a bearing on the subject. Section 8 of our Bill of Rights guarantees the freedom of speech and the liberty of the press. Section 10 guarantees to an accused person a speedy public trial by an impartial jury. If the Constitution guarantees a public trial, is it in the power of the court to make it a private trial? If not, then where is the power of the court to prohibit spectators, or to require or enforce thereafter silence on those who may witness and hear the proceedings? If there is no power on the part of the court to prevent spectators from rehearsing evidence, by the same logic the court has no authority to prevent a publication of the testimony. Our Constitution is but in accord with the genius and spirit of our free institutions, which is intended to guarantee publicity to the proceedings of our courts, and the greatest freedom in the discussion of the doings of such tribunals, consistent with truth and decency. And as has been well said, "when it is claimed that this right has in any manner been abridged, such claim must find its support, if any there be, in some limitation expressly imposed by the lawmaking power." And this imposition must be in accord with the provisions of our Constitution guaranteeing the publicity of all trials, as well as the freedom of speech and of the press. We take it that the learned judge who exercised his authority in this instance did it, as he believed, in the interest of the due administration of the law; but the argument of convenience can have no weight as against those safeguards of the Constitution which were intended by our fathers for the preservation of the rights and liberties of the citizen. And, even if there was a conflict here between the authority and dignity of the court, that should yield to the plain letter of the Constitution. We accordingly hold that the court had no power to prohibit the publication of the testimony of the witnesses in the case, and that his act in punishing the relator for contempt for violating that order was without jurisdiction, and was consequently void.

The relator is ordered discharged.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina

v.

J. D. RAY, *App't.*

(131 N. C. 814.)

An ordinance requiring the closing of stores at 7:30 P. M., excepting Saturday night, is not authorized by general charter authority to make by-laws, rules, and regulations for preserving the health of the citizens, and such as are deemed necessary for the better government of the town.

(Clark, J., *dissents.*)

(December 16, 1902.)

APPEAL by defendant from a judgment of the Superior Court for Halifax County convicting him of violating an ordinance against keeping places of business open in the evening. *Reversed.*

The facts are stated in the opinion.

Mr. W. A. Dunn, for appellant:

It is not a nuisance to keep open dry-goods stores and other mercantile establishments to an hour later than 7:30 o'clock.

The law-making power of towns must act within the scope of their delegated powers, or their acts are *ultra vires* and void. They cannot do what they are not authorized to do by their charter or by the general law of the land. If a thing within itself is not a nuisance, they cannot make it so by saying it is.

State v. Higgs, 126 N. C. 1024, 48 L. R. A. 446, 35 S. E. 473; *Cooley*, Const. Lim. 4th ed. 236; *State v. Webber*, 107 N. C. 965, 12 S. E. 598.

Town ordinances must be subordinate to and harmonized with the general laws of the state, unless special powers are conferred upon the town by its charter.

State v. Brittain, 89 N. C. 574.

An ordinance cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative grant.

Dill. Mun. Corp. 2d ed. § 259; *State v. Thomas*, 118 N. C. 1225, 24 S. E. 535; 17 Am. & Eng. Enc. Law, pp. 248-252; *State v. Taft*, 118 N. C. 1190, 32 L. R. A. 122, 23 S. E. 970.

Messrs. Robert D. Gilmer, Attorney General, and **E. L. Travis** for the State.

Furches, Ch. J., delivered the opinion of the court:

The defendant is the owner of a dry-goods

and grocery store (not of liquors) in the town of Scotland Neck, Halifax county. Scotland Neck is an incorporated town, and on the 4th of July, 1902, the commissioners of said town passed this ordinance: "It shall be unlawful for barrooms, groceries, dry-goods stores, and other places where merchandise is bought and sold (except drug stores for the sale of drugs and medicines only) to keep open later than 7:30 o'clock P. M. except Saturdays. Anyone violating this ordinance shall be fined \$5 for each and every violation." The defendant admits that he is the owner of a dry-goods and grocery store in the town of Scotland Neck, and that he has kept it open later than 7:30 P. M. since the 7th day of July, 1902, the date at which said ordinance was to go into effect, but pleads not guilty, and a special verdict was returned, finding the facts as above.

It is admitted that the charter of said town gives no special authority for the passage of such an ordinance, and that the commissioners had no authority for the passage of said ordinance, except the general powers incident to municipal corporations. This presents squarely the question of corporate power to pass and enforce such an ordinance without any legislative authority to do so, except the fact that it is a chartered municipality. It is therefore not necessary that we should discuss the power of the legislature to pass such an act, or to authorize a municipality to pass such an ordinance, and we do not enter into the consideration of that matter.

It must be admitted that the enforcement of this ordinance would be to deprive the defendant of his natural right,—would be to interfere with the free use and enjoyment of his property, used in such a way as not to interfere with the rights of others. It is not shown, nor is it suggested, that defendant's keeping his store open after 7:30 interfered with the rights of anyone else. It was said that the other merchants in Scotland Neck were willing to close their stores at 7:30, but the defendant was not, and the ordinance was passed to compel him to do so, for the reason that if he kept open the others would be compelled to do so, or to give the defendant the benefit of the trade of the town after that time. But did this give the commissioners the right to close the defendant's store?

It would seem that no legislative power exists, under our form of government and our ideas of personal liberty, as to allow such interference with one's rights of ownership and dominion over his own property, except such interference be exercised for the protection and benefit of the public. When such interference is authorized, it is under the doctrine of eminent domain, or what is known as the "police power of the government." The attempted exercise of the power in this instance is clearly not under the doctrine of eminent domain, but it is said to be under the police power of the government.

NOTE.—For some cases in this series as to the validity of Sunday-closing ordinances, see *Thelsen v. McDavid* (Fla.) 26 L. R. A. 234; *People v. Bellet* (Mich.) 22 L. R. A. 696; *People v. Havnor* (N. Y.) 31 L. R. A. 689; *Eden v. People* (Ill.) 32 L. R. A. 659; *Tacoma v. Krech* (Wash.) 34 L. R. A. 68; *Denver v. Bach* (Colo.) 46 L. R. A. 848.

As to validity of ordinances limiting hours of labor, see *Re Kubach* (Cal.) 9 L. R. A. 482; *State v. McNally* (La.) 36 L. R. A. 533. 60 L. R. A.

If the state could exercise such power (and we do not say it could), can a municipal corporation do so without express authority from the state? The general rule is that a municipal corporation can only exercise such powers as are expressly given in its charter, or such as are necessarily implied by those expressly given. This doctrine is well expressed by 1 Dill. Mun. Corp. § 89, which is copied by Justice Avery in *State v. Webber*, 107 N. C. 962, 12 S. E. 598, and is approved and adopted by this court in that case: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." The same doctrine is probably more pointedly stated, as applicable to the case now under consideration, in *State v. Thomas*, 118 N. C. 1221, 24 S. E. 535, as follows: "An ordinance, says Dillon (1 Mun. Corp. § 325), cannot legally be made, which contravenes a common right, unless the power to do so be plainly conferred by a valid and competent legislative grant; and, in cases relating to such right, authority to regulate, conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit.

. . . If the general power to pass by-laws, intended for local government merely, carries with it, by implication, the authority to restrict the use of private property by prescribing the hours when a person shall be permitted to occupy his own house, then cities and towns need nothing more than the enactment of a law creating them, with the incidental grant embodied in § 3799 of the Code, to give them equal authority with the legislature itself to restrict and regulate the rights of personal liberty and private property within the limits of the municipality. No such latitudinarian construction was intended by the legislature to be given to the statute, and its attempted exercise was therefore unlawful." It seems to us that these authorities settle the question, and plainly show that this ordinance was unlawful and cannot be enforced.

It is said that towns are constantly exercising such power over barrooms where liquors are sold. This power, so far as our investigation goes, is expressly given in the charters. But if there is any case where it is not, it must be understood that it stands on a very different footing to the sale of dry-goods and family groceries. Liquor itself is regarded as an evil,—an enemy of civilization and of good government. *Bailey v. Raleigh*, 130 N. C. 209, 57 L. R. A. 178, 41 S. E. 281; *State v. Barringer*, 110 N. C. 525, 14 S. E. 781. Its sale without a license is condemned and prohibited by law, and the regulations closing such shops might well be put upon the implied power, as being for the

public good. But however that may be, that is not the question before the court, and what has been said as to the sale of liquors has only been said to meet an argument of the state.

It is also said that the state of California has exercised such power without express legislation, and that the Supreme Court of the United States affirmed the judgment of the California court. But when those cases are examined, it will be found that they were cases where the business of ironing was carried on all night in a thickly settled portion of the city of San Francisco, consisting of old wooden buildings near the Sound, where the wind usually blew hard, which made it very dangerous to carry on such work at late hours of the night, on account of fire. And the opinions rest upon the ground that it was for the public good—the protection of the public from the danger of fire—that the city was allowed to prevent such persons from carrying on such work at such late hours of the night. But the Supreme Court of the United States only affirmed the ruling of the state court, which is the rule of that court where there is no Federal question involved. So it amounts to no more than a decision of the supreme court of California against the repeated decisions of our own supreme court. And were we to admit that the distinction does not exist between the California case and this case, which we have pointed out, the question then is, Shall we adhere to our own decisions, when we are not able to see any error in them, or shall we adopt the opinion of the court of California? We prefer to follow our own decisions, and are of the opinion that the corporate authorities of Scotland Neck were not authorized to pass the ordinance under consideration, and it is void.

There is error, and under the special verdict the defendant was entitled to an acquittal and discharge.

The judgment of the court below is reversed.

Clark, J., dissenting:

On July 4, 1902, the town of Scotland Neck passed an ordinance prohibiting "barrooms, groceries, dry-goods stores, and other places where merchandise is bought and sold (except drug stores for the sale of drugs and medicines only), to" be kept "open later than 7:30 P. M. except Saturdays," under penalty of \$5 for each violation; and it was made the duty of the chief of police to ring the town bell at 7:30 P. M. every day, except Saturdays and Sundays, as notice. The ordinance prescribed that it was to be in force from 7th July to 1st October. The defendant admits that he came within the class specified, and did not comply with the ordinance, but kept open his store for the sale of dry-goods and groceries later than 7:30 P. M. and conducted his business just as if the ordinance had not been passed. The sole defense is that the ordinance is invalid. The judge below sustained the action of the mayor, who imposed a fine of \$5, and the defendant appealed. The object of the ordinance, as was stated on the

argument, and as is readily apparent, was to give the clerks and other employees of stores a rest from toil in the hot months of July, August, and September after 7:30 P. M. At that season the days are hot and long, business is dull, and purchases can readily be made by the community without inconvenience before 7:30 P. M. To avoid any reasonable objection, Saturday night is excepted, and the "early closing" is limited to the three hottest and dulllest months in the year. It seems strange that anyone should object to this modest concession to the clerks and others who for small compensation are at work from sunrise till late at night the balance of the year. So reasonable is the regulation, that by common consent the merchants of most of the towns, probably, in the state, have for years, by voluntary agreement, adopted it. But as one merchant in a town by holding out against it can force all other stores to keep open, thus compelling all the clerks and other employees to forego this small concession, the commissioners had no other means to secure this cessation of work, so beneficial to the health and comfort of a large and useful class in the community, than by the passage of this ordinance. There can be no question of the reasonableness of such an ordinance, and if this action of the local legislature did not correctly express the wishes of their constituents, or did not prove satisfactory, public sentiment would soon cause its repeal, or at least the matter would be corrected by the election of a board of commissioners of a different cast. *Hellen v. Noe*, 25 N. C. (3 Ired. L.) 499. Certainly, if the power to pass the ordinance exists, the propriety of its passage is a matter that can be better determined by the commissioners elected by the people of the town, and conversant with the surroundings and the wishes of their constituents, than by five lawyers assembled in a public building in Raleigh.

The ordinance being a reasonable one, the only possible question is that of the power to pass the ordinance. The charter of the town (*Private Laws* 1901, chap. 342, § 15) broadly gives its commissioners the usual powers conferred on towns and cities by Code, chap. 62. Among the powers conferred expressly by that chapter are— independent of the inherent and incidental powers of every municipal corporation—those of Code, § 3799, "They shall have power to make such by-laws, rules, and regulations for the better government of the town as they may deem necessary; provided the same be not inconsistent with this chapter or the laws of the land," and § 3802, "They may pass laws for . . . preserving the health of the citizens." In *Hill v. Charlotte*, 72 N. C., at page 56, 21 Am. Rep. 451, the court says: "We conceive that nothing can be clearer than that when a general authority is given to a municipal corporation, to be exercised through its proper legislative officers, to make ordinances for the good government, health, and safety of the inhabitants and their property, it is thereby left entirely to

the discretion of those authorities to determine what ordinances are proper for those purposes." In *State v. Austin*, 114 N. C., at page 856, 25 L. R. A., at page 283, and 19 S. E., at page 919, Burwell, J., speaking for the court, after setting out in full the above § 3799 of the Code, says emphatically: "This is an express grant of authority to the officers of this municipal corporation to exercise within the territory made subject to their control the police power of the state, the only expressed restriction upon their action being that the rules and regulations made by them shall not be inconsistent with 'the laws of the land.'" There is no law forbidding a regulation giving clerks and other employees "in stores, barrooms, and groceries" a breathing spell after 7:30 P. M. on five days during the three hottest and dulllest months of the year. If the legislature can confer such power on any municipality, as is admitted, the above decision holds that it has been done. It is a most reasonable regulation, a humane and just regulation, and in the interest of the public health and comfort, and detrimental to the interest of no one. As was well said by Daniel, J., in *Hellen v. Noe*, 25 N. C. (3 Ired. L.) 499, with that confidence in the capacity of the people for self-government and ability to regulate for the best their own local matters which marked the utterances of that court: "If a majority of the citizens of the town deem the ordinance impolitic or injurious to the people of the corporation, they have the power in their own hands to remedy the evil; but we cannot say that this ordinance is either against the general law, or is in itself unreasonable." The people are the best judges of their own interest and wishes, and, as Judge Daniel says, the correction should be left to them, unless an ordinance is on its face in violation of some statute enacted by the will of the lawmaking power of the whole state, or is so unreasonable in its nature as to be beyond the police power conferred to the municipality by virtue of the general statute.

A case almost on all fours with this, in the terms of the ordinance, and presenting certainly the very question of the power of the town to pass such an ordinance as this, has been held in favor of the power by the Supreme Court of the United States. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. An ordinance of the city of San Francisco closed all laundries and wash-houses "from 10 o'clock at night till 6 o'clock in the morning." Those opposing the measure argued that the motive was to discriminate against the Chinese. Those defending it said it was because such occupation was dangerous on account of liability from fire. The court, adhering to the settled ruling that the motive in passing a statute or ordinance cannot be considered, unless it appear on the face thereof, held: "The provision is purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies. . . . The same municipal authority which directs the cessation of

labor must necessarily prescribe the limits within which it shall be enforced. . . . This is a matter for the determination of the municipality in the execution of its police powers." The validity of the same ordinance was again presented in *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, and was more fully and elaborately discussed, and the following points, having no reference whatever to the danger from fires, were decided: "The objection that the fourth section is void on the ground that it deprives a man of the right to work at all times is equally without force. However broad the right of everyone to follow such calling, and employ his time as he may judge most conducive to his interests, it must be exercised subject to such general rules as are adopted by society for the common welfare. All sorts of restrictions are imposed upon the actions of men, notwithstanding the liberty which is guaranteed to each. It is liberty regulated by just and impartial laws. Parties, for example, are free to make any contracts they choose for a lawful purpose, but society says what contracts shall be in writing, and what may be verbally made, and on what days they may be executed, and how long they may be enforced if their terms are not complied with. So, too, with the hours of labor. On few subjects has there been more regulation. How many hours shall constitute a day's work in the absence of contract, at what time shops in our cities shall close at night, are constant subjects of legislation. Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops, and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the states."

After these two explicit and unanimous decisions of the highest court known to our laws that any town "possessed of the ordinary powers" has the right to pass "such beneficent and merciful" ordinances for the health and comfort of the toilers "in the heated rooms" of our towns and cities, by "prescribing hours for closing at night," no one has ever since contested the validity of such ordinances in that court, and the state courts have been as humane. Not till now has any court recorded a decision to the contrary. The above cases begun in the United States circuit court, and went thence to the Federal Supreme Court. But the supreme court of California has cited those cases, and heartily indorsed the principles therein laid down, in *Re Hang Kie*, 69 Cal. 152, 10 Pac. 327, quoting with approval: "The provision is purely a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies." In Missouri, under a statute worded like 60 L. R. A.

our Code, § 3799, above cited, a city ordinance closing stores, shops, and other places of business at 9 A. M. on Sunday was held valid. *St. Louis v. Cafferata*, 24 Mo. 94. It seems there was no state prohibition as to opening stores on Sunday. In *State v. Freeman*, 38 N. H. 426, it was held that a town ordinance prohibiting restaurants from being kept open after 10 o'clock at night was valid and authorized by a statute not so broad as our Code, § 3799. To same purport, *Hudson v. Geary*, 4 R. I. 485. And there are other authorities to the same effect, as Judge Field says in *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, and none to the contrary. The validity of an ordinance closing bar-rooms at a specified hour is impliedly recognized as valid and authorized by Code, § 3799, in the discussion in *State v. Thomas*, 116 N. C. 1221, 24 S. E. 535, which holds invalid, not the requirement to close the bar, but the prohibition of the proprietor to remain in it after it was closed.

In Dillon, Mun. Corp. § 400, 4th ed., it is said: "Under a general power to pass any other by-laws for the well-being of the city its council may, by ordinance, prohibit saloons, restaurants, and other places of public entertainment to be kept open after a specified hour, and objections that such by-law was unreasonable and deprived the citizen of the constitutional right of 'acquiring property,' were not considered to be well taken."

If the town commissioners of the progressive and growing town of Scotland Neck thought it would conduce "to the better government and aid to preserve the health of many of its citizens" (Code, §§ 3799, 3802) to close the places of business, except for sale of drugs and medicines, at 7 P. M. on five days in the week during July, August, and September, and that in so ordering they were executing the wishes of a majority of their constituents, are they not the best judges thereof, subject to correction only at the ballot box when a new board is chosen? Our system of government favors local self-government. Whenever any effort is made in the interest of humanity to lessen the hours of toil, and give a breathing spell,—a chance, however small, for the enjoyment of life to the employed,—a protest is almost always made on the ground stated by Judge Field (113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730), that "it deprives a man of the right to work at all times." This objection means simply that it deprives the objector of the right to work "the other fellow" at all times, without stint or limit. Someone has said, with more force than truth or elegance, that "civilization is held to the under dog." On the contrary, civilization consists in greater humanity and consideration for the comfort, the convenience, the health, of those who are not able to compel or to buy that which is conceded them voluntarily or guaranteed by law. The purpose of a government of law is the protection of the weak, for the strong can take care of themselves. The brief recreation and sur-

cease from toil given by this ordinance during the hot summer evenings to the clerks and other employees of the stores in their town is an act which reflects credit upon the commissioners of Scotland Neck. Their ac-

tion is warranted by the decisions of the highest court in the Union and of several states, and their power to do so has not till now been denied in any.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE of West Virginia
v.

John MCBEE, *Plff. in Err.*

(.....W. Va.....)

- *1. On the trial of an indictment under § 16, chap. 149, Code, the burden of proof is on the state to satisfy the jury that the labor was not in household work, or other work of necessity or charity.
2. On such trial, refusal by the court, when asked, to instruct the jury to that effect, is error.
3. If, upon the trial of an indictment under such section, it shall be made to appear to the satisfaction of the jury that material, permanent loss and injury would come to the owner of an oil well by reason of not pumping it on Sunday, such pumping would be deemed a work of necessity, under the statute.

(January 14, 1903.)

ERROR to the Circuit Court for Ritchie County to review a judgment convicting defendant of violating the Sunday law. *Reversed.*

The facts are stated in the opinion.

Messrs. Hunter H. Moss, Jr., and Camden & Peterkin, for plaintiff in error:

It was necessary for the state to show that the work in question was not "a work of necessity or charity."

Clark, Crim. Proc. 270, 281, 326; 1 Bishop, Crim. Proc. 378; *State v. Baltimore & O. R. Co.* 15 W. Va. 362, 36 Am. Rep. 803.

The object of the statute was not to enforce any religious duty, but to provide for a day of rest.

State v. Baltimore & O. R. Co. 15 W. Va. 362, 36 Am. Rep. 803.

By a work of necessity is not meant of physical and absolute necessity; but any labor, business, or work which is necessary to the accomplishment of a lawful purpose under the circumstances of the particular case, is a work of necessity within the statute.

Flagg v. Millbury, 4 Cush. 243; *Com. v. Nesbit*, 34 Pa. 398; *Wilkinson v. State*, 59 Ind. 416, 26 Am. Rep. 84; *Edgerton v. State*, 67 Ind. 588, 33 Am. Rep. 110; *McGatrick v. Wason*, 4 Ohio St. 566; *Carver v. State*, 69 Ind. 61, 35 Am. Rep. 205; *Hennersdorf v. State*, 25 Tex. App. 597, 8 S. W. 926.

*Headnotes by McWHORTER, J.

NOTE.—As to what are works of necessity which may be performed on Sunday, see also, in this series, *Western U. Teleg. Co. v. Yopst* (Ind.) 3 L. R. A. 224; *Handy v. Globe Pub. Co.* (Minn.) 4 L. R. A. 466; *Com. v. Waldman* (Pa.) 11 L. R. A. 563; *Com. v. Matthews* (Pa.) 18 L. R. A. 761; *Ex parte Kennedy* (Tex.) 51 L. R. A. 270; and *Arnnelster v. State* (Ga.) 58 L. R. A. 302.
60 L. R. A.

Messrs. Romeo H. Freer, Attorney General, and *Alex Dulin*, for the State:

While the Sabbath, or Sunday, has its origin in the doctrine of the Christian religion, having been adopted in the place of the old Jewish Sabbath, yet in its legal aspect it is to be regarded as a civil, and not a religious, institution; as a day appointed by the law-making power on which the ordinary business of life shall be suspended, in order that thereby the physical and moral wellbeing of the people may be advanced.

24 Am. & Eng. Enc. Law, p. 529; *State v. Baltimore & O. R. Co.* 15 W. Va. 362, 36 Am. Rep. 803.

The object of pumping the wells on Sunday was one "for revenue only."

In order that the state should make out its case it was only necessary to prove that the defendant was laboring at his trade or calling on Sunday.

5 Am. & Eng. Enc. Law, pp. 39-41; *State v. Swift*, 35 W. Va. 542, 14 S. E. 135.

A flow of two barrels of salt water per day into an oil well is not sufficiently injurious thereto to make the pumping of it out on Sunday a necessity.

Com. v. Funk, 9 Pa. Co. Ct. 277; 5 Am. & Eng. Enc. Law, pp. 541, 542.

It is the peculiar province of the jury to determine, under all the facts and circumstances of the case, whether the work charged to have been done on Sunday was, or was not, a work of necessity.

State v. Knight, 29 W. Va. 340, 1 S. E. 569; *Ungericht v. State*, 119 Ind. 380, 21 N. E. 1082; *Whitcomb v. Gilman*, 35 Vt. 297; *Sayre v. Wheeler*, 32 Iowa, 559; *Com. v. Gillespie*, 146 Pa. 546, 23 Atl. 393.

McWhorter, J., delivered the opinion of the court:

John McBee was indicted in the circuit court of Ritchie county under § 16, chap. 149, Code. The indictment contained two counts,—the first a general charge that the defendant "was found unlawfully laboring at a certain calling on the Sabbath day, said calling not being a household or other work of necessity or charity, against the peace and dignity of the state." The second count was that the defendant "was then and there found unlawfully laboring at a trade or calling, to wit, that of well pumper, pumping an oil well, the same not being a household or other work of necessity or charity." The defendant appeared and moved to quash the indictment, but the court overruled the motion, when the defendant pleaded "Not guilty." No ground for the motion to quash having been pointed out, nor error claimed either in petition for writ of error or in defendant's brief, and the in-

dictment appearing to be sufficient, the motion to quash was properly overruled. The issue was tried before a jury, which rendered a verdict of guilty. The defendant moved to set aside the verdict because the same was contrary to the law and the evidence, and to grant him a new trial, which motion was overruled. The defendant then moved in arrest of judgment, which motion was also overruled, and the court fixed the fine at \$10, and entered up judgment on the verdict. Defendant procured a writ of error, assigning several errors in his petition, based upon bills of exceptions taken by him during the trial.

The first error claimed is in refusing to permit the jury to consider certain proper evidence offered by defendant, as shown in bill of exceptions No. 2. On cross-examination by defendant of prosecuting witness J. H. Davisson, counsel for defendant was questioning witness about trouble between himself and defendant, when witness spoke of the women folks having gotten up a trouble that witness "took up." When he was asked to "state what that was," he answered, "That was a little trouble among the girls there." He then asked witness, "State what the trouble was,"—which question was objected to by the prosecuting attorney, and objection sustained, and exception taken. While it is true the objection was sustained and the question was not permitted to be asked, yet on further cross-examination the witness stated fully in reply to defendant's questions what the trouble was, without objection, so that, whatever there was in the question and answer to benefit the defendant or affect the case, defendant had the benefit of it subsequently.

The second error assigned was the permitting of improper evidence to be considered, as set out in bill of exceptions No. 3, when witness W. K. Jacobs, who had charge of the Cairo Oil Company's property, testified for defendant. On cross-examination by the prosecuting attorney, witness was asked, "Is it not a fact that the Cairo Oil Company orders you to have your men pump this well on Sunday?" Objection of defendant to the question was overruled, and question permitted to be asked, and defendant excepted. Defendant, in his brief, claims that the question was calculated to prejudice defendant's case in the minds of the jury, by tending to create the impression that the oil company, instead of John McBee, was on trial. His answer is, "So far as the wells are concerned, the company never gave me any instruction one way or the other." It seems to me, the tendency of the question, if it made any impression at all upon the jury, would be favorable to the defendant, in that, if he had such instructions from the company, it would tend to relieve him from the responsibility which otherwise would attach to him alone; but, whether he had instructions or not, if the work did not come within the exception of the statute, being a work of charity or necessity, he was equally liable for the violation.

60 L. R. A.

The next exception noticed in defendant's brief is that of the court sustaining the objection by the attorney for the state to a question asked W. F. Taylor, the witness for defendant, who was a practical oilman, and had worked in the oil field where the wells in question were situated, and had had charge of them some two or three years before that, and had stated that he had shut them down on Sunday, and that they did not get Sunday's production back until, probably, Tuesday, and the wells kept dropping off, and he commenced pumping them again, and got a steady production, and that he was afraid that to shut them off on Sunday would spoil the wells altogether, and that he believed that pumping them on Sunday was a work of necessity. Then he was asked to "state whether, speaking from your experience, there is likely to be any change in these wells since you were superintendent," an objection to which question by the attorney for the state was sustained, and exceptions taken. An answer to the question must have been purely speculative,—mere "guesswork,"—and the answer to the next question propounded by the defendant indicates very clearly that, if witness had been permitted to answer the question, it must have been to the effect that he could not tell whether there would be a change or not. He was asked to "state to the jury whether, after a well has been shut down as you shut down these wells, the shutting down of them afterwards is no more injurious than it was at first." He answered: "I don't know. Of course, it is the water that bothers them, and I suppose, as the water goes down, it would not be needed to pump quite so much."

The next and only other assignment of error noticed by defendant in his brief is the refusal of the court to give the instruction offered by the defendant as follows: "The court instructs the jury that the burden of proof is on the state in this case to establish beyond reasonable doubt the fact that the defendant pumped or operated certain oil well or wells in Ritchie county on a Sabbath day within one year prior to the finding of this indictment, and, further, that the burden of proof is on the state to prove that such pumping or operating was not a work of necessity or charity,"—as set out in bill of exceptions No. 11. This instruction was refused as offered, but modified by the court by striking out the last clause, in relation to the burden of proof, and the bill of exceptions shows that this modification was made because the law on the burden of proof was in effect given by defendant's first, second, fourth, and fifth instructions. I have carefully examined the said instructions 1, 2, 4, and 5, as given by the court at the request of the defendant, and fail to find in any one of them a single expression which could be construed to touch the law of the burden of proof. The first and fourth merely state that, if the jury believe from the evidence certain things set out, and that the work done was necessary to preserve the property from destruction, etc., and no

more work was done than was so necessary, then they should find for the defendant. The second is that, unless they believe beyond reasonable doubt, from the evidence, that the work done was not the work of necessity or charity, then they should find for the defendant; and No. 5 is that the object of the law regulating work on Sunday is to obtain a day of rest for the citizens of the state, and is not grounded on any religious tenet or belief. The question of the burden of proof is not touched in any of said instructions. In *State v. Baltimore & O. R. Co.* 24 W. Va. 783, 49 Am. Rep. 290, it is held that the court properly instructed the jury "that the burden of proof is on the state to satisfy the jury that the locomotive and train of cars were not run as a work of necessity or charity." In *State v. Baltimore & O. R. Co.* 15 W. Va. 362, 36 Am. Rep. 803, it is held: "In an indictment against a railroad company for being found laboring at its trade and calling on a certain Sabbath day, it is proper and necessary to allege that such labor was not in household work, or other work of necessity or charity," and, being a necessary allegation, it must be proved, and the burden of proof is with the state to sustain all its allegations. The law requires the allegation to be full. Every fact which is an element in a prima facie case of guilt must be stated. Otherwise there will be at least one thing the accused person is entitled to know, whereof he is not informed. And that he may be certain what each thing is, each must be charged expressly, and nothing left to intendment. All that is to be proved must be alleged. 1 Bishop, Crim. Proc. § 519. The offense charged in the indictment in the case at bar is a statutory offense, and, if the labor as charged was a household or other work of necessity or charity, no offense was committed; hence the necessity to negative the fact in the allegation, and to prove the same. In *Davis v. Webb*, 46 W. Va. 6, 33 S. E. 97, it is held: "Whenever a correct instruction is refused, the judgment will be reversed, unless the appellate court can see from the whole record that, even under correct instructions, a different verdict could not have been rightly found, or unless it is able to perceive that the erroneous ruling of the court could not have influenced the jury." *Dansville Bank v. Waddil*, 27 Gratt. 448. And it is further held in *Davis v. Webb*: "It is the plain duty of a trial court, when asked to do so by either party, to instruct the jury on questions of law involved in the case, when it can thereby aid them in reaching a right conclusion and proper verdict." *State v. Evans*, 33 W. Va. 417, 10 S. E. 792 (syl., point 3). The court erred in modifying the defendant's instruction by striking out the last clause, which instructed the jury "that the burden of proof is on the state to prove that such pumping or operating was not a work of necessity or charity."

It is insisted that the court erred in refusing the motion of defendant to set aside the verdict of the jury and grant a new

trial on the ground that the verdict was contrary to the law and the evidence. The evidence is conflicting as to whether or not the work done was a work of necessity, for the preservation of the oil wells operated. Many cases are cited where the courts have held that work done on Sunday or the Sabbath day, where it is shown to be necessary to the preservation of property, is not a violation of the law. As in *Flagg v. Milbury*, 4 Cush. 243, a work of necessity is defined to be "not meant a physical and absolute necessity; but any labor, business, or work which is morally fit and proper to be done on that day, under the circumstances of the particular case, is a work of necessity, within the statute." And in *Com. v. Nesbit*, 34 Pa. 398, it is held: "The law does not condemn those employments which society regards as necessary, even when they encroach on the Lord's day, if, according to the ordinary skill of the business, it be necessary to do so. And then, the business being recognized as necessary, it may be performed by means of the services of others, and by all the ordinary means of the business, so far as it is necessary." *Wilkinson v. State*, 59 Ind. 416, 26 Am. Rep. 84; *Edgerton v. State*, 67 Ind. 588, 33 Am. Rep. 110; *McGatrick v. Wason*, 4 Ohio, 566; *Hennersdorf v. State*, 25 Tex. App. 597, 8 S. W. 926. Defendant cites the case of *Com. v. Gillespie* (decided by the court of quarter sessions) 21 Pittsb. L. J. N. S. 213, which I am unable to find in the library, from which defendant's counsel quotes: "Pumping of oil wells on Sunday, it appearing that, if they were not pumped, loss results to the owners, by reason of salt water getting in the wells, is a work of necessity, within the act." If it is shown to the satisfaction of the jury that permanent loss and injury come to the owner of an oil well by reason of not pumping on Sunday, such work would be deemed a work of necessity; but if there is no permanent loss of property, and he is only delayed for the time being in procuring the oil from his well, I see no reason why he should be permitted to pump the oil on Sunday, any more than the farmer should be permitted to clear his land or plow his fields on that day. All work, under the statute, is supposed to come to a standstill on Sunday, or the Sabbath day, and it is only in case of actual loss or injury by reason of such delays that it becomes a work of necessity to save the property. In the case at bar there was evidence tending to show that there was no damage or loss by shutting down the well on Sunday, while, on the other hand, there was evidence tending to show that such shutting down would not only result in loss of production of oil, but permanent injury to the well. The question was purely a question for the jury. It was their province to weigh the testimony, and say whether the work complained of was a work of necessity.

For the reasons stated, the judgment will have to be reversed, the verdict set aside, and a new trial granted.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Harry SANDFORD, President of Adams Express Company, *Appt.*,

v.

Ebenezer W. POE, Auditor of Ohio, *et al.*

James C. FARGO, President of American Express Company, *Appt.*,

v.

SAME.

Thomas C. PLATT, President of United States Express Company, *Appt.*,

v.

SAME.

(16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546.)

1. The prevention of a multiplicity of suits is sufficient ground for an injunction against the certifying, by a board of tax appraisers, of assessments against corporations to the officers of a large number of counties, if the assessments are illegal.
2. A Federal court should render judgment depending on the construction of a state Constitution, in accordance with a previous decision by the highest state court on the subject, although, before such state decision was rendered, the Federal court had rendered an opinion to the contrary.
3. The fact that a case argued and duly considered in a state court was a friendly one will not prevent the decision

therein on the construction of the state Constitution from being conclusive in Federal courts.

4. Notice of the time and place at which tax assessors will meet in sessions which are not secret, with the right of the taxpayer to appear and be heard, is sufficient to constitute due process in the assessment.
5. The use of property in the business of interstate commerce does not exempt it from liability to taxation like other property within the jurisdiction in which it is situated.
6. Valuing the property of an interstate express company as a unit profit-producing plant for the purpose of determining the taxable value of that portion of the property which is within a state does not amount to a taxation of property outside the state.
7. Regarding the capital stock of a corporation as a factor in arriving at the value of its whole property considered as a unit plant, although it is situated in different states, may be authorized by state statute, where it is done for the purpose of determining the true value of that portion of the property which is within the state.
8. Taking the relative value of the tangible property of a corporation within a state, as compared with the total value of all its tangible property in different states, where it is done under a statute which does not require this to be done, but requires the true value of the property within the state to be taken as the basis of assessment, considered with reference to the value of all

NOTE.—*Corporate Taxation and the Commerce Clause.*

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I. Scope of note.

This note is confined to cases in which the validity of taxes assessed against corporations was disputed upon the ground that their imposition conflicted with art. 1, § 8, subd. 3, of the Constitution of the United States, declaring that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, commonly called the commerce clause.

II. Introduction.

The principal cases belong in a group wherein was contested, in the state and Federal courts, the constitutionality of statutes of Indiana, Ohio, and Kentucky, all couched in similar language, providing for the taxation of corporations and quasi corporations of both domestic and foreign origin, doing business within these states, and all engaged in interstate commerce.

the property of the corporation, including a consideration of the value of its capital stock as a factor, does not, even if it is inequitable and unjust as a matter of fact, constitute such an illegal assessment that the courts can grant an injunction against it.

(July 15, 1895.)*

APPPEALS by complainants from decrees of the Circuit Court of the United States for the Southern District of Ohio (Eastern Division) dismissing bills filed to enjoin defendants from assessing taxes against complainants under the Nichols law. *Affirmed.*

*This decision was affirmed by the Supreme Court of the United States February 1, 1897 (165 U. S. 194, 41 L. ed. 683), and rehearing denied March 15, 1897 (166 U. S. 185, 41 L. ed. 865).

There were attributed to these statutes several constitutional infirmities, but in the main it was alleged that, under their operation, there was subjected to taxation property beyond the dominion of the respective taxing states, notably, franchises granted by other governments; that the companies were denied the equal protection of the laws in that they were subjected to an undue share of the burden of taxation in violation, at once, of the 14th Amendment of the Constitution of the United States, and of the rule of uniformity and equality of taxation imbedded in the several state Constitutions; and finally, that the taxation provided for in these laws was an interference with, and burden upon, interstate commerce, which belonged exclusively to Congress, and which was beyond the power of any state. Each of the contestants in this group of cases was finally defeated at every point, and the several tax laws were ultimately sustained. The theory which prevailed after much conflict of opinion was that nothing but property,—albeit in great part intangible and elusive property,—within the respective states, was subjected to taxation in virtue of the challenged statutes.

The questions relating to the taxation of the property of the complaining companies in these cases, especially their franchises and other intangible assets asserted to be beyond the jurisdiction of these states, have already been exhaustively discussed in the notes in this series on the *Taxation of corporate franchises in the United States* (Louisville Tobacco Warehouse Co. v. Com. (Ky.) 57 L. R. A. 33), and on the *Taxation of capital stock of corporations in the United States* (State Bd. of Equalization v. People (Ill.), 58 L. R. A. 513). The questions which arise under the equal protection clause of the 14th Amendment to the Federal Constitution, and the state constitutional provisions respecting equal and uniform taxation, have been fully treated in the note on *Constitutional equality in the United States in relation to corporate taxation*. *Bacon v. Board of State Tax Commrs.* (Mich.) 60 L. R. A. 321.

The questions, so far as the commerce clause in the cases was concerned, are now to be considered.

The group referred to followed in order of time, and was related to the Indiana railroad tax cases, viz.: *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114, Affirming 133 Ind. 625, 33 N. E. 432; *Indianapolis & V. R. Co. v. Backus*, 154 U. S. 438, 38 L. ed. 1040, 14 Sup. Ct. Rep. 1114, Affirming 133 Ind. 600, 33 N. E. 443; *Cleveland, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439, 60 L. R. A.

Statement by Lurton, Circuit Judge:

These suits were brought to enjoin the assessment of taxes against the Adams Express Company for the years 1893 and 1894, and the American Express Company and the United States Express Company for the year 1894. The defendants are Ebenezer W. Poe, auditor of the state of Ohio, John K. Richards, attorney general of the state of Ohio, and William T. Cope, treasurer of the state of Ohio, and compose a board of tax appraisers for the assessment of telegraph, telephone, and express companies, under an act of the Ohio legislature passed April 27, 1893, and known as the "Nichols law." To the several bills demurrers were filed, which, on full argument, were finally sustained, and the bills dismissed. The complainants have severally perfected appeals and assigned errors. The ground upon which the suits

38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122, Affirming 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421; and comprised what, for convenience, may be designated the telegraph and express company cases.

The following cases made up this group: *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054, Affirming 141 Ind. 281, 40 N. E. 1051; *American Exp. Co. v. Indiana*, 165 U. S. 255, 41 L. ed. 707, 17 Sup. Ct. Rep. 991; *State ex rel. Poe v. Jones*, 51 Ohio St. 492, 37 N. E. 945; *Western U. Teleg. Co. v. Poe*, 61 Fed. 449, and *United States Exp. Co. v. Poe*, 61 Fed. 475, Reargument ordered in 64 Fed. 9; *Adams Exp. Co. v. State*, 55 Ohio St. 69, 44 N. E. 506; *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, Rehearing denied 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604, Affirming *Sanford v. Poe*, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527; *Western U. Teleg. Co. v. Norman*, 77 Fed. 13.

A review of the cases in the group will be found on pages 553-559, in the note on capital stock taxation, just mentioned, under the case of *State Bd. of Equalization v. People* (Ill.) 58 L. R. A. 513, *et seq.*

III. What is commerce.

Just what is or is not embraced within the meaning of the word "commerce," in the clause of the Constitution of the Union investing Congress with power to regulate it when carried on with foreign nations or Indian tribes and between the states, has never been judicially catalogued.

Time and time again, by one or another court, in one or another case, it has been decided that a given transaction or subject was either within or without the terms of the commerce clause, so that by a gradual process of inclusion and exclusion it can now be told with tolerable certainty what is or is not enfolded in the word "commerce" as used in the commerce clause. It will aid the reader in his investigation of the subject to set forth these decisions at the outset.

The first and leading case on the construction of the commercial clause of the Constitution, to use the words of Mr. Justice Field in a later one (*Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238), is that of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, and the definition of "commerce" in that clause framed in that case by Chief Justice Marshall still stands. The

all proceed is, in substance, that the assessments complained of, and the scheme of taxation embodied in the Nichols law, under which the assessments were made, are void as in contravention: First, of the Constitution of Ohio, which provides that all property shall be taxed according to its true value in money by a uniform rule, and that the property of corporations shall be taxed "the same as the property of individuals" (Ohio Const. art. 12, § 2, and art. 13, § 4); second, "of the Constitution of the United States, because the effect of the rule of valuation prescribed by the statute and adopted in these particular assessments is, not to confine the tax to the property of the companies within the state of Ohio, but to tax something else which is not within the state of Ohio, and, therefore, to take the property of the companies without due process of law,

and that the scheme, as a special one applied to these special agencies of interstate commerce, imposes an illegal burden upon that commerce;" third, complainants also contend that, if the Ohio statute be valid under both the Constitution of Ohio and of the United States, the assessments are nevertheless void, because the assessments made were arbitrary and illegal, in that the assessors did not follow the statute or pursue any definite mode of valuation. Upon a first hearing before Circuit Judge Taft, the demurrers of the defendants were overruled, and defendants required to answer. The grounds upon which Judge Taft proceeded were: First, jurisdiction in equity was predicated upon the ground that a multiplicity of suits would result unless the defendants should be restrained from certifying their assessments to the auditors of

meaning is not limited, he said, to traffic,—to buying and selling or the interchange of commodities. "Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter."

The power to regulate commerce includes the power to regulate navigation as connected with the commerce with foreign nations and among the states. It does not stop at the mere boundary line of a state; nor is it confined to acts done on the water or in the necessary course of the navigation thereof. It extends to such acts done on land which interfere with, obstruct, or prevent the due exercise of the power to regulate commerce and the navigation with foreign nations and among the states. *United States v. Coombs*, 12 Pet. 72, 9 L. ed. 1004.

Commerce among the states is trade, traffic, intercourse, and dealing in articles of commerce between states by citizens and others, and carried on in more than one state. *Groves v. Slaughter*, 15 Pet. 449, 10 L. ed. 800.

The power conferred by the commerce clause is without limitation. It extends to all subjects of commerce, and to all persons engaged in it. It embraces traffic, navigation, and intercourse. *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805.

Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than that in which they lie. Commerce among the states does not stop at a state line. Coming from abroad, it penetrates wherever it can find navigable waters reaching from without into the interior, and may follow them up as far as navigation is practicable. Wherever commerce among the states goes the power of the nation as represented in the Supreme Court goes with it to protect and enforce its rights. *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96.

Under the commerce clause, Congress has power to legislate over navigation as well as trade,—over intercourse as well as traffic; and to prescribe what shall constitute American

vessels and the national character of the seamen who shall navigate them, and rules and regulations for the intercourse and navigation of such vessels between the different states. *King v. American Transp. Co.* 1 Flipp. 1, Fed. Cas. No. 7,787.

The law before us, said the United States Supreme Court in another case, professes to regulate traffic and intercourse with the Indian tribes. It manifestly does both. It relates to buying and selling and exchanging commodities which is the essence of all commerce; and it regulates the intercourse between the citizens of the United States and those tribes which is another branch of commerce, and a very important one. *United States v. Holliday*, 3 Wall. 407, 18 L. ed. 182.

Transportation for others as an independent business is commerce irrespective of any purpose of the owner of goods carried to sell or retain them after delivery. *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed.—, 23 Sup. Ct. Rep. 214.

Transportation is essential to commerce, or rather it is commerce itself; and every obstacle to it, or burden laid upon it, by legislative authority is regulation. *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527.

By the term "commerce" is meant not traffic only, but every species of commercial intercourse, every communication by land or by water, foreign and domestic, external and internal. *State v. Delaware*, L. & W. R. Co. 30 N. J. L. 473.

Transportation is as much a part of commerce as are the goods transported. If there can be no commerce between states without goods, so there can be none without the transportation of the goods. The two must be united to constitute interstate commerce. A duty on one of these two elements in commerce must in the nature of things operate as a tax upon the other. As commerce the two things are indissoluble; they are not divisible for the purposes of taxation. *Erie R. Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226.

The word "commerce" is a term of broad significance. It embraces considerably more than the mere bargain and sale of goods and merchandise and other property between individuals. It includes all the instruments by which it may be conducted. It embraces transportation by railroads, ferries, etc., and all common carriers. It may be carried on between individuals in the same state, or over railroads lying in the same state. It is then internal commerce, and is under the control of state legislation. Or it may be conducted and engaged in

eighty-seven counties, within each of which the defendants had property; second, that the Nichols law, under which the assessments had been made, was void as in conflict with the Constitution of the state of Ohio. The opinion of the court upon these questions is reported in 61 Fed. 449. Before answers were filed, a suit involving the constitutionality of this legislation was decided by the supreme court of Ohio, and the validity of the law under the Ohio Constitution sustained. *State ex rel. Poe v. Jones*, 51 Ohio St. 492, 37 N. E. 945. Upon the filing of this opinion by the Ohio court, Judge Taft granted a rehearing, and sustained the demurrers of defendants, upon the ground that the decision of the supreme court of Ohio as to the construction of the Nichols law and its validity under the Constitution of Ohio was conclusive upon the courts of the United States. A very con-

vincing opinion upon this aspect of the question was filed, and is reported in 64 Fed. 9. A further argument was heard before Judge Taft upon the question as to whether the state board of assessors had enforced the Nichols law according to the construction placed thereon by the supreme court of Ohio. Upon the latter hearing it was agreed that the bills of the several complainants should be treated as amended by the incorporation therein of the facts which had been made to appear by the two affidavits of the defendant Poe as to the manner in which the amount of the several assessments had been reached. The learned circuit judge, upon the bills as thus amended, was of opinion that the board of assessors had kept "well within the law" as construed by the Ohio court. He therefore sustained the demurrers and dismissed the several bills.

between individuals living in different states or transported over railroads lying in and running through different states. It is then interstate commerce, and its regulation belongs to Congress. *Sternberger v. Cape Fear & Y. Valley R. Co.* 29 S. C. 510, 2 L. R. A. 105, 7 S. E. 836.

Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *United States v. Cassidy*, 67 Fed. 698; *United States v. Coal Dealers' Assn.* 85 Fed. 252.

The word "commerce" as used in the grant of power in the Federal Constitution to Congress to regulate foreign, interstate, and Indian tribal commerce, is not limited to the mere buying and selling of merchandise and other commodities, but comprehends the entire commercial intercourse with foreign nations and among the several states. It includes navigation as well as traffic in its ordinary signification, and embraces ships and vessels as the instruments of intercourse and trade as well as the officers and seamen to navigate and control them. The power of regulation vested in Congress extends to all these subjects. *People v. Brooks*, 4 Denio, 469.

Commerce is the interchange or mutual change of goods, productions, or property of any kind between nations or individuals. Transportation is the means by which commerce is carried on. Without transportation there could be no commerce between nations or among the states. Any regulation of the transportation of interstate commerce, whether it be upon the high seas, the lakes, the rivers, or upon railroads or other artificial channels of communication affecting commerce, is a regulation of commerce itself. *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.* 45 Iowa, 338, 24 Am. Rep. 773.

A shipment of live stock on a through rate across state lines is interstate commerce, even where the liability of each carrier is limited to its own line. *Houston & T. C. R. Co. v. Williams* (Tex. Civ. App.) 31 S. W. 556.

But if property be shipped under a contract binding the receiving carrier no further than its own line, which terminates within the state, and without charging a through rate, it is not interstate commerce, although the shipment is 60 L. R. A.

under a through bill, and to a place outside of the state. *Houston & T. C. R. Co. v. Davis*, 11 Tex. Civ. App. 24, 31 S. W. 308.

And yet a shipment of cattle from one point to another in the same state consigned to a consignee in an adjoining territory to be carried to destination by a continuous trip is interstate commerce, although the initial carrier only contracted to carry the stock to its terminal within the state. *Mexican Nat. R. Co. v. Savage* (Tex. Civ. App.) 41 S. W. 663; *Houston Direct Nav. Co. v. Insurance Co. of N. A.* 89 Tex. 1, 30 L. R. A. 713, 32 S. W. 889; *Texas & P. R. Co. v. Avery* (Tex. Civ. App.) 33 S. W. 704.

The shipping of goods to a point just over the state line, where they are unloaded, reloaded and rebilled to proceed further to an ultimate destination in view from the start, is interstate commerce. *State v. Southern Kansas R. Co.* (Tex. Civ. App.) 49 S. W. 252.

A corporation organized under a general railroad act, owning a grain elevator, freight house, several lines of railroad tracks appurtenant thereto, and the land they are built upon, at a harbor wholly within its home state; which owns neither railroad rolling stock nor boats; whose entire business consists in loading, unloading, and storing grain and other freight in transit from or to places outside of such state, — is not engaged in interstate commerce so as to be immune from excise taxes laid by its own state upon its franchise or business. *People ex rel. Connecting Terminal R. Co. v. Miller*, 82 N. Y. Supp. 562.

Commerce embraces intercourse of persons as well as importations of merchandise; and a state tax upon incoming passengers is a regulation in conflict with the commerce clause. *Passenger Cases*, 7 How. 283, 12 L. ed. 702.

The term "commerce," as employed in clause 3, § 1, art. 1, of the Constitution of the United States, is not to be construed as limited to an exchange of commodities only, but as including, as well, intercourse with foreign nations or the citizens of other states; and intercourse includes passenger transportation. *People v. Raymond*, 34 Cal. 492.

That all transportation of freights and persons from points without to points within the state, or from points within to points without the state, is commerce between the states, is abundantly settled, both upon principle and authority. *Vermont & C. B. Co. v. Vermont C. R. Co.* 63 Vt. 1, 10 L. R. A. 562, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731.

The business of landing and receiving passengers and freight at wharves on opposite sides

Argued before *Lurton*, Circuit Judge, and *Severens* and *Hammond*, District Judges. Messrs. *Ramsey*, *Maxwell* & *Ramsey* for appellants.

Mr. J. R. Richards, Attorney General, for appellees:

This court will sustain Judge Taft in following the supreme court of Ohio upon a purely Ohio question, and in conclusions in which that court is sustained by the Supreme Court of the United States in the Indiana cases. Judge Taft did right in following the decision of the supreme court of Ohio.

State Railroad Tax Cases, 92 U. S. 576, sub nom. *Taylor v. Secor*, 23 L. ed. 663; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Concord v. Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. ed. 628; *Moore v. Citizens' Nat. Bank*, 104 U. S. 625, 26 L. ed. 870; *Bucher v. Cheshire R. Co.* 125 U. S.

582, 31 L. ed. 798, 8 Sup. Ct. Rep. 974; *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep. 227; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Balkam v. Woodstock Iron Co.* 154 U. S. 177, 38 L. ed. 953, 14 Sup. Ct. Rep. 1010.

The property of an express company constitutes a plant for transportation purposes. The assessment of the Ohio property did not exceed a fair proportion of the value of this plant, taking into consideration the value of the capital stock and other facts, whatever basis of apportionment may be taken. In fact, no rule of appraisal aside from that laid down in the Nichols law was adopted; the result presents the best judgment of the board, in the light of the law and all the facts before it. If the assessment is erroneous, it is in consequence of a mistake of judgment, which a court will

of a navigable river separating two states, for transportation across the stream from one state to another by ferriboats, however short the distance traversed, or frequent the trips made, is interstate commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

Boats engaged in lightering goods to and from sea-going vessels, and in towing such vessels between the ocean and the wharves of a seaport; and which are enrolled and licensed in the coasting trade,—are engaged in external commerce, and are beyond the reach of state regulation. *Foster v. Davenport*, 22 How. 244, 16 L. ed. 248.

A bridge over waters dividing two states is a vehicle of interstate commerce,—as much so as is a ferryboat,—and traffic across it is interstate commerce. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across the river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier. *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 205, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1092.

The legislation of Congress under the grant of power to regulate commerce has uniformly proceeded on the idea that the vehicles of commerce were but agents of trade, and that the right to regulate them was included in the right to regulate the end for which they were used. The only plain and intelligible rule would seem to be that the power of Congress to regulate commerce extends to all the immediate agents and vehicles of commerce; and, as it extends to these vehicles for some purposes, it must for all. *Mitchell v. Steelman*, 8 Cal. 363.

Empty railroad cars on their way to a point of lading outside of the state are not, however, engaged in interstate commerce so as to be beyond state control. *Norfolk & W. R. Co. v. Com.* 93 Va. 749, 34 L. R. A. 105, 24 S. E. 837.

The telegraph is an instrument of commerce, and telegraph companies are subject to the regulative power of Congress in respect of their foreign and interstate business. *Pensacola Teleph. Co. v. Western U. Teleph. Co.* 90 U. S. 1, 24 L. ed. 708; *Western U. Teleph. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067.

A telegraph company occupies the same rela-

tion to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. They do their transportation in different ways, and their liabilities are in some respects different; but they are both indispensable to those engaged to any considerable extent in commercial pursuits. *Western U. Teleph. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067.

Intercourse by telegraph between states is interstate commerce. *Western U. Teleph. Co. v. Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126.

Communication by telegraph is commerce, and, when carried on between different states, it is directly within the power of Congress to regulate, and is free from the control of state regulations save those of a strictly police character. *Leloup v. Port of Mobile*, 127 U. S. 840, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

The transmission of telegraph messages is commerce, and when they are transmitted between places in different states, or to and from foreign countries, they are beyond the reach of state taxation. *Western U. Teleph. Co. v. State Bd. of Assessment*, 132 U. S. 472, sub nom. *Western U. Teleph. Co. v. Seay*, 33 L. ed. 409, 1 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161, Reversing 80 Ala. 273, 60 Am. Rep. 99.

Telegraphy is commerce. *Western U. Teleph. Co. v. Atlantic & P. State Teleph. Co.* 5 Nev. 109.

And messages over telephones between two states are interstate commerce, and the sending of them cannot be prohibited or interfered with by injunction from a state court, because taxes assessed against those in the business of transmitting them are unpaid. *Re Pennsylvania Teleph. Co.* 48 N. J. Eq. 91, 20 Atl. 846.

In the light of all the foregoing authorities, the decision of the supreme court of Ohio in *Western U. Teleph. Co. v. Mayer*, 28 Ohio St. 521, so far as it holds that commerce between the states relates to trade in articles of property, and that telegrams between citizens of different states, although connected with commercial transactions, are not commerce, but only instruments to aid or facilitate commerce, and, even if indispensable to a successful prosecution of trade, are, as such instruments, subject to state taxation,—must be pronounced unsound.

But the issuing of a policy of insurance is not a commercial transaction, nor is the doing of an insurance business commerce. Policies of insurance are simple contracts of indemnity, not

neither review nor correct.

The property of an express company constitutes a plant, taking into consideration the value of its capital stock and its earnings.

State ex rel. American Exp. Co. v. State Bd. of Assessment & Equalization, 3 S. D. 338, 53 N. W. 192.

Where the constitutionality of a law is involved, every possible presumption is in favor of its validity, and this continues until the contrary is shown beyond a reasonable doubt.

Sinking Fund Cases, 99 U. S. 700, 718, *sub nom. Union P. R. Co. v. United States*, 25 L. ed. 496, 501; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143, 144, 25 L. ed. 901; *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 82; *State ex rel. Atty. Gen. v. Cincinnati*, 20 Ohio St. 33; *Marmet*

articles or instrumentalities of commerce. They have neither existence nor value extrinsic of the parties to them. They are not commodities to be shipped from one place to another and offered for sale. The taking out of policies of insurance is not an interstate transaction of commerce, although insured and insurer are domiciled in different states. *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357; *Ducat v. Chicago*, 10 Wall. 410, 19 L. ed. 972; *Liverpool & L. Life & F. Ins. Co. v. Massachusetts*, 10 Wall. 566, *sub nom. Liverpool L. Life & F. Ins. Co. v. Oliver*, 19 L. ed. 1029; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *People v. Thurber*, 13 Ill. 554; *Insurance Co. of N. A. v. Com.* 87 Pa. 173, 30 Am. Rep. 352; *List v. Com.* 118 Pa. 322, 1 Inters. Com. Rep. 784, 12 Atl. 277.

We cannot, said the court in this case, regard the questions presented by this record as open. They are all decisively settled by the Supreme Court of the United States in the case of *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357.

A state tax upon a domestic insurance company, measured by the amount of business done within the state, in so far as it affects premiums received for insuring imported goods while they remain in the original packages in bonded warehouses, does not conflict with the commerce clause, since the contract of insurance is one of indemnity only, and the tax thereon neither touches the goods nor the right to sell them. *People v. National F. Ins. Co.* 27 Hun, 188, *Reversing* 61 How. Pr. 334.

It has been judicially determined, time and time again, by the highest judicial authority in the land, that issuing a policy of insurance is not a transaction of commerce. This must now be regarded as the law of the land. *State v. Phipps*, 50 Kan. 600, 18 L. R. A. 657, 4 Inters. Com. Rep. 299, 31 Pac. 1097.

Whether or not commerce flowing in a continuous stream from one place to another in the same state and between parties subject to the jurisdiction thereof is to be regarded as purely internal and domestic, or as interstate, when part of the passage from one terminal to the other is across the soil of another state, has been a mooted question in the past. In the one case it would be subject to state regulation; in the other, to regulation exclusively by Congress.

Navigation upon the high seas, although between ports in the same state and confined entirely to voyages along the coast of that state alone, without entering or passing a single port of another state or country, is not internal domestic commerce, but commerce national in its

v. State, 45 Ohio St. 64, 12 N. E. 463; *Baker v. Cincinnati*, 11 Ohio St. 542; *State ex rel. Atty. Gen. v. Covington*, 29 Ohio St. 113; *Cooley*, Const. Lim. 107, 108.

The Nichols law is based upon the essential differences existing between the property of telegraph, telephone, and express companies and other property. The property of these companies is in nature and use a unit, and, to be justly valued, so that the companies may bear their fair share of the public burdens, must be treated for assessment purposes as a unit.

St. Louis v. Western U. Teleg. Co. 148 U. S. 98, 37 L. ed. 383, 13 Sup. Ct. Rep. 485; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 34, 35 L. ed. 620, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 867; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Pacific Exp.*

character, and within the exclusive power of Congress to regulate. *Lord v. Goodall*, N. & P. S. Co. 102 U. S. 541, 26 L. ed. 221.

And yet a state tax may be levied and collected upon the gross earnings of a domestic railroad corporation for the continuous transportation of freight and passengers between points within its territory over a line which runs out of, and then back into, the state between such points. *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806.

In deference to that decision, several cases in the state courts have held commerce of this sort to be internal and domestic.

A state has the power to regulate the charges for the carriage of goods by a single railroad from one place to another in the same state, notwithstanding nearly one half of the journey is over the soil of an adjoining state. *Campbell v. Chicago, M. & St. P. R. Co.* 86 Iowa, 587, 17 L. R. A. 443, 4 Inters. Com. Rep. 203, 53 N. W. 351.

It has such power, although nearly all of the journey is outside of the state. *Seawell v. Kansas City, Ft. S. & M. R. Co.* 119 Mo. 222, 5 Inters. Com. Rep. 262, 24 S. W. 1002.

A state may fix the rate upon telegraph messages between different points within it, passing between persons resident therein, in spite of the fact that on their way they leave and return to the state. *State ex rel. Railroad Comrs. v. Western U. Teleg. Co.* 113 N. C. 213, 22 L. R. A. 570, 18 S. E. 389.

Telegrams taking that course are not interstate commerce. *Ibid.*

Neither is transportation of the same character. *Dillon v. Erie R. Co.* 19 Misc. 116, 43 N. Y. Supp. 320.

But the transportation of property from a consignor in one part of a state to a consignee in another part of the same state, over several railroads of which one is entirely in another state, although the journey from place to place is not interrupted, is interstate commerce, and the state in which the terminals are has no power to regulate the charges for carrying it on. *Sternberger v. Cape Fear & Y. Valley R. Co.* 29 S. C. 510, 2 L. R. A. 105, 7 S. E. 836.

The rule, however, which has now become established in respect of state regulation of this class of commerce, is that formulated by Mr. Justice Field, viz.: "To bring the transportation within the control of the state as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state. *Pacific Coast*

Co. v. Seibert, 142 U. S. 354, 35 L. ed. 1040, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

Because of the inherent and essential differences referred to, it is not only proper, but wise, for the state to classify the property of these companies for taxation.

Wagoner v. Loomis, 37 Ohio St. 571.

The method of valuing the property of a telegraph company provided in the Nichols law, and distributing such valuation among the taxing districts according to mileage, is a just and fair mode of assessment, and has been sustained in numerous decisions. The value of the capital stock guides, but does not control.

Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 547, 552, 553, 31 L. ed. 790, 792, 793, 8 Sup. Ct. Rep. 961; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 426,

427, 32 L. ed. 229, 233, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Leloup v. Port of Mobile*, 127 U. S. 641, 649, 32 L. ed. 312, 314, 8 Sup. Ct. Rep. 1380; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 23, 25-27, 35, 36, 35 L. ed. 613, 616, 617, 621, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 235, 35 L. ed. 994, 997, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *State Railroad Tax Cases*, 92 U. S. 608, *sub nom. Taylor v. Secor*, 23 L. ed. 671; *Atty. Gen. v. Western U. Teleg. Co.* 141 U. S. 40, 45, 35 L. ed. 628, 630, 11 Sup. Ct. Rep. 889.

The taxing power is included in the general grant of legislative power. Section 2 of article 12 is merely a limitation on the taxation of property, and does not preclude the legislature from using other means of raising money for general revenue.

S. S. Co. v. Railroad Comrs. 9 Sawy. 253, 258, 18 Fed. 10, 13.

That rule has been distinctly adopted by the United States Supreme Court in a case of this character decided during the current year. *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. —, 23 Sup. Ct. Rep. 214, Affirming 106 Fed. 363.

Commerce between places in the same state, but passing through another state in the course of a continuous journey, is interstate commerce so as to afford jurisdiction to the interstate commerce commission to pass upon the merits of a controversy between shippers and carriers of freight over rates. *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. R. Co.* 2 Inters. Com. Rep. 289; *Milk Producers' Protective Asso. v. Delaware, L. & W. R. Co.* 7 Inters. Com. Rep. 92.

A state has no power to fix the freight charges for the continuous transportation of merchandise by common carrier between two places in such state, when a considerable part of the journey is necessarily through outside territory. *State ex rel. Railroad & W. Commission v. Chicago, St. P. M. & O. R. Co.* 40 Minn. 267, 3 L. R. A. 238, 2 Inters. Com. Rep. 519, 41 N. W. 1047; *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. —, 23 Sup. Ct. Rep. 214, Affirming 106 Fed. 363.

In the last-cited case *Holmes, J.*, distinguished the *Lehigh Valley R. Case* (145 U. S. 201, 36 L. ed. 875, 4 Inters. Com. Rep. 90, 12 Sup. Ct. Rep. 808) by saying that in that case the tax was determined in respect of receipts for the proportion of the transportation within the state, and that a tax so proportioned is valid even in the case of commerce admitted to be interstate (citing *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163); whereas, when a freight rate is established it is as a whole.

IV. Congressional inaction means freedom.

It was at the outset much debated whether the power given by the Constitution of the Union to regulate commerce between the states and with foreign nations was the same as that conferred upon it to pass uniform laws upon the subject of bankruptcy, namely, a power exclusive as well as supreme when exercised, but one that did not prevent the states from enacting valid laws upon the subject so long as Congress remained silent and idle.

In the first great case of *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, the question was whether the commercial power was not concurrent in the nation and the states. And it was decided that when, as in that case, Congress had en-

acted laws regulating commerce, state laws upon the same branch of the subject became nullities. The decision left it an open question whether the states had power, pending affirmative action by Congress, to regulate external commerce, although Mr. Justice Johnson, who concurred, was of the opinion that the grant of the commercial power to Congress carried the whole subject-matter, and left nothing to the states at all; so that any state legislation respecting external commerce would necessarily be unconstitutional *ab initio*.

The debate continued through many years. In *Grove v. Slaughter*, 15 Pet. 449, 10 L. ed. 800, the view just mentioned as that of Mr. Justice Johnson was taken by McLean and Baldwin, JJ., and the opposite one was held, but not argued, by Chief Justice Taney. Mr. Justice McLean argued that the necessity of a uniform commercial regulation, more than any other consideration, led to the adoption of the Federal Constitution, and, unless the power conferred in that respect was not only paramount, but exclusive, the Constitution must fall of attaining one of the principal objects of its formation. Of the contention that a state might exercise a commercial power if the same had not been exercised by Congress, and that this state power ceased when the Federal authority was extended over the same subject-matter, he said that it rested upon the supposition that a state may exercise a power which is expressly given to the Federal government if that government does not exert such power in all the modes, and over all the subjects, in and to which it can be applied. He insisted that, if such a rule of construction was generally adopted and practically enforced, it would be as fatal to the spirit of the Constitution as it was opposed to its letter. And he asserted that a power might well remain dormant, although the expediency of exercising it had been fully considered; that it was "often wiser and more politic to forbear than to exercise a power." These remarks called forth an opinion by the chief justice when he had intended not to express one. He referred to the subject as a question brought into discussion as to whether the grant of power to the general government to regulate commerce did not carry with it an implied prohibition to the states to make any regulations upon the subject, and he declined to express any opinion upon that question, because, he insisted, it was outside of the case, and nothing required from the members of the court a voluntary declaration of opinion. He admitted that, if a state makes any regulation of commerce inconsistent with those made by Congress, or in any

Hill v. Higdon, 5 Ohio St. 246, 67 Am. Dec. 289; *Zanesville v. Richards*, 5 Ohio St. 592; *Baker v. Cincinnati*, 11 Ohio St. 540; *Western U. Teleg. Co. v. Mayer*, 28 Ohio St. 533; *Adler v. Whitbeck*, 44 Ohio St. 565, 9 N. E. 672; *Anderson v. Brewster*, 44 Ohio St. 585, 9 N. E. 683; *Marmet v. State*, 45 Ohio St. 68, 12 N. E. 463; *State ex rel. New England Mut. L. Ins. Co. v. Reinmund*, 45 Ohio St. 214, 13 N. E. 30; *Ashley v. Ryan*, 49 Ohio St. 504, 31 N. E. 721.

There is no denial of the equal protection of the law. The Federal cases recognize the right of a state to classify property for taxation, and use such methods of valuation as, in the judgment of the legislature, will result in an equality of burdens.

Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33

L. ed. 892, 895, 10 Sup. Ct. Rep. 533; *Home Ins. Co. v. New York*, 134 U. S. 594, 606, 33 L. ed. 1025, 1031, 10 Sup. Ct. Rep. 593; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 351, 35 L. ed. 1035, 1040, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. ed. 463, 466, 6 Sup. Ct. Rep. 110; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 209, 32 L. ed. 107, 109, 8 Sup. Ct. Rep. 1161; *State Railroad Tax Cases*, 92 U. S. 575, 608, 611, sub nom. *Taylor v. Secor*, 23 L. ed. 663, 671, 672; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, 338, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 419, 6 Sup. Ct. Rep. 57; and other cases cited later.

Due process of law is provided by the

wise interfering with them, it must yield. No one, he said, doubts the controlling power of Congress in this respect, nor its right to abrogate and annul any and every state commercial regulation. But the point upon which opinion differed was as to the validity of a state regulation of commerce pending congressional action, and not in conflict or inconsistent with such action. No case had yet arisen which made it necessary, in the judgment of the court, to decide that question.

That case was decided in 1841, and the learned chief justice shows how little was then foreseen of the future controversies over questions arising under the commerce clause, when he added: Nor am I aware that there is any reason for supposing that any such case is likely to arise, for the states have very little temptation to make a regulation of commerce when they know it may be immediately annulled by an act of Congress, even if it does not, at the time it is made, conflict with any law of the general government. The point in dispute, therefore, would seem to be but little more than an abstract question which the court may never be called upon to decide, and perhaps, like other abstract questions, is destined, on that very account, to be more frequently and earnestly discussed. But, until some case shall bring it here for decision, and until some practical purpose is to be answered by deciding it, I do not propose to engage in the discussion, nor to express an opinion. Baldwin, J., thought the question was outside of the case then before the court, but, as some of his colleagues had expressed themselves upon it, he would not remain silent. He thought the power of Congress to regulate commerce among the states was exclusive of any interference by the states, and that this proposition had been conclusively established by the decisions in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, and *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678. If these decisions, he said, are not to be taken as the established construction of this clause of the Constitution, I know of none which are not yet open to doubt; nor can there be any adjudication of this court which must be considered as authoritative upon any question if these are not to be so on this.

In the *License Cases*, 5 How. 504, 12 L. ed. 256, a state statute passed to discourage the consumption of ardent spirits by prohibiting their sale within the state without a license from the selectmen of the town where the vendor resided was held valid, and not repugnant to the commerce clause, although applied to the case of the sale of a cask of liquor imported from another state, and sold by the importer in the

condition imported; because Congress had not then passed any law regulating commerce between the states. The case of *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, was distinguished by saying that, in the case at bar, the cask of gin was imported from another state, while in the cited case the package of dry goods was imported from a foreign country; and that Congress had passed a customs duty or tariff act, but no law regulating commerce among the several states. Taney, Ch. J., expressed the opinion that, by the commerce clause of the Federal Constitution, the states were not absolutely prohibited from legislating in regulation of interstate and foreign commerce in the absence of all action by Congress, but only after Congress had exercised its constitutional power, and in conflict therewith. And Catron, Nelson, and Woodbury, JJ., were of the same opinion.

Then came the *Passenger Cases*, 7 How. 283, 12 L. ed. 702, and again Mr. Justice McLean declared that the power to regulate commerce with foreign nations and among the several states is, by the Constitution of the United States, vested exclusively in Congress, and that the states cannot exercise it at all, whether Congress has or has not acted. Wayne, J., agreed to this, but deemed it unnecessary to say so, while one of the conclusions announced by Grier, J., at the end of his opinion was that Congress had regulated commerce and intercourse with foreign nations and between the states by willing that it should be free.

In 1850 the supreme court of Maine was content to say that, without intimating any opinion upon the controverted question whether Congress has the exclusive power to regulate commerce to the extent of its grant, its exclusive power to do so will be admitted for the consideration of this case. *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655.

Whenever Congress exercises its power to regulate commerce among the states or with foreign nations all conflicting state laws must give way, declared the United States Supreme Court in a later case. But, if it be held that a state can impose a tax in the exercise of a concurrent right of regulating commerce until some regulation on the subject has been made by Congress, yet, if a state imposes a discriminating tax levied exclusively upon the products of her sister states, then, looking to the consequences which the exercise of this power, if it be once conceded, entails,—amounting to a total abolition of all commercial intercourse between the states, under the cloak of the taxing power,—the supposed right cannot be admitted, even

Nichols law, both in itself, and when taken in connection with other statutes of Ohio. There are provisions for notice, for statements, for hearing, for review and correction of errors and overvaluations, for contesting assessments.

Ohio Rev. Stat. §§ 167, 5848-5852; *State Railroad Tax Cases*, 92 U. S. 609, *sub nom. Taylor v. Secor*, 23 L. ed. 672; *McMillen v. Anderson*, 95 U. S. 37, 41, 42, 24 L. ed. 335, 336; *Davidson v. New Orleans*, 96 U. S. 97, 104, 105, 24 L. ed. 616, 619, 620; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 708, 710, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 333, 334, *sub nom. Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 417, 6 Sup. Ct. Rep. 57; *Spencer v. Merchant*, 125 U. S. 345, 355, 31 L. ed. 763, 767, 8 Sup.

Ct. Rep. 921; *Palmer v. McMahon*, 133 U. S. 660, 669, 33 L. ed. 772, 776, 10 Sup. Ct. Rep. 324; *Lent v. Tillson*, 140 U. S. 326, 35 L. ed. 424, 11 Sup. Ct. Rep. 825; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.

In the absence of an allegation of fraud, the action of the board in fixing the valuation is treated as conclusive, and the court will not revise its judgment to determine whether its valuation is or is not excessive. Courts do not resolve themselves into assessing authorities to determine the value of property for taxation.

State Railroad Tax Cases, 92 U. S. 610, 612, 616, *sub nom. Taylor v. Secor*, 23 L. ed. 672, 673, 674; *Kelly v. Pittsburgh*, 104 U. S. 78, 80, 26 L. ed. 658, 659; *German Nat. Bank v. Kimball*, 103 U. S. 732, 26 L. ed. 469; *Wagoner v. Loomis*, 37 Ohio St. 571;

when Congress has failed to act on the subject in any manner whatever. *Hinson v. Lott*, 8 Wall. 148, 19 L. ed. 387.

In 1875 the United States Supreme Court decisively announced that, Congress not having seen fit to prescribe any specific rules to govern interstate commerce, its inaction on that subject, when considered with reference to its legislation respecting foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several states. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it. *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547.

And yet in 1880 Mr. Justice Field, in writing for the court, stated, without dissent: There have been, it is true, expressions of opinion by individual judges of this court, going to the length that the mere grant of the commercial power anterior to any action of Congress under it is exclusive of all state authority; but there has been no adjudication of the court to that effect. *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238.

It was not so very long afterwards that the court declared: We have so often held that the power given to Congress to regulate commerce with foreign nations, among the several states, and with the Indian tribes is exclusive in all matters which require, or only admit of, general and uniform rules, and especially as regards any impediment or restriction upon such commerce, that we deem it necessary merely to refer to our previous decisions upon the subject. We have also repeatedly held that, so long as Congress does not pass any law to regulate commerce among the several states, it thereby indicates its will that such commerce shall be free and untrammelled, and that any regulation of the subject by the state, except in matters of local concern only, is repugnant to such freedom. *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454.

And in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 567, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, the dissenting justices take pains to concede that any taxes, duties, or impositions upon interstate commerce (that is, upon commerce itself), carried on over the railroads of a state, would interfere with the freedom of such commerce, and would be repugnant to the presumed intention of Congress.

60 L. R. A.

If Congress has not made any express regulations with regard to interstate commerce, its inaction is equivalent to a declaration that it shall be free in all cases where its power is exclusive, and its power is exclusive, necessarily, whenever the subject-matter is national in its character, and properly admits of only one uniform system. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

The Constitution does not provide that commerce shall be free; but, by the grant of the power to regulate it, exclusive when the subjects are national in their nature, it was left free except as Congress might impose restraint; therefore it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. *Re Rahrer*, 140 U. S. 545, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

Non-action by Congress with respect of commerce between the states is equivalent to a declaration that it shall be free. *State v. Duckworth (Idaho)* 39 L. R. A. 365, 51 Pac. 456.

V. State powers.

a. None to tax external commerce.

The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. ed. 579.

It cannot be doubted that a tax which so seriously affects the interchange of commodities between the states as essentially to impede or seriously to interfere with it is a regulation of commerce. And it is also true that Congress has the same right to regulate commerce among the states that it has to regulate commerce with foreign nations. *Hinson v. Lott*, 8 Wall. 148, 19 L. ed. 387.

The rule is general that, whenever taxation by a state is forbidden, or would interfere with the full exercise of a power vested in the government of the United States over the same subject, it cannot be imposed. *Low v. Austin*, 13 Wall. 29, 20 L. ed. 517.

States cannot, by legislation, place burdens upon commerce with foreign nations or among the several states. The decisions go to that extent, and their soundness is not questioned.

Stanley v. Albany County, 121 U. S. 541, 549, 30 L. ed. 1000, 1003, 7 Sup. Ct. Rep. 1234; *Williams v. Albany County*, 122 U. S. 154, 30 L. ed. 1088, 7 Sup. Ct. Rep. 1244; *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 37 L. ed. 91, 13 Sup. Ct. Rep. 194.

The resort to the court is premature. No injunction will lie against this board ascertaining the valuation and certifying it to the county auditors. *Non constat* but that prior to the levy the valuation may, if excessive, be corrected.

Ohio Rev. Stat. §§ 5848, 167; *Jones v. Davis*, 36 Ohio St. 478.

In an action to enjoin the levy or collection of taxes, the amount known or admitted to be due must first be paid or tendered.

Ohio Rev. Stat. § 5851; *State Railroad Tax Cases*, 92 U. S. 613-617, *sub nom. Taylor v. Secor*, 23 L. ed. 673-675; *German Nat. Bank v. Kimball*, 103 U. S. 733, 26 L. ed. 469; *Albuquerque Nat. Bank v. Perea*, 147

U. S. 87, 90, 37 L. ed. 91, 92, 13 Sup. Ct. Rep. 194; *Frazer v. Siebern*, 16 Ohio St. 624.

The tax is not one on the interstate business carried on by the companies, but upon the property of the companies, owned and used in Ohio and having a situs here, for purposes of taxation. There is, therefore, no violation of the commerce clause of the Constitution of the United States.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 294, 295, 296, *sub nom. Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 164, 168, 169; *State Railroad Tax Cases*, 92 U. S. 608, *sub nom. Taylor v. Secor*, 23 L. ed. 671; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Brown v. Houston*, 114 U. S. 623, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Ratterman v. Western U. Teleg. Co.* 127 U.

In all cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in the particular channels, or conditions for carrying it on. *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819.

It may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, encroaches upon the exclusive power of Congress. *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547.

A state cannot tax the business of ferrying freight and passengers across a navigable river flowing between it and another state. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

Taxing is one of the principal forms of regulating commerce. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce,—a restriction upon it; a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress. *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or the receipts derived from that transportation, or on the occupation or business of carrying it on; and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it which belongs solely to Congress. *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Lyng v. Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Pacific Exp. Co. v. Selbert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

Whether a charge made by a state be viewed as a tax, a license, or a fee, if its exaction violates the commerce clause, it is void, whatever 60 L. R. A.

may be the technical character given it. *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865.

All agree that interstate commerce is not the subject of state regulation, and the cases are uniform in holding that a tax upon such commerce is a regulation within the inhibition of the Federal Constitution. *Vermont & C. R. Co. v. Vermont C. R. Co.* 63 Vt. 1, 10 L. R. A. 562, 3 Inters. Com. Rep. 498, 21 Atl. 262, 731.

No more fruitful subject of controversy has been presented than the proper construction of the commerce clause in the Federal Constitution as connected with the right of the states to impose taxation upon interstate commerce, or, rather, on the question when a tax is to be regarded as a tax on such commerce, because the bald proposition that a state may tax interstate commerce has probably never been asserted by any of the courts of the states. *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720.

When commerce is of a national character so as to require a uniform system of regulation there is no constitutional or legal power in a state to interrupt, impede, or regulate it. *State v. Delaware, L. & W. R. Co.* 30 N. J. L. 473.

And it may be laid down as a general rule, universally applicable to all cases arising under the commerce clause, that, whenever the taxation of a commodity would amount to a regulation of commerce, so will the taxation of an inseparable incident or necessary concomitant of such commodity. *Erie R. Co. v. State*, 31 N. J. L. 531, 86 Am. Dec. 226.

That the commerce clause of the Constitution exempts from the burden of state taxation those who confine themselves to interstate commerce is a truth of which at this day knowledge must be imputed to the law-making power; and, in the absence of language that clearly connects such an intent with that power, it should not be held that there was a purpose to ignore such truth or violate its principles. *Osborne v. State*, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731, 14 So. 588. Affirmed in 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214.

b. Legislation affecting external commerce not always invalid.

The difficulty of drawing the line between constitutional and unconstitutional taxation by the state, said Chase, Ch. J., in one case in the Supreme Court of the United States, has always

S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Pacific Exp. Co. v. Seibert*, 142 U. S. 354, 35 L. ed. 1040, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 98, 37 L. ed. 383, 13 Sup. Ct. Rep. 485.

Lurton, Circuit Judge, delivered the opinion of the court:

If the assessments complained of be illegal, for any reason, the jurisdiction of a court of equity to enjoin the defendants from certifying them to the several county auditors of the state seems to be clear, upon the ground that a multiplicity of suits would result unless the assessment be enjoined be-

been acknowledged by this court; but that there is such a line is clear, and the court can best discharge its duty by determining in each case on which side the tax complained of is. It is as important to leave the rightful powers of the state in respect of taxation unimpaired as to maintain the powers of the Federal government in their integrity. *Osborne v. Mobile*, 16 Wall. 479, 21 L. ed. 470.

Every tax upon personal property, or upon occupations, business, or franchises, affects, more or less, the subjects and the operations of commerce. Yet, it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. *State Tax on Railway Gross Receipts*, 15 Wall. 284, sub nom. *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 164; *Delaware Railroad Tax*, 18 Wall. 206, sub nom. *Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Osborne v. Mobile*, 16 Wall. 479, 21 L. ed. 470; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. *Sherlock v. Alling*, 93 U. S. 90, 23 L. ed. 819; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

For instance, a state may require a railroad annually to fix its rates for fares and freights, and to post and keep them posted throughout the year by a printed copy thereof in all its stations, under penalties for default and for charging more than the posted rates, without thereby infringing upon the exclusive power of Congress to regulate commerce, provided the company is left entirely free to fix any rates it chooses. *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710.

The constitutional grant of power to Congress, conferred by the commerce clause, does not give authority to extend its legislation throughout the entire sphere of legislation in the several states. Each state has exclusive control over all matters pertaining to its own internal police. It can establish and regulate ferries across its rivers, control the moving of vessels in its own harbors, and enact health and inspection laws, which, by quarantine or otherwise, may operate on persons coming within its jurisdiction in the course of commerce. *King v. American Transp. Co.* 1 Flipp. 1, Fed. Cas. No. 7,787.

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fore the assessors shall certify to each county auditor the proportion of the gross assessments collectible by each county auditor under the scheme of apportionment among the counties provided by the act. To require the complainants to pay each of the numerous county auditors, and then sue to recover, or to enjoin each, would be most oppressive. We think, therefore, that the jurisdiction asserted in the bill, of avoiding a multiplicity of suits, was a sufficient ground to support the original bill, as well as the bills subsequently filed to enjoin the tax of 1894, assessed after the jurisdiction in the original case had attached. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153-157, 25 L. ed. 903-905; *State Railroad Tax Cases*, 92 U. S. 575-618, sub nom. *Taylor v. Secor*, 23 L. ed. 663-675; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339-348, 35 L. ed. 1035-1038, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Shelton v. Platt*, 139 U. S. 591-599, 35 L. ed. 273-277, 11 Sup. Ct. Rep.

The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation. Others can best be regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. To this extent the power to regulate commerce may be exercised by the states. *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96.

In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. *Sherlock v. Alling*, 93 U. S. 90, 23 L. ed. 819.

The principle established by the decisions of the Supreme Court of the United States is that, in regard to the powers conferred by the commerce clause of the Constitution of the Union, there are some which, by their essential nature, are exclusive in Congress, and which the states can exercise under no circumstances; while there are others which, from their nature, may be exercised by the states until Congress shall see proper to cover the same ground by such legislation as that body may deem appropriate to the subject. *Pound v. Turck*, 95 U. S. 450, 24 L. ed. 525.

Not every state law which in effect regulates burdens or restricts commerce is repugnant to the Federal Constitution. When the regulations are distinctly local in character they are free of objection. Such are regulations regarding the speed of trains in or near cities and towns, precautions required in approaching bridges, tunnels, crossings, entering deep cuts, and rounding curves; and, generally, regulations respecting operations which may endanger the safety of the people. *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

Where commerce is not national in its character, so as to require a uniform system of regulation, the states may do many things to regulate it, and some that more or less affect commercial intercourse, without any violation of the Constitution. *State v. Delaware, L. & W. R. Co.* 30 N. J. L. 473.

VI. Property taxation.

The reader should consult the notes in this

646; *Marshall v. Holmes*, 141 U. S. 589, 35 L. ed. 870, 12 Sup. Ct. Rep. 62; *Adams Exp. Co. v. Poe*, 61 Fed. 470.

The question as to the constitutionality of the Nichols law under the Ohio Constitution must be regarded as conclusively settled for this court by the opinion of the highest court of the state of Ohio, as announced in the case of *State ex rel. Poe v. Jones*, 51 Ohio St. 492, 37 N. E. 945, heretofore cited. The objection that this court ought not to feel precluded by the opinion of the Ohio court, by reason of the made-up character of the suit in which that opinion was announced, is not satisfactory. It is true that the circuit court of the United States first obtained jurisdiction of the question as to the validity of the Nichols law under the Constitution of Ohio, and that that court, in a very vigorous and persua-

sive opinion, concluded that the Nichols law contravened the Constitution of Ohio, and was therefore invalid. The courts of Ohio had not theretofore passed upon the question, and the circuit court could not escape the duty of determining for itself the true meaning and construction of the Constitution of Ohio, so far as involved by the mode of assessment provided by the Nichols law. Before a final decree had been rendered, the supreme court of Ohio, in a case involving the validity of the same law, announced a contrary opinion, and held the Nichols law, as construed by the same court, an entirely valid law, so far as it was supposed to be affected by the state Constitution. Under the circumstances of this case, we think the duty of the circuit court was to accept the opinion of the Ohio court as conclusive, and to render judgment accordingly. The case

series on *Taxation of corporate franchisees in the United States* (Louisville Tobacco Warehouse Co. v. Com. (Ky.) 57 L. R. A. 33), and *Taxation of capital stock of corporations in the United States* (State Bd. of Equalization v. People (Ill.) 58 L. R. A. 513), for cases of property taxation of corporations engaged in foreign or interstate commerce.

a. Corporate property.

1. Generally.

The fact that a corporation is engaged in foreign or interstate commerce even exclusively confers upon it no immunity from state taxes upon its property within the state imposing them, whether that property be tangible or intangible. Such property may be assessed specifically and in detail, or as an entirety in the aggregate. The property and assets within the taxing district may be inventoried or estimated according to any fair and equitable rule of proportion.

It was conceded in *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 28 L. ed. 1067, and again in *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Intern. Com. Rep. 134, 8 Sup. Ct. Rep. 1380, that, although a telegraph company has accepted the restrictions and obligations of the act of Congress of July 24, 1866 (Rev. Stat. title 65, §§ 5263-5266, U. S. Comp. Stat. 1901, pp. 3579-3582), and is engaged in foreign and interstate commerce, yet, its property in a state is subject therein to taxation the same as any other property. And it was so decided in *State ex rel. Gottlieb v. Western U. Teleg. Co.* 165 Mo. 502, 65 S. W. 775, Affirmed in 190 U. S. 412, 47 L. ed. —, 23 Sup. Ct. Rep. 731.

A tax imposed by a state nominally upon the capital stock of a foreign telegraph company so accepting and thus engaged, but in effect on account of property owned and used by it within such state, the value of which is determined by the proportion of the length of its lines in such state to the entire length thereof everywhere, is not repugnant to the commerce clause. *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961.

This decision, and a subsequent one between the same parties (141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889), established, as it was afterwards said, in reviewing one of the principal cases, that a statute of a state requiring a telegraph company to pay a tax upon its property within such state, valued at such a proportion of the whole value of its capital stock as the length of its lines in such state bears to the length of all its lines everywhere, deducting a 60 L. R. A.

sum equal to the value of its real estate and machinery subject to local taxation within the state, is constitutional. *Western U. Teleg. Co. v. Taggart*, 183 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1034.

The statutes of Massachusetts and Indiana, involved in these three cases, were said in the last to be indistinguishable in any material respect.

The validity of similar taxation under the statutes of Tennessee was affirmed in *Western U. Teleg. Co. v. State*, 9 Baxt. 509, 40 Am. Rep. 9.

Although a state statute provides that certain corporations shall, in addition to other taxes imposed by law, pay annually taxes upon their franchisees, both state and local, yet, when such provision is coupled with others requiring such corporations, both domestic and foreign, to furnish information to enable an assessing board to value their capital stocks, including their entire tangible and intangible property, wherever located, and requiring such board, after deducting the values of all tangible property everywhere assessed, to assess the tax imposed by such statute upon the balance, and, if the corporation assessed be a railroad, telegraph, express, etc., company operating a line extending beyond the state, then the proportion of the capital stock which the mileage in the state bears to the whole length must be taken as the value of the corporate franchise taxable,—the act does not lay a tax upon the occupation, nor a franchise tax, nor a tax upon business, but only one upon property claimed to be within the taxing jurisdiction; and, therefore, it is not in conflict with the commerce clause. *Western U. Teleg. Co. v. Norman*, 77 Fed. 13.

The state taxation of the track and rolling stock of a railroad owning and operating an interstate line in proportion to the trackage within such state to that of the whole line is not an interference with, or regulation of, commerce between the states, so as to conflict with the Federal Constitution. *Cleveland, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421.

Property taxation rests solely on the value of the property taxed, never upon what it earns, nor upon the privilege of using it; but, as such value results from such use, and from the profit gained or expected from such use, and both the use and the profit, actual or anticipated, vary, the cash value of property for taxation often involves something created by the use to which it is put, and it is impossible so to segregate the value of any given property as to determine what part thereof results from any particular

before it involved no rights or contracts between individuals which had been entered into upon the faith of earlier and conflicting decisions of either the courts of the United States or of the state, and therefore presented no question such as arose in *Burgess v. Seligman*, 107 U. S. 32, 27 L. ed. 364, 2 Sup. Ct. Rep. 10, or *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539, or *Douglass v. Pike Co.* 101 U. S. 677, 25 L. ed. 968, and *Rowan v. Runnels*, 5 How. 134, 12 L. ed. 85. Where the construction or validity of a state statute does not involve rights acquired upon the faith of earlier and conflicting decisions, it is the clear duty of Federal courts to accept and adopt the decisions of the highest court of a state in respect to the construction and conformity of state laws to the Constitution of the state. The decision of

such questions properly belongs to the highest courts of the state. We entirely concur with the opinion of the circuit judge upon this question, who said:

"Here is not involved the validity or construction of a law on the faith of which individuals have made contracts, advanced money, or incurred liability. We have here simply a tax law fixing the obligation of artificial persons of a certain class to contribute to the support of the state. In respect of such a law, it would be anomalous and absurd to have a diversity of rulings between the state and Federal courts. The intolerable result of such a diversity would be that companies who could invoke the jurisdiction of the Federal court would not pay the tax, while all those who could not invoke that jurisdiction would be compelled to pay it. There is nothing in the decisions

use and what does not; hence, the fact that railroad property, for instance, is used in general for commerce, a part of which is interstate and foreign, that has contributed and does contribute materially to the value of the property, does not relieve the value so created from taxation as property. *Cleveland, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122.

A tax on transportation companies running sleeping cars over other lines partly within and partly out of the state, upon the mileage proportion basis, applying alike to both foreign and domestic corporations, does not burden interstate commerce. *Pullman's Palace Car Co. v. Board of Assessors*, 55 Fed. 206.

A state tax of a specified percentage on the value of a railroad, its rights, franchises, and property in the state, is a tax upon property as such located and used within the state, and, therefore, not repugnant to the commerce clause of the Federal Constitution. *State v. New York, N. H. & H. R. Co.* 60 Conn. 326, 22 Atl. 765.

A tax imposed equally upon the capital of all corporations doing business within the state, both domestic and foreign ones, and whether engaged in external commerce or not, and laid on account of property within the state, is, in substance and effect, a tax upon the corporate property, and, when imposed upon a corporation engaged in interstate commerce, is not obnoxious to the Federal Constitution. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

The opinion was expressed in a decision made in 1902 by the supreme court of Minnesota, that a section of a statute of that state (An Act Providing for the Taxation of Freight Line and Equipment Companies, Laws 1897, chap. 160, § 5), exacting annually from each corporation of the kind designated that did business or owned cars operated in the state "a sum in the nature of an excise tax or license," to be computed by taking 2 per cent of the sum fixed by a state board of appraisers as the value of the proportion of the capital stock of such corporation owned and used in the state, less the value of the real estate assessed and taxed locally in such state, was not conflicting with the commerce clause. This conclusion was reached by reasoning that the state had power to tax property employed in interstate commerce, and none to tax the privilege of carrying on such commerce; and, as the legislature must be presumed to have intended to enact a constitutional law, therefore, the statute must be construed as one imposing a tax upon property, and not an excise 60 L. R. A.

upon privilege. The court, however, proceeded to decide that the statute was unconstitutional and void for violating the rule of uniformity and equality of taxation in the state Constitution, because it imposed an arbitrary specific property tax upon one class of corporations instead of subjecting such property to the general rate ad valorem. *State v. Canda Cattle Car Co.* 85 Minn. 457, 89 N. W. 66.

Under a statute for the taxation of domestic corporations upon their capital stock which is to be assessed at its actual value, the subject of taxation is at all times where the corporation is in law and in fact, although a portion of the capital is invested in sea-going ships carrying on commerce in remote parts of the world. *People ex rel. Pacific Mail S. S. Co. v. New York City & County Tax Comrs.* 1 Hun, 143, Affirmed in 58 N. Y. 243.

A state tax upon the capital stock of a foreign transportation company doing business in the taxing state, apportioned by the mileage method, does not violate the commerce clause of the Constitution of the United States. *Com. v. Western U. Teleg. Co.* 2 Dauphin Co. Rep. 40.

A domestic corporation owning and operating exclusively an interstate bridge may be taxed, in spite of the commerce clause in the state in which it originated, upon its entire property and assets in such state, both tangible and intangible. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532.

A state may tax an interstate express company upon its property within such state, estimated as an entirety upon the mileage proportion basis, and assessed after deducting the value of all its tangible property within the state, without thereby violating the commerce clause. *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527.

A statute for the assessment and taxation of the property within the enacting state of an interstate express company through the action of a state board of equalization, although the valuation is four times as high as the value of the furniture, fixtures, and realty reported by the corporation, and made by taking into consideration contracts with railroads and gross earnings, is not, by such action, rendered invalid as a burden upon interstate commerce. *State ex rel. American Exp. Co. v. State Board*, 8 S. D. 338, 53 N. W. 192.

2. Vehicles of commerce.

Property employed exclusively in commerce with foreign nations or among the several states, such as ships, railroad cars, telegraph poles and

of the Supreme Court of the United States which gives the slightest warrant for supposing that, in the case of a state tax law, it would not follow the decision of the supreme court, whenever rendered, and however divergent from its own views the conclusion, provided no Federal question was involved. In the *State Railroad Tax Cases*, 92 U. S. 575, 617, 618, *sub nom. Taylor v. Secor*, 23 L. ed. 663, 674, the circuit court of the United States held that a tax law of Illinois was invalid because in violation of the state Constitution. Before the cases reached the Supreme Court of the United States on appeal, the supreme court of the state decided that the law was valid. The circuit court decree was accordingly reversed. It is true that in that case the Supreme Court of the United States concurred with the state court on the merits, but Jus-

tice Miller used this language: 'But if, for no other reason, we should reverse the decrees of the circuit court in these cases because the same questions involving the considerations urged upon us here have been decided by the supreme court of the state of Illinois in a manner which leads to the reversal of these. . . . As the whole matter, then, concerns the validity of a state law as affected by the Constitution of the state, that question and the other one of the true construction of that statute belong to the class of questions in regard to which this court still holds, with some few exceptions, that the decisions of the state courts are to be accepted as the rule of decisions for the Federal courts. It is, nevertheless, a satisfaction that our judgment concurs with that of the state court, and leads us to the same conclusions.' In *Bauserman v. Blunt*, 147

wires, and other vehicles, mobile or stationary, plainly constitutes a special class. The owners of such property have strenuously contended for its exemption from state taxes by reason of such exclusive use. This contention has uniformly and regularly been overruled.

It is well settled that there is nothing in the Constitution or laws of the United States which prevents a state from taxing personal property employed in interstate or foreign commerce like other personal property within its jurisdiction. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

(4) Mobile.

Vessels engaged in commerce, foreign or between the states, are taxable by the states wherein they have a situs, as property, *ad valorem*, and like any other property of their owners; but they cannot be taxed as instruments of commerce. *State Tonnage Tax Cases*, 12 Wall. 213, *sub nom. Cox v. Lott*, 20 L. ed. 370.

A steamboat engaged in interstate commerce is not exempt from taxation as a piece of property. *Linehan R. Transfer Co. v. Pendergrass*, 16 C. C. A. 585, 36 U. S. App. 48, 70 Fed. 1.

A tax on ships does not violate the Federal Constitution. If they are property within the jurisdiction of the taxing state the right to tax them is obvious. *State ex rel. Ravenel v. Charleston*, 4 Rich. L. 286.

A tax on money invested in shipping is no more a tax on, or regulation of, commerce than is a tax on stock in trade or money at interest. Each affects income, but does not increase or diminish the facilities by which commerce is conducted. *Ibid.*

The interest owned by a resident of the state in ships or vessels, whether in or out of port, is taxable *ad valorem* as other property belonging to him, notwithstanding they are employed in foreign or interstate commerce. *Howell v. State*, 3 Gill, 14.

And by the local authorities where he resides, particularly when he lives in the seaport where such vessels are registered. *Gunther v. Baltimore*, 55 Md. 457.

A state may lawfully levy a tax on steamboats and other vessels plying exclusively in its own waters and owned by its own citizens, although enrolled and licensed as coasting vessels under the laws of the United States. *Lott v. Mobile Trade Co.* 43 Ala. 578.

It may tax such steamboats although they are used in interstate commerce. Such a tax is in no sense a burden upon, an interference with or a regulation of, commerce between the states 60 L. R. A.

Perry v. Torrence, 8 Ohio, 522, 32 Am. Dec. 725.

Steamboats engaged in interstate commerce, and belonging to a domestic corporation, may be taxed as property *ad valorem* with all other property in the same jurisdiction at their home port, where they are enrolled, and where the officers of their corporate owner reside. *Wheeling, P. & C. Transp. Co. v. Wheeling*, 9 W. Va. 170, 27 Am. Rep. 552, Affirmed in 99 U. S. 273, 25 L. ed. 412.

The proposition just stated is supported by the decisions in *Hays v. Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254, and *Morgan v. Parham*, 16 Wall. 476, 21 L. ed. 304.

Tugs and barges belonging to a domestic corporation are taxable as property in the state which created their owner, although they are used in transporting coal mined in such state to another state in the course of interstate commerce, and notwithstanding they are registered in a foreign port, which, however, they never enter, and where they are not taxed. *Norfolk & W. R. Co. v. Board of Public Works*, 97 Va. 23, 32 S. E. 779.

A state may tax, as it taxes other property *ad valorem*, ships and vessels within its jurisdiction engaged in external commerce; but it must levy these taxes at the port of registry, and must not discriminate adversely to them, nor lay a duty of tonnage. *Moran v. New Orleans*, 112 U. S. 75, 28 L. ed. 655, 5 Sup. Ct. Rep. 38.

It cannot tax such vessels employed in its own waters when they belong to a foreign corporation and are registered at its domicile. *Johnson v. DeBary-Haya Merchants' Line*, 37 Fla. 499, 37 L. R. A. 518, 19 So. 640.

The mere physical presence of a vessel engaged in coasting trade within a given state does not entitle such state to tax it as property; neither does the fact that it is engaged in interstate commerce exempt it from such taxation. Its taxability as personal property depends upon its situs, and this is determined by its registry and the residence of its owner. *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303.

A ferryboat plying daily between a city and another place, where its owner is domiciled, and where it is moored every night, and whence it begins in the morning its daily trips, although enrolled and registered at the port of such city, because the owner resides in the same collection district, has not such a situs within such city as to be taxable there as property. *Mobile v. Baldwin*, 57 Ala. 61, 29 Am. Rep. 712.

Boats registered and enrolled under the laws of the United States at a particular port are

U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Moore v. Citizens' Nat. Bank*, 104 U. S. 625, 26 L. ed. 870, and *Green v. Neal*, 6 Pet. 291, 8 L. ed. 402, the Supreme Court reversed the ruling of the circuit court as to the effect of a state statute of limitation solely because, after the decision by the circuit court, the supreme court of the state had given the statute a different construction. In *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep. 227, a case involving the construction of the tax laws of the territory of Dakota, the supreme court of the territory took one view. The case was carried to the Supreme Court of the United States for review. Meantime the territory had become a state, and the state supreme court reversed the ruling of the territorial court. The Federal Supreme Court thereupon reversed the judgment of

the territorial court in deference to the decision of the state court. See also *Suydam v. Williamson*, 24 How. 427, 13 L. ed. 742, and *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544."

The suggestion that the opinion of the Ohio court should not be followed, because the suit in which it was announced had many features of a moot-court case, cannot be seriously entertained. The facts do show that a case was made up for the purpose of obtaining the opinion of that court in as summary a way as possible, and that it was intended as a test case. The facts now relied upon to destroy the effect of the decision were also made known to the Ohio court. The conclusion that court reached was that the case was one fairly under its jurisdiction, and that the validity of the Nichols law under the Ohio Constitution was pre-

taxable there, although they belong to a foreign corporation, when their owner has its principal office in that port. *St. Louis v. Consolidated Coal Co.* 113 Mo. 83, 20 S. W. 699.

Unregistered vessels employed in interstate commerce, although without the state of their owner's domicile, are none the less taxable there,—at least, until it is proved that they are so permanently located beyond its jurisdiction as to have acquired a taxable situs elsewhere. *Com. v. American Dredging Co.* 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. Rep. 221, 15 Atl. 443.

Dredges without self-moving power, not enrolled or registered, or used in the carrying trade, nor designed so to be, although vessels within admiralty jurisdiction, are not instruments of commerce, and, hence, are taxable wherever they are found employed for a more or less definite period of time, whether such be the domicile of their owner or not. *McRae v. Bowers Dredging Co.* 90 Fed. 360.

This is said to be so, even when such boats come into the taxing jurisdiction to perform work for the National government. *National Dredging Co. v. State*, 99 Ala. 462, 12 So. 720.

A familiar mode of taxing commerce is by imposing on its vehicles a tonnage tax,—a duty on tonnage as the Constitution calls it. A grievous burden would be laid upon trade by a tax upon the vehicle in which it is carried on; as grievous as by regulations applying to the trade itself, or by taxes on the articles which are the subjects of trade; hence, the prohibition against a state's laying any duty of tonnage,—a prohibition in general terms, and not confined to any kind or kinds of commerce, or any class of vessels. *Johnson v. Drummond*, 20 Gratt. 416.

Railroad rolling stock is not exempt from taxation as property, by a state in which it is located, because it is used in interstate commerce. *Reinhart v. McDonald*, 76 Fed. 403.

And when it belongs to a domestic railroad corporation it is assessable at the principal office of the company, unless otherwise directed by statute. *Appeal Tax Court v. Western Maryland R. Co.* 50 Md. 274; *Appeal Tax Court v. Northern C. R. Co.* 50 Md. 417.

But it does not follow that the terminal of a railroad that extends into three states is to be regarded as its domicile, so as to authorize local officials to levy taxes upon its rolling stock in virtue of a general property-tax act. *Philadelphia, W. & B. R. Co. v. Appeal Tax Court*, 50 Md. 397.

Under statutes for taxing railroad rolling stock exclusively used in railroading by domestic corporations, a state may tax sleeping cars 60 L. R. A.

used by one of its own companies, although they are owned by a foreign corporation, and are employed in interstate commerce. *Denver & R. G. R. Co. v. Church*, 17 Colo. 1, 28 Pac. 468.

Railroad cars engaged in interstate commerce, although owned and used by a foreign corporation, may be taxed as property in a state where they are in use. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Pullman's Palace Car Co. v. Hayward*, 141 U. S. 36, 35 L. ed. 621, 11 Sup. Ct. Rep. 883.

While ships or vessels engaged in interstate or foreign commerce upon the high seas or other waters, which are a common highway, and having a home port where they are registered under Federal laws at the domicile of their owners, are not taxable in another state at whose ports they incidentally and temporarily touch to deliver or receive passengers and freight, it is because, unlike railroad cars, they are not in any proper sense abiding within the limits of such state, and have no continuous presence or actual situs within its jurisdiction, and, hence, are only taxable at their legal situs, the home port and owner's domicile, and not because they are instruments of commerce. *Ibid.*

The three dissenting justices in these cases (*Bradley, Field, and Harlan, JJ.*) did not deny that railroad cars and ships were taxable as property, even when employed in interstate and foreign commerce; but they insisted that there was no essential difference between the two; that one was no more taxable than the other; that both were taxable at the domicile of their owner; and that neither was taxable in another state, where they were transiently present in the transactions of commerce. *Ibid.*

A state may lawfully tax railroad cars belonging to a foreign corporation that has no place of business within it, and which are in use by a domestic corporation employing them in interstate commerce, although such cars are constantly in transit to and fro across the state. And it may lay such tax according to the average number of such cars in use. *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599, *Affirming* 24 Colo. 291, 56 L. R. A. 89, 51 Pac. 421; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, 44 L. ed. 708, 20 Sup. Ct. Rep. 631, *Affirming* 18 Utah, 378, 48 L. R. A. 790, 55 Pac. 639; *Dubuque v. Illinois C. R. Co.* 39 Iowa, 56; *Pullman's Palace Car Co. v. Twombly*, 29 Fed. 658; *Orleans v. Pullman's Palace Car Co.* 8 C. C. A. 490, 23 U. S. App. 180, 60 Fed. 37.

A state has the right to tax sleeping cars engaged solely in business between two of its

sented in a way to give jurisdiction and demand decision. That it was in reality a friendly suit does not detract from the weight of the court's opinion as an opinion. The case was argued and duly considered. Opportunity was given the present able counsel, then and now representing the complainants, to appear and argue the case. We think that due respect for the high tribunal who heard and decided the case requires that we shall accept its judgment that the case was not a moot case, but was one entitled to be heard and decided. This was the conclusion of the circuit court, and meets our approval.

Being of opinion that the decision of the supreme court of the state removes from this case all questions of conflict between the act and the Constitution of the state, there remains for consideration the question as to

whether there is in the act, as construed by the state court, or as administered, any violation of rights secured by the Federal Constitution to the complainants. The law under which the assessments complained of were made is entitled: "An Act to Amend and Supplement Sections 2777, 2778, 2778a and 2780 of the Revised Statutes of Ohio." Section 2778a is the only one which needs to be set out, and is as follows:

"Sec. 2778a. Every express, telegraph, and telephone company embraced in § 2777, whether chartered by the laws of this state or by any other state or country, doing business in this state, shall, annually, between the 1st and 10th day of May, return to the auditor of state under the oath of its treasurer, the amount of its capital stock, its place of business, the par value and market value (or if there be no market value, then

own cities; and, so far as Federal authority is concerned, the power of such taxation is plenary. *Gibson County v. Pullman Southern Car Co.* 42 Fed. 572.

Two cases, however, hold that the rolling stock of a foreign railroad corporation, although more or less in use within another state in the course of interstate commerce, have no situs for taxation outside of the state of their owner's domicile. *Appeal Tax Court v. Pullman's Palace Car Co.* 50 Md. 452; *Baltimore & O. R. Co. v. Allen*, 22 Fed. 376.

A foreign railroad corporation which in another state leases and operates a railroad line, is taxable upon the rolling stock used and remaining permanently in such state, but not upon the rolling stock passing through such state in the course of interstate commerce. *Bain v. Richmond & D. R. Co.* 105 N. C. 363, 8 L. R. A. 209, 3 Inters. Com. Rep. 149, 11 S. E. 311. The court rested its conclusion upon the ground that the state could not tax the vehicles of interstate commerce, and, while these were employed therein by a nonresident owner, they had no taxable situs in the state; but it was otherwise as to property kept all the time within the state.

Refrigerator cars belonging to a corporation, chartered in one state and doing business in another, used exclusively to carry its own products to markets for sale, and running upon railroads in a third state either entirely through it or to different places within it, are instruments of interstate commerce, and beyond the reach of taxation in such third state. *State ex rel. Armour Packing Co. v. Stephens*, 146 Mo. 662, 48 S. W. 929.

(b) *Immobile.*

Bridges spanning waters between two states, and belonging to corporations chartered by both, are taxable as property in each in proportion to the quantity of structure lying within either boundary. *State, Delaware & E. Bridge Co., Prosecutor, v. Metz*, 29 N. J. L. 122; *State, Easton Bridge, Prosecutor, v. Metz*, 31 N. J. L. 378; *State, Easton Delaware Bridge Co., Prosecutor, v. Metz*, 32 N. J. L. 199; *St. Louis Bridge Co. v. East St. Louis*, 121 Ill. 238, 12 N. E. 723; *St. Louis Bridge Co. v. People*, 125 Ill. 226, 17 N. E. 468; *State ex rel. Glenn v. Mississippi River Bridge Co.* 109 Mo. 253, 19 S. W. 421; *Chicago, B. & Q. R. Co. v. Nebraska City*, 53 Neb. 453, 73 N. W. 952.

But such a bridge may escape municipal taxation by reason of being not technically within the municipal limits. *Louisville Bridge Co. v. Louisville*, 81 Ky. 189, 60 L. R. A.

If, however, it is so placed that the city police power extends over it, and it enjoys the benefits of the city government and public improvements, it is subject to local taxation. *Covington v. Bridge Co.* 7 Ky. L. Rep. 683.

Such a bridge, too, in Kentucky, is taxable to the low-water mark on the Indiana shore of the Ohio river. *Louisville Bridge Co. v. Louisville*, 22 Ky. L. Rep. 703, 58 S. W. 598.

The poles and wires used by telegraph and telephone companies in the transmission of messages have been subjected to taxation chiefly by municipalities in which they are situated, and in virtue of the police power. As has been shown above, such transmission is commerce, and the business carried on over such poles and wires is to a greater or less extent interstate and foreign commerce, while the poles and wires are as much instrumentalities of commerce as are ships and railroad cars, differing only in mobility.

Municipal ordinances imposing annual charges upon each telegraph pole and mile of wire within the municipality, in the exercise of a police power of regulation and inspection when operating against a foreign corporation carrying on an interstate and foreign telegraph business, are not in conflict with the commerce clause in the United States' Constitution. *Philadelphia v. Postal Teleg. Cable Co.* 67 Hun, 21, 21 N. Y. Supp. 536.

But a state statute making it the duty of every telegraph company working or controlling a line within the state to report upon oath of its executive officer, on or before a named date, annually, to the state auditor a full statement of each line and of the whole number of miles worked or managed in the state, and to pay yearly into the state treasury a tax equal to \$100 per mile of poles, and a single wire thereon, with 50 cents a mile for each additional wire, is, when applied to a foreign corporation engaged in transmitting messages between several states, void for conflict with the commerce clause of the Federal Constitution. *Com. v. Smith*, 92 Ky. 38, 17 S. W. 187.

A city has a right, by municipal ordinance, to impose a reasonable charge for the use of the streets upon each telegraph and telephone pole set up therein, notwithstanding the commerce clause and the act of Congress giving telegraph companies post-road privileges. *Postal Teleg. Cable Co. v. Baltimore*, 79 Md. 502, 24 L. R. A. 161, 29 Atl. 819.

A municipality is not prevented by the commerce clause from ordering the removal of telephone poles which have become so decayed and so heavily laden with wires as to be no longer safe,

the actual value) of its shares at the time of said return. The return shall also contain a statement in detail of the entire real and personal property of said company, and where located, and the value thereof as assessed for taxation; the telegraph and telephone companies shall, in addition thereto, return the whole length of their lines, and the length of so much of their lines as is without and as is within the state of Ohio, which lines shall include what said telegraph and telephone companies control and use under lease or otherwise; and said board of appraisers and assessors shall, in the determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said company, and such other evi-

dence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said company, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid. Express companies shall, in making said returns, include therein, as a part thereof a statement of their entire gross receipts for the year ending the 1st day of May, of the business done within the state of Ohio, giving the receipts of each office in said state, and the location thereof for said year."

By § 2780b, the assessors are required to deduct from the total value of the property of said companies, as ascertained and determined by § 2778, the valuation of any and all real estate, as assessed for taxation, situate

even if it be granted that telephonic communication between different states is interstate commerce. *Michigan Teleph. Co. v. Charlotte*, 93 Fed. 11.

A municipal ordinance requiring every telegraph, telephone, and electric-light pole in the city to be inspected by the police department, and to be licensed, and imposing upon each corporation maintaining such poles a yearly license tax of \$1 for each pole it maintains, is a reasonable exercise of the police power; and, when applied to a foreign telegraph company carrying on its business all over the Union, is not repugnant to the commerce clause. *Allentown v. Western U. Teleg. Co.* 148 Pa. 117, 23 Atl. 1070; *Chester v. Philadelphia, R. & P. Teleg. Co.* 148 Pa. 120, 23 Atl. 1070; *Western U. Teleg. Co. v. Philadelphia*, 22 W. N. C. 39, 12 Atl. 144.

A municipality has a right to impose a license tax upon telegraph poles and wires within its limits, although they are employed for transmitting messages between states. *Philadelphia v. American U. Teleg. Co.* 167 Pa. 406, 31 Atl. 628.

When a municipality has no authority to tax telegraph companies for revenue, but only a police power to regulate and charge license fees, an ordinance imposing upon such a corporation license charges for occupying the city streets with its poles and wires, that amount in the aggregate to \$16,000 annually, while the cost of supervision and control, and of protecting persons and property on account thereof, has been for several years, and still is, but \$3,500 yearly, is unreasonable and void,—an attempt to tax for revenue, and not a police regulation. *Philadelphia v. Western U. Teleg. Co.* 2 Inters. Com. Rep. 728, 40 Fed. 615.

In the later litigation between the same parties, 81 Fed. 948, 82 Fed. 797, Reversed for error in excluding testimony offered, in 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 454, the controversy was waged over the question of the reasonableness of a charge of \$1 per pole and \$2.50 additional per mile of overhead wires avowedly for inspection and regulation. It was conceded that state taxes could be laid upon the property of foreign corporations engaged in interstate commerce, and that reasonable municipal license taxes might be imposed with respect of poles and wires as police regulations.

In the litigation of the same company with St. Louis, Missouri, it was at first held that a municipal ordinance requiring all telegraph and telephone companies, not taxed for city purposes on their gross incomes from and after a named date, to pay the city a specific sum annu-

ally for the occupation of the streets with poles and wires for each pole erected or used, was void for conflict with the commerce clause. *St. Louis I. Western U. Teleg. Co.* 39 Fed. 59.

But this decision was reversed by the Supreme Court, and that tribunal held that the exaction was not a tax, either upon property or privilege, but rather a charge for compensation for use of streets, like a rental; also, that a charge of \$5 per pole could not be said to be so unreasonable as to be void upon its face. *Id.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485.

Upon the new trial in the court below, the ordinance was held void upon the double ground that it violated contract rights and imposed unreasonable charges. *Id.* 63 Fed. 68.

A license fee charged by a borough for each telegraph pole set up, and each mile of telegraph wire strung within its limits, and exacted from a corporation engaged in using such poles and wires for foreign and interstate commerce, not being a tax upon the corporate property, or on the transmission of messages, or on the receipts from messages, or upon the business or occupation of telegraphing, but a charge for local governmental supervision, is not, when reasonable in amount, obnoxious to the commerce clause. *Western U. Teleg. Co. v. New Hope*, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204.

A municipal license charge upon each pole and mile of wire of an interstate telegraph corporation is *prima facie* reasonable, and the reasonableness of the regulations prescribed in respect thereto in the exercise of the police power is a question for the court,—but, whether a money-license charge is reasonable or unreasonable must be left to the determination of the jury. And what is reasonable in one municipality may be oppressive in another. *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. —, 23 Sup. Ct. Rep. 817.

b. Freight carried by interstate carriers.

The statute enacted August 25, 1864, by the legislature of Pennsylvania, to provide additional revenue for the commonwealth's use, provided, in substance, that, in addition to taxes already imposed by law, every railroad, steamboat, canal, slackwater navigation, or other transportation company doing business in that state, should make quarterly returns of the number of tons of freight carried or moved by it during the previous three months, and should pay taxes per ton at the rates of, first, 2 cents on products of mines, second, 3 cents on farm and forest products and animal and vegetable

in the state, and on which said companies pay taxes.

All of the complainant companies are corporations of states other than Ohio, and each has its principal office in another state. The questions presented by each separate bill are, in substance, the same. For purposes of convenience, we shall consider the averments in the bill of the Adams Express Company as presenting substantially the ground for relief made by each of the other complainants. That bill avers that much the greater part of its business done in Ohio is in the transportation of goods, wares, and merchandise from points within the state to points in other states, and from points without the state to points within; that it owns no line of railroad in the state of Ohio, but conducts its business under contracts with the owners of such railroads; that it owns

no real estate in the state, except such as is used for stabling horses used by them in the collection and distribution of goods, wares, and merchandise, and that the personal property within the state consists entirely of office furniture and tools, horses, and wagons; that the actual cash value of its personal property in the state of Ohio in 1893 did not exceed the sum of \$53,500, and that the total value of its real estate within the state does not exceed \$25,170, and that all taxes on this real property have been paid; that the assessment for 1893 made against the said company was \$460,033.38; that the whole number of shares in the said company is 120,000, and that the market value of the shares ranged during the year preceding from \$1.40 to \$1.50 upon the dollar, a price which the bill avers is greatly in excess of the actual value of all the property

foods, and, third, 5 cents on merchandise, manufactures, and all other articles. The tax was laid without discrimination, equally upon carriers whose lines extended beyond the state and those whose lines were wholly within it, and it applied as well to freight brought into and carried out of the state as to that taken up and set down within it. The Dauphin county common pleas, in *Com. v. Erie R. Co.* 1 Pearson (Pa.) 345, and in *Com. v. Philadelphia & R. R. Co.* 1 Pearson (Pa.) 379, held this act unconstitutional for violation of the commerce clause.

The supreme court of Pennsylvania was of the opposite opinion, and reversed these decisions in the Tonnage Tax Cases. *Com. v. Erie R. Co.* 62 Pa. 286, 1 Am. Rep. 399. According to the view of that tribunal the statute imposed, not so much a tax, as an imposition in the nature of a charge for facilities granted, or as compensation for the use of public works, or for acquisitions under the power of eminent domain, or a royalty for a franchise or privilege granted; and, therefore, it held that, even in the case of freight brought into, carried through, or shipped out of, the state, there was no burden on, regulation of, or interference with, interstate commerce.

In deference to this ruling, the Dauphin county common pleas afterwards sustained a tonnage tax under this act, in *Com. v. Monongahela Nav. Co.* 2 Pearson (Pa.) 372, although of the opinion that the tax was void by the Federal Constitution. The court did not doubt the power of the state to tax freight taken up and delivered within its own borders, but it denied its power to tax goods in transit, and thought it equally clear, but for the contrary decision of its own supreme court, that power was wanting in a state to tax freight brought from, or carried to, points beyond the state lines on account of transportation. It followed a decision deemed unsound, to the end that the case might proceed directly to the United States Supreme Court instead of coming back for a new trial.

When the decision of the Pennsylvania supreme court, just cited, came before the Supreme Court of the United States for review in the State Freight Tax Case, 15 Wall. 232, *sub nom.* Philadelphia & R. R. Co. v. Pennsylvania, 21 L. ed. 148, counsel for the state, in a display of great learning, and with marked ability, contended: (1) That the power conferred by the Federal Constitution upon Congress to regulate foreign, interstate, and Indian tribal commerce did not, *ipso facto*, divest the states of all power to do likewise, but that the state power

in the premises still existed in all its pristine vigor until Congress enacted laws, or a law, governing the subject; (2) that the Pennsylvania statute, *sub judice*, taxing all railroads within the state a stated sum for every ton of freight they carried, both internal and external, imposed a franchise tax measured by tonnage or business done, and was not in any case such a regulation of commerce as fell within the purview of the commerce clause granting it to confer exclusive power on Congress. These contentions did not prevail. The court held that freight carried from state to state was interstate commerce, and not subject to a state tax, although there has been no regulation by Congress upon that subject. Whatever, it said, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the states, we regard it as established that no state can impose a tax upon freight transported from state to state, or upon the transporter because of such transportation.

A tax on the freight or tonnage carried from one state to another, it further held, is a regulation of commerce, and cannot be imposed by a state, even upon its own domestic corporations engaged in such carriage. And when a state tax is, in express terms, laid upon freight carried by a railroad,—as where the carrier is required to pay the state a tax at specified rates on each 2,000 lbs. of freight carried,—and such tax is not proportioned to the business done in transportation, but is the same whether the freight is moved a mile or 300 miles, and, though carried by several connecting lines on a continuous journey, the tax is to be paid by whichever one line the state treasurer calls upon, and freight carriers are authorized to add the tax to the tolls,—the tax plainly rests upon the freight carried, and not upon the franchise or business of the carrier. Such a tax, so far as it attaches to freight carried from or to places beyond the boundaries of the state, is void for conflict with the commerce clause of the Federal Constitution. *Ibid.*

The constitutionality of a state tax, said Strong, J., who expressed the views of the majority of the court in that case, is to be determined, not by the form or agency through which it is to be collected, but by the subject on which the burden is laid. And, again, he says: As there is no limit to the rate of taxation she (the state of Pennsylvania) may impose, if she can tax at all, it is obvious the condition may be made so onerous that an exchange of commodities with other states would be impossible. And, he adds, in substance, nor

of said company. It avers that the scheme of taxation set forth in the act, "while professing to require the taxation of property in the state of Ohio, does not in fact do so, inasmuch as it directs the said board of appraisers and assessors, in ascertaining and assessing the value of the property of express companies in Ohio, to be 'guided by' and to 'determine the value' of the company's property in the said state 'by the value of the company's capital stock.'" It also alleges that the value of its capital is fixed and determined by the nature, extent, and uses of its property, not only in Ohio, but in many other states of the United States, and by the skill, diligence, fidelity, and success with which its business is conducted in all these states; that it employs many thousands of men, who are constantly engaged as messengers in carrying goods,

wares, and merchandise from one part of the country to another, and otherwise, and that its income is largely the result of their efforts; that it "owns valuable securities of other companies, and holds valuable contracts and business arrangements with other corporations, and all of these, none of which are held and owned in the state of Ohio, and many of them not taxable at all, together with the good will which it has earned in the course of more than fifty years of service to the public in said business, go to make up the value of the shares of its capital." It further complains that the act does not provide a method for taxation of property according to its true value in money, "but is really an attempt to enforce against express, telegraph, and telephone companies the payment of a tax for the privilege of doing business within the said state by placing a fic-

can it make any difference that the purpose of the law is revenue, and not regulation. It is not the purpose, but the effect, that is to be considered. *Ibid.*

Swayne, J., dissented, taking the ground that the statute in question imposed a tax on the business of those required to pay it, and that the tonnage was only a mode of ascertaining the extent of such business. He thought the fact that the act made no discrimination between internal and external carriage of freight conclusive on this point. *Ibid.*

Argued with this case, and decided the same way, was *Erie R. Co. v. Pennsylvania*, 15 Wall. 282, 21 L. ed. 164.

A state law making it unlawful for any domestic coal-mining company or association to transport by rail, canal, or vessel any coal mined in the state to any place in the state or elsewhere for sale until a state tax of 2 cents a long ton be first paid on such coal to the carrier for the use of the state, and requiring every carrier to collect, in advance, such tax before receiving at any mine coal for transportation for sale; with additional provisions for returns, payment to state officials, and penalties for noncompliance, and for the remission to coal-mining companies that pay such tax of other taxes on their capital stock,—imposes a tax upon the transportation of property beyond the state, and is unconstitutional and void under the commerce clause of the Federal Constitution. *State v. Cumberland & P. R. Co.* 40 Md. 22. Three members of the court dissented in this case, deeming the tax one laid, not upon transportation, but upon coal-mining corporations, measured by their output.

A state statute providing that all corporations regularly doing business in the enacting state, and not being domestic ones, shall be assessed and taxed for and in respect of the business done by them within the state, a transit duty of a specified sum on every passenger and ton of freight carried by or for any such corporation, or on any railroad or canal within the state for any distance beyond 10 miles (except passengers and freight transported exclusively within the state); and requiring such transit duty for railroad and canal transportation to be paid to the state treasurer annually in January for the transactions of the preceding year, according to sworn statements of the number of passengers and tons of freight carried furnished each year,—does not conflict with the commerce clause of the Constitution of the United States. *State v. Delaware, L. & W. R. Co.* 30 N. J. L. 473.
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c. Traffic.

1. Beginning.

Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced. *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 909.

But this movement does not begin until the article has been shipped or started for transportation from the one state to the other. *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

No definite rule, says the court in the latter case, has been adopted as to the point of time when the taxing power of the state ceases as to goods exported to a foreign country or to another state. The view which seems to us the sound one on that subject is that goods do not cease to be part of the general mass of property in the state, subject, as such, to its jurisdiction, until they have been shipped or entered with a common carrier for transportation to another state, or have been started on such transportation in a continuous route or journey. We think that this must be the true rule on the subject. The products of a state, although they are intended by their owner to be exported to another state, and are partially prepared for such purpose by being deposited at a place or port of shipment within the state, are not free from state taxation as exports. *Ibid.*

When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepôt* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is not only reasonable to regard them as not only within the state of their origin, but as part of the general mass of property of that state subject to its jurisdiction and liable to taxation, & not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the state. *Ibid.*

The fact that an article is manufactured for export to another state does not, of itself, make it an article of interstate commerce within the meaning of the Constitution, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. *Kidd*

titious value upon their property;" "that the said pretended law is a tax upon interstate commerce, inasmuch as it attempts to establish an artificial and fictitious basis for the valuation for taxation of the property of your orator in this state, a valuation which is determined by the value of its property in other states and by reference in part to its earnings and gains in this state from business which is largely interstate;" that, in making the assessment complained of, the assessors "were guided by the value of one share of your orator's capital, and in all other respects as directed by the act." In conclusion, the bill avers that the method of taxation is unfair, unjust, and unequal, "inasmuch as it requires your orator to pay taxes in Ohio upon property situated in other states, upon which it pays taxes according to its value, and upon its gains and

earnings in localities outside of the state of Ohio, in which its gains and earnings are very much larger than those derived from an equal number of miles of line operated by it in Ohio."

By amendment, the minutes of the board and an affidavit of E. W. Poe, one of the board, and a defendant, were incorporated as parts of the bill. From these it appears that the complainants had actual notice of the meetings of the board, appeared and explained their returns, and were heard by counsel; that, in the testimony of the agents of complainants, information as to the character in detail of the property of these companies in the state, and the character of the business done, was laid before the board; and that supplementary statements were filed (not under oath) showing that the total value of the real estate of the Ad-

v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

A tax laid upon each ton of coal mined by corporations is a tax on the business of mining, and not upon commerce; and, therefore, although the coal is intended for transportation beyond the borders of the state, the tax is not violative of the commerce clause. *Com. v. Pennsylvania Coal Co.* 2 Pearson (Pa.) 402.

Corn purchased by a foreigner and moved from its place of growth to a railroad station and there temporarily stored in cribs awaiting shipment, intended to be removed from the state as soon as a favorable opportunity for transportation presents itself, and not in fact sold, used, or manufactured in such state, has no situs for taxation at its temporary resting place, because its commercial transit has begun. *Ogilvie v. Crawford County*, 2 McCrary, 148, 7 Fed. 745.

But ice cut within a state and there kept in storage until the market is ready to take it, when it is shipped to the domicile of the owner, a foreign corporation, for distribution from its office in another state, is not, while so stored, property in transit, and is, therefore, taxable as personal property in the state of its origin, without violation of the commerce clause of the Federal Constitution. *State, John Hancock Ice Co., Prosecutor, v. Rose* (N. J. L.) 50 Atl. 364.

Logs, after they have been inspected pursuant to state laws, in possession of persons engaged exclusively in exporting timber to foreign countries, purchased in the state for the purpose of exportation, and lying in a seaport of such state awaiting shipment abroad, and in process of such shipment, are exports within the meaning of the Federal Constitution, and so exempt from state and county taxes at such seaport. *Clarke v. Clarke*, 3 Woods, 408, Fed. Cas. No. 2,846.

Timber so circumstanced, belonging to an alien having contracts of sale to foreigners, and in part actually exported before the owners of personal property are required to make their returns for taxation, and the rest of it shipped within a few months thereafter, must be regarded as segregated from the mass of property in the state, and to be exports not taxable therein. *Blount v. Munroe*, 60 Ga. 61.

A tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is, in substance, the same thing, for it, or a like instrument, is necessarily always associated with every shipment of articles of commerce from one port to another. Hence, a state law to provide a revenue from stamp taxes upon 60 L. R. A.

written instruments, in so far as it requires bills of lading for transporting gold or silver in coin, dust, or ingots, from within to places without the state, to bear stamps expressing in value the amount of the tax or duty laid, lays an impost or duty upon exports, and, therefore, is unconstitutional. *Almy v. California*, 24 How. 169, 16 L. ed. 644.

Strong, J., afterwards, in the *State Freight Tax Case*, 15 Wall, 232, *sub nom.* *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146, criticised this decision as assigning the wrong reason. The statute should have been declared void, in his opinion, because it was a regulation of commerce.

Recently the United States Supreme Court annulled, as an unconstitutional tax or duty on exports, the act of Congress of June 13, 1898 (30 Stat. at L. 448, § 6, chap. 448, U. S. Comp. Stat. 1901, p. 2201), so far as it required stamps to be affixed to foreign bills of lading. *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648.

But the constitutional prohibition against laying any tax or duty on articles exported from any state is not infringed by the provisions of the internal revenue act requiring distinguishing stamps to be attached to packages of tobacco intended for export at the warehouse of the manufacturer, because, under the rule laid down in *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, such packages do not take on the character of exports until they leave the manufacturer and actually begin their journey. *Turpin v. Burgess*, 117 U. S. 504, 29 L. ed. 988, 6 Sup. Ct. Rep. 835.

2. In transit.

To prevent the taxation of property at the place of its location on the ground that it is in transit, there must be the fixed purpose to have it proceed on its journey within a reasonable time. It is not enough that it is intended to be removed at some time in the future, dependent upon contingencies. *State Trust Co. v. Chehalis County*, 24 C. C. A. 584, 48 U. S. App. 190, 79 Fed. 282.

Property actually in course of transportation to another state, temporarily delayed *en route*, is not taxable at the place of detention. It has no situs there, and is in course of interstate commerce. *Delaware & H. Canal Co. v. Com.* 1 Monaghan, 86, 1 L. R. A. 232, 2 Inters. Com. Rep. 222, 17 Atl. 175.

When freight destined for a market without the state has been delivered to a carrier, and has actually begun its journey, it is as much beyond the reach of state taxation when that

ams Express Company was \$3,050,272.47, and of the personality \$1,034,481.43, and that the total value of the real estate of the American Express Company was \$4,956,585.63, and of its personality \$1,742,402.04. No statement as to the total value of the realty or personality of the United States Express Company was given. By schedules filed, the value of the personal property at each office in the state was given, and the gross receipts from business done in the state at each office was also shown. This affidavit further sets out that "in the statement of the Adams Express Company were included reports from 363 offices. From 2 of these offices the personal property was returned at a value of less than \$1; from 72 offices the personal property in each instance was returned at a value of over \$1; from 51 offices the personal property was returned

at a value of over \$1, and under \$2. Thus, from 125 offices of the Adams Express Company the personal property was returned at less than \$2. In the statement of the American Express Company there were reports from 302 offices, and from but 46 of these offices was there any return of personal property. In the statement of the United States Express Company there were reports from 417 offices, and from only 95 of these offices were there any returns of personal property. Neither of the express companies made any return of safes, pouches, or other personal property, or the value thereof, used on the railroad lines in this state in the transaction of its business. In arriving at the value of the property of these express companies taxable in Ohio, the board did not follow any fixed rule, except the rule that property in Ohio is ordinarily taxed at not more than

journey is temporarily interrupted as it is while in motion on the cars. Com. v. Lehigh Valley R. Co. 22 W. N. C. 525.

Coal belonging to a foreign association of nonresidents, mined in one state and sent by rail to a distributing station in another, thence to be shipped by water to a market in a third state, is not taxable under an assessment to commission agents in whose custody it is while lying on the wharf at such station to be assorted into sizes and shipped as fast as cargoes of particular sizes can be made up and vessels secured to transport them; because, first, the agents are not the proper persons to assess under the terms of the controlling statute, and, second, such coal is in commercial transit and has no situs for taxation at such distributing station, and any attempt to tax it there would be futile in view of the commerce clause. State, Detmold, Prosecutor, v. Engle, 34 N. J. L. 425.

A foreign corporation engaged in mining coal in its home state, the great bulk of which it sends from the mines to tide water across another state to market in a third, but of which it delivers in the intervening state from railroad cars on side tracks, some, but only to fill orders previously taken outside of such intermediate state, is not taxable in the middle state, either upon the coal delivered there, or upon the greater quantity lying for a longer or shorter time on the docks at tide water awaiting facilities for shipment to its final market. State, Lehigh & W. Coal Co., Prosecutor, v. Carrigan, 39 N. J. L. 35.

Logs cut in one state, and drawn to a river between it and another state, and there temporarily left upon the ice awaiting the opening of navigation to proceed to a third state, where are the mills and domicile of their owner, following such course in a reasonable time, are exempt as property *in transitu* in the intervening state. Connecticut River Lumber Co. v. Columbia, 62 N. H. 286.

While it is true that property *in transitu* on a navigable stream from one state to another is not taxable in an intermediate state, where it is temporarily detained *en voyage*, yet, where the owner has for several years used a harbor in the intervening state as a safe place to store, through the winter, such property, to be drawn from as he requires it, and has kept an agent there in charge of it, and rented privileges for its accommodation, such property has a sufficient situs at its resting place to make it taxable there. Burlington Lumber Co. v. Willetts, 118 Ill. 559, 9 N. E. 254; Schulenberg-Boeckler Lumber Co. v. Willetts (Ill.) 6 West. Rep. 534.

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Staves purchased by a foreign corporation and transported to a railroad station and piled there awaiting shipment without the state to the city where the owner has its domicile, to be there made into casks, where there is no purpose to dispose of them in any way in the state where they temporarily lie, are in transit from such state, and have no situs therein for taxation. Standard Oil Co. v. Bachelor, 89 Ind. 1.

When, however, such staves are stacked at a receiving station, and there made to undergo a process of shaping and trimming to make them of uniform length and thickness before shipment, they then become taxable at such station, although held there for no other purpose than to finish and ship as in the former case. Standard Oil Co. v. Combs, 96 Ind. 179, 49 Am. Rep. 156; Brown County v. Standard Oil Co. 103 Ind. 302, 2 N. E. 758.

Certainly, says Bradley, J., in his dissenting opinion in Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, property merely carried through a state cannot be taxed by the state. Such a tax would be a duty which the state cannot impose. If a drove of cattle is driven through Pennsylvania from Illinois to New York for the purpose of being sold in New York, whilst in Pennsylvania it may be subject to the police regulations of the state, but it is not subject to taxation there.

A flock of sheep driven by direct route from one state across another to a third, proceeding at a daily average rate, is the subject of interstate commerce, and is not to be subjected to taxation under a statute of the middle state taxing live stock brought into such state for grazing, although the flock on the journey is allowed to graze over a strip of land along its route a quarter of a mile wide. Kelley v. Rhoads, 188 U. S. 1, 47 L. ed. —, 23 Sup. Ct. Rep. 259, Reversing 9 Wyo. 352, 63 Pac. 935.

The law, so far as interstate commerce is concerned, is settled, that property actually in transit is exempt from local taxation, although, if it be stored for an indefinite time during such transit,—at least for other than natural causes or lack of facilities for immediate transportation,—it may be lawfully assessed by the local authorities. *Ibid.*

The substance of the cases of Brown v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415; and Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475,—is, it was said in this case, that while property is at rest for an indefinite time await-

two thirds of its actual value, and the law governing this board. The board considered the facts, already stated, set out in the returns and supplementary statements, and also other facts in said returns and in the testimony of the authorized agents of the companies who appeared before the board. For purposes of comparison, the board examined the gross receipts returned by these companies in preceding years. Taking all the information the board had or could secure, the value of the capital stock of the company, its gross receipts within Ohio, the return of the personal property made, and the character thereof, and evidence of undervaluations and omissions therein, the number of officers, the amount of business done, the nature and value of the property and capital required to carry on such business, and other evidence and information, the

board, in each instance, ascertained what it considered the fair proportion of the property of the company employed by it in Ohio, and fixed the value of the property of such company situate and taxable therein; being guided, in determining the value of the property, by the value of the entire capital stock, and other evidence and information before the board."

There is no ground for complaint that the assessments were made without due process of law. The complainants had notice of the time and place where the board would meet, and were required to make a sworn return of their property. The time and place were fixed by the law, and its sessions were not secret. In *State ex rel. Poe v. Jones*, 51 Ohio St. 492, 37 N. E. 945, heretofore cited, the supreme court of Ohio construed the act as entitling the companies "to be present

ing transportation or sale, at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another state it becomes the subject of interstate commerce, and is exempt from local assessment. *Ibid.*

Quoting this statement in the next decision upon the point, wherein was sustained a tax laid by Michigan upon logs cut in her forests and floated by water to a railroad station, and there assessed while awaiting embarkation to a point beyond the state, it was added: In further specification, we may say that the cases establish that there may be an interior movement of property which does not constitute interstate commerce, though the property come from, or be destined to, another state. In the one case, though it has not reached its place of disembarkation or delivery, it may be taxed. In the other case, until it be shipped or started on its final journey, it may be taxed. The case at bar falls within this principle. *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 47 L. ed. —, 23 Sup. Ct. Rep. 266.

3. Termination.

The courts have not always found it easy to decide when foreign or interstate commerce in a given subject ended so as to permit the state to tax it.

The early and leading case on the subject established four propositions, viz.: 1. That the right to import an article into a state includes and carries the right to sell it therein in the condition imported, and a state law taxing the right to sell imports is no more valid than is one taxing the right to import, or the imported article itself. 2. That, while it is true that at some point of time the right of a state to tax imported articles commences, that point is not the instant they have fully and completely entered the country and into the possession of the importer. 3. That, while an imported article remains the property of the importer in his warehouse and in the original form or package in which it was imported, a state tax upon it is too plainly a duty upon imports to escape the prohibition of the Federal Constitution against such duties. 4. That, when an importer has so acted upon a thing imported that it has become mixed with the mass of property in the country, it has lost its distinctive character as an import, and become subject to the taxing power of the state. *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678. Followed in *State v. Shapleigh*, 27 Mo. 344.

It is unquestionably no easy task, said Taney, Ch. J., soon afterwards, to mark by a certain 60 L. R. A.

and definite line the division between foreign and domestic commerce, and to fix the precise point, in relation to every imported article, where the paramount power of Congress terminates and that of the states begins. *License Cases*, 5 How. 504, 12 L. ed. 256.

In these cases, *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, was said by McLean, J., to have held that a tax on the sale of an imported article imported only for sale is a tax on the article itself; and that importation gives the right to the importer to sell the package imported free from any charge by the state. And by Catron, J., to have held that a tax on the importer is a tax on the import; and that an import which has paid a tax to the United States according to the regulations made by Congress cannot be taxed a second time in the hands of the importer.

It is no objection to a state law that it imposes a tax upon, or prohibits the sale of, an article of merchandise in the original package upon which a tax or duty has been paid to the United States, when such package has either been produced within the state, or, if imported, is not in the hands of the importer, but in those of his vendee, since, on sale by the importer it has become part of the general mass of property in the state. *Pervear v. Massachusetts*, 5 Wall. 475, 18 L. ed. 608.

The right to sell imported merchandise in the original unbroken packages free from state and local taxation is restricted to the actual importer, and does not belong to one who purchases from the consignee. Therefore, one who purchases from the consignee cargoes of merchandise brought from abroad, sometimes before and sometimes after the arrival of the carrying vessels at the entrance to the seaport of the United States, but before they are entered at the custom house or duty paid thereon, such cargoes by the terms of the purchase remaining at the risk of the consignees until actually loaded upon lighters furnished by the purchaser for carriage to the wharf, although such merchandise is sold in the original packages as brought into port by such purchaser,—is not an importer of such merchandise, and, hence, is not exempt from a tax laid by municipal ordinance of the port of entry equal to a percentage of his sales, nor relieved from the penalties imposed for failure to make returns of such sales. *Waring v. Mobile*, 8 Wall. 110, 19 L. ed. 342.

Undoubtedly, said the court, goods at sea may be sold by the consignees to arrive, and, if they indorse and deliver the bill of lading to the purchaser, and he accepts the same under

and explain the statement rendered of its property and the value thereof." They did, in fact, appear, and offered evidence, and were heard by counsel. This right to appear and be heard is due process. *Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *State Railroad Tax Cases*, 92 U. S. 575, *sub nom. Taylor v. Secor*, 23 L. ed. 663; *Pittsburgh, O. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114.

The act is assailed upon the suggestion that it permits and requires the assessment and valuation of property outside the state. This contention is based largely upon the theory that the law imposes upon the assessors the arbitrary duty of estimating the value of the property owned by these companies

as equal to the market value of its capital stock, and the further duty of apportioning to the state of Ohio that proportion of the total capital stock which the value of its personal property in Ohio bore to the total value of its personal property wherever situated. It must be confessed that the principal rule of assessment has been most obscurely drawn. Whether this was done that it might be read one way by the assessors and another by the courts is somewhat problematical. But the act in its most important feature has been construed by the supreme court of Ohio in *State ex rel. Poe v. Jones*, and that construction must be now read into the act, and accepted as conclusive as to its meaning by this court. That court, upon this point, said: "The board, in determining the value of the company's property in this state for taxation, is not re-

actual delivery and acceptance of the goods, the effect of the transaction is to vest a perfect title in the purchaser discharged of all right of stoppage *in transitu* on the part of the vendor and indorser of the bill of lading. Nothing of the kind was done in this case. On the contrary the agreement was that the loss, if any, before the delivery of the goods into the lighters should fall on the shippers. Influenced by these considerations, the court is of the opinion that the shippers or consignees were the importers, and that the complainant was the purchaser of the importers and the second vendor of the imported merchandise. *Ibid.*

But the difficulty here is that the merchandise in question was actually delivered to the purchaser during the voyage, at sea, and before actual importation. The court had just decided that such lightering from the sea-going vessel to the wharf in this identical way in the same harbor was but the "prolongation of the voyage of the vessels assisted to their port of destination." *Foster v. Davenport*, 22 How. 244, 16 L. ed. 248.

In *Henson v. Lott*, 8 Wall. 148, 19 L. ed. 387, a majority of the court was of the opinion that a state statute making it unlawful for any one bringing in spirituous liquors from another state to offer them for sale, even in the original unbroken packages, without first paying a tax of 50 cents a gallon thereon, while, if it stood alone, might well be regarded as a regulation of interstate commerce, yet, was saved from invalidity by imposing the same tax on domestic distillations. Nelson, J., however, in dissent, pointed out that, under such a ruling, a state may effectively tax the products of other states without burdening its own citizens at all, as, if New York should tax coal from Pennsylvania, cotton, rice, and sugar from the south, and Illinois, lumber from Wisconsin.

Unsold, imported goods which have paid customs duties and remain in the unbroken, original packages as imported in the importers' hands, kept awaiting sale, are not subject to state taxation, even as a part of the owner's general property. *Low v. Austin*, 13 Wall. 20, 20 L. ed. 517, followed in *State, Gerdaun, Prosecutor, v. Davis* (N. J. L.) 50 Atl. 586; *State ex rel. Gelpi v. Board of Assessors*, 46 La. Ann. 145, 15 So. 10.

There is a difficulty. It is true, says the Supreme Court of the United States in a subsequent case, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the state begins. A similar difficulty was felt in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 60 L. R. A.

678, in drawing the line of distinction between the restriction on the power of the states to lay a duty on imports and their acknowledged power to tax persons and property. Following the guarded language of the court in that case, it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal government over a commodity has ceased and the power of the state has commenced. It is sufficient that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin. *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

A tax, therefore, laid by the law of the state in such a manner as to discriminate unfavorably against goods produced or manufactured in another state, is a regulation of interstate commerce forbidden to all but Congress by the Constitution of the Union. *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015.

Coal mined in one state, and brought in bulk to another, and there held for sale by its first owner, not being an import within the meaning of the constitutional prohibition against laying imposts or duties on imports or exports, becomes immediately subject to taxation as a part of the general property of the state, provided it is not merely temporarily resting on a journey to a destination beyond the state. And it must not be discriminated against because it came from another state. *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

When, said Bradley, J., on one occasion, imported goods become mingled with the general mass of property in a state, they are not followed and singled out for taxation as imported goods by reason of being imported. If they were the tax would be as unconstitutional as if imposed upon them by reason of their being imported. When mingled with the general mass they are taxed in the same manner as other property. *Philadelphia & S. Mall S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.

An import ceases, in the constitutional sense, to be such the moment the importer becomes the vender, and sells it disengaged from the commercial regulations of the United States. In the hands of the retailer or distributor it is an article of the internal trade and commerce of the state,—a trade or commerce which none but state legislation can protect or regulate, and which necessarily falls peculiarly under

quired to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as the value of its entire capital stock, thus making the respective values equivalents of each other. But, taking the market value of the entire capital stock as a *datum*, the board is to be only guided thereby in ascertaining the true value in money of the company's property in this state. The statute does not bind the board to find the value of the entire property of the company equal to that of the entire capital stock. While the value of the property may be less, there may be cases, and not uncommon, in which the value of the property will exceed the market value of the capital stock."

The value of its capital stock under the act, as thus construed, was but one of the factors to be looked to in estimating the

total value of the property owned by the companies. The board might conclude, on all the evidence, that the property was of a greater or less value than its capital stock, and there is nothing in the act which arbitrarily requires the assessors to ignore "the other evidence" which the law contemplated they would look to, and find according to the fact. As construed by the Ohio court, the act required the assessors to ascertain the value of the property of all the companies to be assessed by the special board which was "within the state." In the opinion of that court, the provision of the law which required the board to regard the entire property of such companies, wherever situated, as one entire plant, and as "a dividend-producing unit machine," was not obnoxious to the Constitution of that state, nor to any provision of the Constitution of the United

the police power of every community. Any tax or restraint, therefore, imposed for police purposes upon the seller of wines and strong liquors within the state can by no construction be deemed a duty upon imports, or a regulation of the commerce of the United States, unless a tax upon a warehouse be a duty upon imports, and a license to a drayman a regulation of the commerce of the Union. *State v. Peckham*, 3 R. I. 289.

A state law subjecting foreign wines and ardent spirits, and all goods, wares, merchandise, and effects, imported from any place beyond the Cape of Good Hope, and all other goods, wares, merchandise, and effects which are the production of any foreign country, offered for sale by sample or otherwise by brokers, every time they shall be sold to specified duties payable into the state treasury; and which does not discriminate in any manner between articles which have lost, and articles which retain, the character of imports,—is to the extent that the latter are affected, in conflict with the Constitution of the United States, and void. *People v. Marling*, 3 Keyes, 374.

And it has been held that, inasmuch as a state has full power to tax property imported from abroad after it has entered into and mingled with the general mass of property in the state, it may, so far as the Federal Constitution is concerned, lawfully lay upon such property a heavier tax than it imposes upon property of the same kind produced within the state. *Davis v. Dashiell*, 61 N. C. (Phill. L.) 114.

4. Original packages.

An original package is the package in the exact condition it is received by the carrier at the initial shipping point. It may be a single bottle, or cardboard box, or two or more of those fastened together, or several contained in a box, barrel, crate, or other receptacle. *Guckenhelm v. Sellers*, 81 Fed. 997; *McGregor v. Cone*, 104 Iowa, 465, 39 L. R. A. 484, 73 N. W. 1041; *Healey v. State*, 42 Neb. 556, 60 N. W. 962.

It is the outside case, although containing several separate packages. *State v. Chapman*, 1 S. D. 414, 10 L. R. A. 432, 47 N. W. 411; *Re Harmon*, 43 Fed. 372; *Re May*, 82 Fed. 422; *May v. New Orleans*, 178 U. S. 496, 44 L. ed. 1165, 20 Sup. Ct. Rep. 976.

Unless such case be the receptacle furnished by the carrier for convenience of carriage. *Kelch v. Alabama*, 91 Ala. 2, 10 L. R. A. 430, 8 So. 353.

Size has nothing to do with it. *State ex rel. Cochran v. Winters*, 44 Kan. 723, 10 L. R. A. 60 L. R. A.

616, 25 Pac. 237; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

But the package must be such as has been generally employed in the past by honest dealers for shipping like goods,—one not obviously resorted to for the purpose of evading the law. *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132.

Drawing the bung from a cask, and taking out a sample of its liquid contents to test in order to accept or reject the sale, do not make the cask a broken package, nor destroy its character as an original one. *Wind v. Iler*, 93 Iowa, 316, 27 L. R. A. 219, 61 N. W. 1001.

Neither does taking the cover off a box to ascertain whether its contents are what they purport to be. *Re McAllister*, 51 Fed. 282.

d. Property sent into a state for sale.

The constitutional prohibition against state taxation of imports does not apply to articles brought in from another state. *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Hinson v. Lott*, 8 Wall. 148, 19 L. ed. 387; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

It is, therefore, in the commerce clause alone that restraints upon state action respecting property coming in from other parts of the United States must be sought.

The distinction which exists between the commercial power and the police power as affected by the commerce clause of the United States Constitution, as was said in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, of the power of the states to tax persons and property within their territory, and the prohibition on them against laying any duty on imports, though quite distinguishable when they do not approach each other, may yet, like the colors intervening between white and black, approach so nearly as to perplex the understanding as colors perplex the vision in marking the distinction between them. *Re Rahrer*, 140 U. S. 545, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

A state statute which requires all importers of foreign articles or commodities of dry goods, wares, or merchandise by bale or package, or of wines and distilled spirits, and other persons selling the same by wholesale, bale, package, hogshead, barrel, or tierce, to take out and pay \$50 for a license before they are authorized to sell, with penalties for refusal or neglect so to do, is just as repugnant to the commerce clause of the Federal Constitution as it is to that forbidding the states to lay taxes on im-

States. It was also of opinion that the fundamental law of Ohio was not contravened by treating, as elements in making up the gross value of such a unit plant, good will, business skill, contracts with railway or other carriers, and every other business consideration which contributed to the successful and profitable operation of the manifold parts of so complicated a machine. Neither was it objectionable that the value placed by the general public upon the capital stock of such companies, as indicated by sales of shares on the open market, should be looked to as a guide in fixing the total value of the property of such companies, wherever situated. That court was also of opinion that the money value of that part of this unit plant found within the state was within the taxing jurisdiction of Ohio.

Accepting, as we feel constrained to do,

the opinion of the Ohio court as to the construction to be placed upon the provisions of the Ohio Constitution concerning uniformity of taxation and admissible methods for assessing the property of corporations, and accepting, also, the construction of this Nichols law as settling the meaning of the legislature, we are unable to see wherein any provision of the Constitution of the United States has been infringed. The law does not discriminate between domestic corporations and those of states other than Ohio. There was due process of law in the ascertainment of values. The bill does not charge any actual fraud upon the part of the assessors. Mere excessiveness of valuation, not the result of intentional or reckless wilfulness, and not a consequence of a departure from the affirmative provisions of the law regulating such assessments, is not remedi-

ports. *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678.

State statutes passed to discourage the use of ardent spirits by prohibiting their sale in small quantities without previous license, as applied to importations from foreign countries or other states not sold as imported by the importer, are valid, notwithstanding the commerce clause, and in spite of the fact that Congress has, by law, authorized such importations. *License Cases*, 5 How. 504, 12 L. ed. 256.

In these cases, *Grier, J.*, considered the statutes, *sub judice*, police regulations merely, and outside of the prohibitory clauses of the Constitution. The question presented in his opinion was simply whether states could interdict the sale of an article of commerce believed to be pernicious in effects, and to cause disease, pauperism, and crime. And *Daniel, J.*, considered the statutes valid, because he thought the decision in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, unsound, and that the original-package doctrine of the nontaxability of goods in the hands of the importer after importation had completely ended could not and should not be maintained.

A statute imposing a specific tax per gallon upon spirituous liquors distilled within the state, to be paid by the distiller under a system requiring a license and regular returns from him, and, complementary thereto, a specific tax of the same amount per gallon upon such liquors brought into and offered for sale within the state from beyond its borders, to be paid by the dealer introducing the same, inasmuch as it is legislation which does not discriminate against the products of sister states, but merely subjects them to equal taxation with similar home products, is not an attempt to regulate commerce, but is a legitimate exercise of the taxing power of the state. *Illinois v. Lott*, 8 Wall. 148, 19 L. ed. 387. *Nelson, J.*, dissented on the ground that a state had no constitutional power to tax the sale in original packages of articles imported from other states for a market.

A statute imposing an annual tax for selling spirituous, vinous, malt, and other intoxicating liquors, exclusive of wines and beers made in the enacting state, is a nullity so far as it applies to one exclusively vending vinous and malt liquors fermented or brewed without such state, because the discrimination made is in conflict with the commerce clause. But in other respects it is valid and enforceable, because it makes no discrimination between foreign and domestic distilled spirits. *Tiernan v. Rinker*, 102 U. S. 123, 26 L. ed. 103. 60 L. R. A.

A state tax on auctioneers' sales of foreign goods in the original packages as imported before they have become incorporated into the general property of the country is unconstitutional and void. *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015.

This is especially so when such sales of domestics are exempted from such tax. *Ibid.*

As sales by manufacturers are chiefly effected through agents, a tax upon the selling agents of manufacturers is a tax upon the manufacturers, and, if such tax is made to depend upon the foreign character of the wares, that is, upon their having been manufactured without the state,—it is to that extent a regulation of commerce in the articles between the states. Commerce among the states in any commodity can only be free when the commodity is exempted from all discriminating regulations and burdens imposed by local authority by reason of its foreign growth or manufacture. *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565.

It matters not, said *Field, J.*, whether the tax be laid directly upon the articles sold, or in the form of licenses for their sale. If, by reason of their foreign character, the state can impose a tax upon them, or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article, and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states. *Ibid.*

Later the court took the opposite view. *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58.

A state may not, under the guise of exercising its police power, or of enacting inspection laws, make discriminations against the products and industries of other states in favor of its own. A law, therefore, making it unlawful to sell fresh beef, veal, or mutton, unless slaughtered within 100 miles of the place of sale, until after it has been inspected and approved, is, when applied to meats brought from a distant state, a direct burden upon interstate commerce, and, therefore, void. *Brimmer v. Reiman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

So, is a law requiring flour brought from other states to be inspected, and a fee to be paid for such inspection, when there is no such requirement as to state-made flour. *Volght v.*

able by application to courts of equity. The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property through the state, nor from points within the state to points in other states, nor from points in other states to points within the state. It purports to provide for a tax upon property within the state of Ohio. Though this property is employed very largely in the business of interstate commerce, yet that does not exempt it from liability to taxation as all other property within the jurisdiction of Ohio. This proposition is too well settled to need argument. *Delaware Railroad Tax*, 18 Wall. 232, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 896; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530-549, 31 L. ed. 790-792, 8 Sup. Ct. Rep. 961; *Leloup v. Port of Mobile*, 127 U. S. 640-649,

32 L. ed. 311-314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18-23, 35 L. ed. 613-616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

Neither does the fact that the property of the express companies was valued as a unit profit-producing plant violate any Federal restriction upon the taxing power of a state within which a part of that plant is found. The value of property depends in a large degree upon the use to which it is put. If a railroad may be valued as a unit, rather than as a given number of acres of land plus so many tons of rails and so many thousand ties and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the state of Ohio had a right to tax the property within

Wright, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855.

State statutes regulating the sale of intoxicating liquors, and making no discrimination against imported goods or those coming from other states, are valid exercises of the police power, but inoperative so far as original, unbroken packages in the hands of the first recipient within the state are concerned, because of the commerce clause. When, however, Congress enacts that such laws may apply to such original, unbroken packages brought from other states or from foreign countries, with all the force and effect that they operate upon other goods of the same class, it is a declaration upon its part that commerce therein need be no longer free, and is the removal of an obstacle to the enforcement of such laws or a consent that such laws may be enacted and enforced. *Re Rahrer*, 140 U. S. 545, *sub nom. Wilkerson v. Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. No member of the court dissented from the decision in this case, but three, Harlan, Gray, and Brewer, JJ., who concurred in the result, did not assent to the reasoning in the opinion of the chief justice.

While the act of Congress of August 8, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), providing that all fermented, distilled, or other intoxicating liquors transported into any state or territory, or remaining therein for use, consumption, sale, or storage, shall, upon arrival therein, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as if such liquors had been produced therein, and shall not be exempt because of introduction in original packages,—warrants the application of local statutes and ordinances licensing, regulating, and controlling traffic in malt liquors to a storage and distributing agency of a foreign brewing corporation sending his beer in original packages; yet, such act has not deprived such beer of its character as an article of interstate commerce, and, hence, an ordinance taxing such agency for revenue only, and not for regulation or control, is void under the commerce clause. *Pabst Brewing Co. v. Terre Haute*, 98 Fed. 330.

A statute of North Dakota, imposing license taxes upon intoxicating liquors, was attacked upon similar grounds by a Minnesota corporation which did in that state a precisely similar business. The court, upon a critical examination of such statute, concluded that it was not a revenue measure, but a police regulation, and consequently within the purview of the act of 60 L. R. A.

Congress just mentioned, but that, inasmuch as it discriminated adversely to the foreign brewer by requiring of him a wholesaler's license from which domestic brewers selling their own beer were exempt, it was for this reason, and to the extent of the wholesaler's license tax, void. *Minneapolis Brewing Co. v. McGilivray*, 104 Fed. 258.

A state statute requiring the owners of boat-loads of coal and coke to submit them to the inspection of, and gauging by, state officers, and to pay certain fees therefor, under pecuniary penalties if they sell without so doing, set in operation against a foreign corporation engaged in interstate commerce and sending cargoes of coal and coke mined in its home state into the enacting state for sale, does not conflict with the Federal Constitution. *Pittsburg & S. Coal Co. v. Louisiana*, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459, Affirming 41 La. Ann. 465, 6 So. 220.

An act which allows goods manufactured in the state to be peddled free, and exacts a license fee from peddlers of similar goods manufactured without the state, discriminates in favor of domestic, home-made goods, and against those made in other states, and so violates the Federal Constitution. *State v. Furbush*, 72 Me. 493.

In *State ex rel. Morderal v. Charleston*, 10 Rich. L. 240, a municipal ordinance declaring every slave brought into the city for sale from beyond the limits of the state subject to a specific tax was held valid. The decision was put upon the grounds, first, that slaves brought from another state were not imports, and second, if they could be so considered, the tax was not a duty or impost, but a levy *per capita* after importation. The commerce clause was not discussed in the case.

A series of cases in the state of New York upon the question of the taxability of goods sent from other state into that state for sale have been fully discussed in the previous note in this series on the *Taxation of capital stock of corporations in the United States* (State Bd. of Equalization v. People (III.) 58 L. R. A. 513, pp. 536-540), and need not again be noticed.

The reader will find additional cases in point here in other parts of this note, where franchise privilege and license tax laws come under notice (*infra*, X.).

VII. Intercourse.

a. Passenger travel.

A state law requiring the master of every incoming vessel to make a sworn report within twenty-four hours after arrival of the name,

the state, and to assess it at its true cash value, there is no Federal restriction which will prevent such property from being "assessed at the value which it has, as used, and by reason of its use. *Pittsburgh, C. & St. L. R. Co. v. Backus*, 154 U. S. 431, 38 L. ed. 1038, 14 Sup. Ct. Rep. 1114; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

That an express company owns no line of railway, and operates no railroad, does not prevent the value of its property from being affected by the relation of each part to every other part, and the use to which a part is put as a factor in a unit business. The Pullman Car Company neither owned nor operated any line of railroad. Its cars were

moved by railway carriers under contracts, yet it was not regarded as violative of any Federal restriction that its property should be regarded as a unit plant, with a unit value, and the value of its property in Pennsylvania assessed in the proportion that the mileage of the roads over which its cars ran in that state bore to the total mileage covered by its entire business. *Pullman's Palace Car Co. v. Pennsylvania*, cited above.

Neither is it an objection that the Ohio law required the assessors to look to the value of the capital stock of the company as a factor in arriving at the value of its whole property considered as a unit plant. In *State Railroad Tax Cases*, 92 U. S. 575-605, *sub nom. Taylor v. Secor*, 23 L. ed. 663-670, Mr. Justice Miller said: "When you have ascertained the current cash value of the whole funded debt, and the current cash

age, occupation, birthplace, and last legal settlement of each of his passengers, and to give bond to prevent any of them becoming a public charge under penalty of \$75 for each passenger, is a police regulation only, not a commercial one, and not in conflict with the commerce clause. *New York v. Miln*, 11 Pet. 102, 9 L. ed. 648.

Story, J., dissented, holding that the statute before the court was a regulation of commerce and unconstitutional.

This case was subsequently said to be an authority only for the right of a state to demand of the master or owner of an arriving vessel a list of the passengers with personal statistics, and not for the requirement of bonds or money payments of each passenger. *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543.

While a state has the unquestionable power to protect itself from an influx of foreign paupers and other persons who would become public charges, yet, a statute providing (as did Mass. act April 20, 1837) for the inspection of incoming vessels, and prohibiting the landing therefrom of lunatics, idiots, cripples, aged and incompetent to maintain themselves, and paupers, and which imposes a tax upon the master for passengers brought in, including those who do not fall within any of the prohibited classes, and requires payment thereof before even sane, healthful, and able passengers are permitted to come ashore, is unconstitutional as a regulation of commerce. So, too, is a statute (1 N. Y. Rev. Stat. 445, 446, title 4) requiring the master of every vessel entering the state ports to pay a specific sum for each passenger landed and each member of the crew. *Passenger Cases*, 7 How. 283, 12 L. ed. 702. The court divided in these cases, McLean, Wayne, Grier, Catron, and McKinley, JJ., concurring in the judgment, but not upon all the reasoning, and Taney, Ch. J., with Daniel, Nelson, and Woodbury, JJ., dissenting.

By the judgment in these cases, according to Mr. Justice Wayne, the court meant to decide substantially as follows: a. That statutes imposing taxes upon passengers, either aliens or citizens, entering the ports of the enacting states, either in foreign or domestic vessels, from either foreign nations or other state ports, are in the nature of commercial regulations and inconsistent with the constitutional power of Congress. b. That states cannot constitutionally tax the commerce of the United States to pay the expenses of executing their police laws. c. That commerce includes an intercourse of persons, as well as the importation of merchandise. d. That, inasmuch as Congress has 60 L. R. A.

enacted laws admitting foreigners, with their personal luggage and tools of trade, free of duties and imposts, state statutes taxing for any purpose immigrants while the vessel is in transitu to her destined port, although it has arrived within the jurisdictional limits of such states, before the immigrants have landed, are in conflict with the legislation of Congress, and hence unconstitutional and void. e. That the Massachusetts and New York laws *sub judice*, so far as they laid any obligation on owners, consignees, or captains of incoming vessels to pay or be responsible for a tax or duty of any kind whatever for arriving passengers, were void in virtue of the commerce clause, and the acts of Congress pursuant thereto. f. That such state laws, so far as they imposed taxes upon passengers, were void, also, because they conflicted with the constitutional requirement of uniformity in duties, imposts, and excises throughout the United States; that requirement being as real and as obligatory with respect of the states without as with congressional action, and such uniformity being interfered with and destroyed by any state tax upon the intercourse of persons between states or between this and other nations. g. That the power of Congress to regulate commerce includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters of the United States; and any state tax affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the grant of power to Congress. h. That states, in exercising their police powers, may pass quarantine and health laws interdicting the landing of passengers and freight, may prescribe the places and the time of quarantine, may impose penalties for violation, and may exact such fees as will pay the cost of inspection, detention, disinfection, and purification, which laws, although affecting commerce, are not regulations of it within the meaning of the Constitution. *Ibid.*

State statutes whereby the master or owner of every vessel landing passengers from a foreign port is bound, on arrival, to report the name, birthplace, age, occupation, and last legal settlement of each passenger, whereupon the local port officers are to indorse a demand that such master or owner give a \$300 bond for every passenger entering the city, conditioned to indemnify the immigration commissioners and every city, county, and town in the state against expense for relief or support of such passenger for four years, or, at his option, pay \$1.50 in lieu of giving such bond, under heavy penalties for neglect or refusal to do one or the

value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for all these are represented by the value of its bonded debt, and the shares of its capital stock."

This language is quoted with approval in *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 429, 38 L. ed. 1037, 14 Sup. Ct. Rep. 1114.

It may be that in a particular instance this would operate with injustice, but that it is a proper matter to be considered is not to be controverted. As construed by the Ohio court, this act does not require the assessors to find that the value of the property of such a corporation is the precise equivalent of the value of its capital stock as as-

certainied by the rule stated above. The board was only required to treat the value of the capital stock as a guide in ascertaining the actual value of its property.

In view of the wealth, population, and area of Ohio, it is not a violent presumption that the value of the part of such a plant within that state was in the proportion that the actual value of its tangible property in Ohio bore to the total value of all its tangible property, wherever situated. The mileage basis of apportionment has been sustained where railroads, telegraph, and sleeping-car companies were the subject of assessment for taxation. *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 431, 38 L. ed. 1038, 14 Sup. Ct. Rep. 1114, and other cases heretofore cited. A mileage basis was not adopted by the assessors whose action is now complained of, because the express compa-

other within twenty-four hours,—are unconstitutional and void under the commerce clause. Whatever the language used in framing such statutes, their natural and reasonable effect is to compel the owners of incoming vessels to pay a sum of money for each passenger they bring to port, and, hence, they as much impose taxes upon passengers as if they lay them directly upon the passengers or on the vessels or their owners for the right to land passengers. A statute that imposes a heavy, and almost impossible, condition on the exercise of the right of a master or owner to land passengers from his vessel, with the alternative of paying a small sum of money, in effect exacts the payment of such sum, and consequently lays a burden upon foreign commerce, and this the state is powerless to do. *Henderson v. Wickham*, 92 U. S. 259, 23 L. ed. 543.

A state statute empowering an officer to satisfy himself whether or not any passenger, not a citizen of the United States, who arrives from any foreign port by vessel, is insane, idiotic, deaf, dumb, blind, crippled, or infirm, and unaccompanied by relatives able and willing to support him, or who is likely to become a public charge, or has been a pauper, a convict, or is a lewd woman; and which excludes every such person from landing until the master, owner, or consignee of the vessel gives a separate bond of \$500 with two different resident sureties, in each case running for two years, conditioned to save harmless every county, city, and town in the state against expense for the relief, support, or care of such passenger; and which authorizes such inspecting officer to exact fees for examination of each passenger, for every bond and each oath to sureties, or to commute such fees,—is unconstitutional and void in virtue of the commerce clause. *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550.

The last two cases were followed, and a like conclusion reached, in *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87.

But while state statutes laying taxes on incoming passengers from foreign nations are void by reason of being regulations of commerce, an act of Congress laying such a tax is valid because Congress has the power to regulate commerce with foreign nations. *Head Money Cases*, 112 U. S. 580, *sub nom.* *Eddie v. Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247.

A statute imposing a capitation tax upon each passenger about to leave the state by railroad, stage-coach, or other vehicle carrying passengers, for hire, to be collected of the carrier, is unconstitutional and void. *Crundall v. Nevada*, 60 L. R. A.

6 Wall. 35, 18 L. ed. 745. *Miller, J.*, who wrote for the court, expressed the opinion that the tax did not, of itself, amount to a regulation of commerce of a national character which required or admitted of uniformity of regulation over the whole country, and, therefore, however obnoxious it might be in other respects, that it was not violative of the commerce clause. But *Clifford, J.*, while agreeing that the law was unconstitutional, thought it plainly inconsistent with the commerce clause, and that the judgment annulling it should be placed exclusively upon that ground; a view in which *Chase, Ch. J.* concurred.

A statute imposing upon every person, corporation, association, or company in the business of carrying passengers by steam power upon land or water within the limits of the enacting state a state tax at a specified rate for each passenger transported, with a proviso that, if the carrier's charter limits the fares it may charge, it may increase fares by the amount of the tax, does not tax the business of the carrier measured by the number of passengers carried, but it taxes the passengers through the medium of the carrier as collector. In so far, therefore, as the law operates upon passengers coming into, passing through, or departing from, the state, it is in effect a regulation of commerce between the states, and hence inoperative and void. *Clarke v. Philadelphia, W. & B. R. Co.* 4 Houst. (Del.) 158.

An act requiring one employing laborers in certain named counties for the purpose of sending the hirelings out of the state to pay a license fee is an unconstitutional restriction upon the right of persons to leave or pass through the state with freedom. *Joseph v. Randolph*, 71 Ala. 499, 46 Am. Rep. 347.

A state tax upon the receiving and landing of passengers and freight at a wharf upon a navigable river bounding another state, by a ferry thereon plying between the two states, is a tax upon transportation, and therefore upon commerce between states, and void under the commerce clause of the Federal Constitution. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

A state law declaring the running or using of sleeping cars on railroads in the state, when they do not belong to the railroads upon which they are run or used, a privilege, and imposing a specific tax of \$50 each, payable annually, upon each car so run or used, enforcing payment on default by distress warrant, is, in respect of all sleeping cars which begin or end runs outside of such state, unconstitutional for

nies failed to return the *datum* asked for by the assessors. Precisely what rule the assessors did adopt in apportioning the total value does not clearly appear, though the inference is strong that the distribution was made largely on the basis of the relative value of tangible property in Ohio to the total value of all the tangible property owned by the complainants.

It may be that, under exceptional circumstances, a rule of apportionment based on mileage or upon the relative value of the local tangible property as compared to the total value, or based upon gross receipts within the state as compared to total gross receipts, would be inequitable and unjust. Speaking of objections to an apportionment on a mileage basis, Mr. Justice Brewer, speaking for the court, in *Pittsburgh, C. O. & St. L. R. Co. v. Backus*, 154 U. S. 431, 38

L. ed. 1038, 14 Sup. Ct. Rep. 1114, said: "It is true, there may be exceptional cases,—and the testimony offered on the trial of this case in the circuit court tends to show that this plaintiff's road is one of such exceptional cases,—as, for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or, where in certain localities, the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the state, took into account the

repugnancy to the commerce clause of the Constitution of the United States, because it lays a tax upon the privilege of transporting passengers from state to state. *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Tennessee v. Pullman Southern Car Co.* 117 U. S. 51, 29 L. ed. 791, 6 Sup. Ct. Rep. 643.

A stamp tax upon a contract for passage beyond the limits of the state, which, though nominally paid by the carrier, is added to the price of the passage ticket, and really paid by the passenger, is void as a regulation of interstate commerce. *People v. Raymond*, 34 Cal. 492.

b. Telegrams.

Intercourse by telegraph between parties in different states, being interstate commerce, states cannot constitutionally lay taxes upon the messages constituting such intercourse.

The supreme court of Ohio, in deciding that a tax of that state upon the receipts within it of a foreign telegraph company, the bulk of which came from business crossing the state lines, was not repugnant to the commerce clause, took the untenable position that commerce between the states related to trade in articles of property, and that telegrams or correspondence by any other method, although relating to commercial transactions, were not commerce. They are, it declared, instruments or aids to facilitate commerce, and, like vehicles on which goods or persons are transported, may be indispensable to a successful prosecution of trade, and such instruments have always been subject to state taxation. *Western U. Tele. Co. v. Mayer*, 28 Ohio St. 521.

If this decision rested upon no other ground it could not stand. The same must be affirmed of the similar decision in *Western U. Tele. Co. v. Richmond*, 26 Gratt. 1.

The reversals of *Western U. Tele. Co. v. Com.* 110 Pa. 405, 20 Atl. 720, in 128 U. S. 39, 32 L. ed. 845, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6, and *Western U. Tele. Co. v. State Board of Assessment*, 80 Ala. 273, 60 Am. Rep. 49, in 132 U. S. 472, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161, and the decision in *Ratterman v. Western U. Tele. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127, are conclusive on this point. Receipts from interstate telegrams are not taxable by the states because of the commerce clause.

A tax laid upon a telegraph company of a specific sum for every message sent, because it is sent and without regard to the distance it is 60 L. R. A.

to go or the price paid for transmitting it, is a tax on the messages, and, so far as it operates on messages sent out of the state, it is a regulation of foreign and interstate commerce and beyond the power of the state to impose. *Western U. Tele. Co. v. Texas*, 105 U. S. 460, 28 L. ed. 1067, Reversing 55 Tex. 314.

And such statute having in respect of out-of-state messages been thus held an unconstitutional interference with commerce between the states, inasmuch as there is no way of effectively discriminating under its terms between business wholly within the state, which might be taxed under a properly worded law, and the business protected by the commerce clause, it cannot be saved. *Id.* 62 Tex. 630.

But where the subjects of taxation can be separated so that what arises from interstate commerce can be distinguished from what arises from commerce wholly within the state, the courts will act upon the distinction, and will restrain the tax upon interstate commerce while permitting the state to collect that resting upon commerce solely within its territory. *Ratterman v. Western U. Tele. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127.

To present a defense to a claim for such taxes the facts must show that the messages transmitted were interstate commerce, or in obedience to governmental orders, and that the office was kept and used for such purposes only. *Moore v. Bufaula*, 97 Ala. 673, 11 So. 922.

The court cannot take judicial notice that a domestic telegraph company complaining of an assessment against it as in contravention of the commerce clause does an interstate business and operates its lines outside of the state. *People ex rel. Western U. Tele. Co. v. Tierney*, 57 Hun, 357, 10 N. Y. Supp. 940, Modified in other respects in 126 N. Y. 166, 12 L. R. A. 251, 27 N. E. 269.

And a telephone company carrying on an interstate business, sued for license fees imposed under a statute charging 75 cents a year in each county where it carries on a telephonic business for each instrument in use, has the burden of showing what instruments and how many are used in interstate commerce, so as to be beyond the reach of such tax. It cannot escape liability by simply showing that the instruments used in domestic and local business cannot be segregated or discriminated from those used in interstate business. *State v. Rocky Mountain Bell Teleph. Co. (Mont.)* 71 Pac. 311.

VIII. Internal commerce.

The internal commerce of a state—that is,

peculiar and large value of such facilities, and such extra rolling stock. But whether in any particular case such matters are taken into consideration by the assessing board does not make against the validity of the law, because it does not require that the valuation of the property within the state shall be absolutely determined upon a mileage basis."

The valuation of the returned personal property of the Adams Express Company for 1893 was \$53,500, and the assessed value as determined by the board is \$460,033.08. This great increase undoubtedly casts a shadow on the action of the board. Still, the bill, including the amendments incorporating the affidavits of Auditor Poe as a part thereof, does not charge any actual fraud on the part of the board, by intentionally and deliberately placing a valuation grossly in excess of the real value, for the purpose of compelling the complainant to bear a larger share of taxation than it rightfully should. As in the case last cited, it may be said "that the most that can be made out of the bill is a complaint that the assessment is too high, because the board took into consideration property outside of the state, and gave to the property within

the state a value partly deduced from that without the state." But if it was lawful to value the whole plant looking to it as a unit, and looking to the market value of the capital stock as a factor in the ascertainment of that total value, and that such a method does not contravene the Constitution or law of Ohio, then it would seem to follow, in the absence of specific charges of fraud, or of a departure from the method of appraisal indicated by the law, that a court of equity is without power to relieve against a mere excessive valuation. Clearly, a court of equity will not, in the absence of fraud or violation of law, enjoin an assessment merely upon allegations of excessiveness.

What we have said as to the case made by the Adams Express Company is equally applicable to the suits of each of the other express companies, there being no material difference in the averments of the several bills.

Our conclusion must be, therefore, that neither the law nor the assessment thereunder is obnoxious to either the Constitution of Ohio nor any Federal restriction; and *the decree of the Circuit Court dismissing the several bills must be affirmed.*

the commerce which is wholly confined within its limits—is as much under its control as foreign or interstate commerce is under the control of the general government. *Sands v. Manistee River Improv. Co.* 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113.

No judicial decision has been noticed, said the supreme court of Maine half a century ago, which denies to a state the right to regulate navigation upon its interior waters which cannot be navigated for the purpose of commerce with foreign nations or among the several states. On the contrary, that right has been admitted in those judicial opinions which have been considered to advance the most extensive claims to the regulation of commerce and navigation by the United States. *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 665.

The power given to Congress to regulate commerce does not carry the power to tax for revenue. That is derived from the authority to lay and collect taxes, duties, imposts, and excises. Nor does such power to regulate, even if construed to be exclusive, prohibit states from taxing commerce within their own jurisdictions. The inability of states to do this, results altogether from the prohibition against laying duties on imports and exports. *Johnson v. Drummond*, 20 Gratt. 419.

The power of each state to tax, at its discretion, its own internal commerce, and the franchises, property, and business of its own corporations, so that interstate intercourse, trade, or commerce, which must be free, be not embarrassed or restricted, is beyond dispute. *State Freight Tax Case*, 15 Wall. 232, *sub nom.* *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146.

A state law regulating commerce, if confined to internal commerce and to only so much of interstate commerce as directly affects the people of the state, does not conflict with the commerce clause. *Pelk v. Chicago & N. W. R. Co.* 94 U. S. 104, 24 L. ed. 97.

A state may lawfully tax traffic and transportation between places wholly within its own territory. *Delaware & H. Canal Co. v. Com.* 1 Monaghan, 36, 1 L. R. A. 232, 2 Inters. Com. 60 L. R. A.

Rep. 222, 17 Ati. 175; *Com. v. Buffalo, N. Y. & P. R. Co.* 2 Dauphin Co. *Rep.* 216.

Even when, in the course of a continuous journey between such places, the state is left and returned to again. *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. *Rep.* 87, 12 Sup. Ct. *Rep.* 806; And see, 1 L. R. A. 232, *note*, 1 Monaghan, 45, 2 Inters. Com. *Rep.* 226; *Com. v. New York, L. E. & W. R. Co.* 21 W. N. C. 410.

It was not contested in *Northern P. R. Co. v. Raymond*, 5 Dak. 356, 1 L. R. A. 732, 2 Inters. Com. *Rep.* 321, 40 N. W. 538, but that a territorial statute imposing a tax or providing for the commutation of it upon a railroad was valid so far as its application was restricted to local business alone, although it was unconstitutional as to business extending beyond the limits of the territory. And, in effect, this was decided in *Northern P. R. Co. v. Barnes*, 2 N. D. 310, 51 N. W. 366.

A state statute imposing upon railroads of a designated class a privilege tax graduated by the mileage operated or controlled for taking up and transporting freight and passengers from one point to another within such state, a specific sum annually, does not violate the commerce clause of the Federal Constitution. *Knoxville & O. R. Co. v. Harris*, 99 Tenn. 684, 53 L. R. A. 921, 43 S. W. 115.

But a statute imposing upon railroad corporations an annual excise tax or license charge equal to a fraction of 1 per cent of their gross earnings from transportation business originating and terminating within the taxing state, not to include earnings derived from business of an interstate character, does not warrant the inclusion of receipts for carrying the mails, although these were in part paid for mail matter taken up and set down within the state, where it cannot be determined how much was received for business of this kind. *People ex rel. New York C. & H. R. R. Co. v. Morgan*, 168 N. Y. 1, 80 N. E. 1041.

A state, and its municipalities by its authority, may tax commerce within the jurisdictional limits, if such business exclusively is affected, when carried on by railroads (*Nashville, C &*

INDIANA SUPREME COURT.

WESTERN UNION TELEGRAPH COMPANY, *Appt.*,

v.

Thomas TAGGART *et al.*

(141 Ind. 281.)

1. The existence of facts which would authorize the signatures of the presiding officers of the two houses of the legislature to a statute cannot be inquired into where it is authenticated by their signatures
2. A state tax on that portion of the property of an interstate telegraph company which is within the state may lawfully be made by considering the value of the whole line as a unit, and assessing the tax on a mileage basis after deducting the value of property subject to local taxation, such as real estate, structures, machinery, and appliances.
3. The fact that a telegraph line is engaged in interstate commerce does not prevent a state tax on the value of that portion of the property which is within the state, although the value of the whole line

as a unit is taken into account in fixing such value.

4. The fact that the portions of a telegraph line outside the state are of proportionally greater value than portions within the state does not prevent applying the mileage basis of valuation under the act of 1893, after deducting the value of property subject to local taxation, since allowance for any such variance of value may be made, and the cardinal rule of the statute is to assess only what property is within the state, and that at its true cash value.
5. The fact that the valuation of the property of an interstate telegraph company is made upon its capital stock is not objectionable, where the tax is in effect levied only upon the actual value of the property of the company within the state.

(May 14, 1895)*

APPPEAL by complainant from a judgment of the Circuit Court for Marion

*This decision was affirmed by the Supreme Court of the United States on May 18, 1896 (163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054).

St. L. R. Co. v. Alabama City, 134 Ala. 414, 32 So. 731; York v. Chicago, B. & Q. R. Co. 56 Neb. 572, 76 N. W. 1065; palace-car companies (State v. Pullman's Palace Car Co. 64 Wis. 89, 23 N. W. 871); express companies (Southern Exp. Co. v. Hood, 15 Rich. L. 66, 94 Am. Dec. 141; Pacific Exp. Co. v. Selbert, 142 U. S. 339, 35 L. ed. 1035, 8 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214); notwithstanding all such companies are engaged in interstate commerce.

While a state has no power to tax telegraph messages between it and other states or upon business of the national government, it may lawfully lay a tax upon messages passing between private parties and from one place to another exclusively within its own jurisdiction, without coming in conflict with the Constitution of the United States. Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26 L. ed. 1067; Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; Western U. Teleg. Co. v. Pennsylvania, 128 U. S. 39, 32 L. ed. 345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6; Western U. Teleg. Co. v. Alabama State Bd. of Assessment, 132 U. S. 472, *sub nom.* Western U. Teleg. Co. v. Seay, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; Postal Teleg. Cable Co. v. Charleston, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094.

When a statute does not in terms apply to interstate or foreign business, it is not to be implied that the legislature intended to transcend its constitutional powers in enacting it; if, therefore, the business is such as to be interstate and local commerce, the statute affecting it will be construed to apply only to the local or domestic part of it. State *ex rel.* Beek v. Wagener, 77 Minn. 483, 46 L. R. A. 442, 80 N. W. 633, 778, 1134; State v. Northern P. Exp. Co. (Mont.) 71 Pac. 404; State v. Rocky Mountain Bell Teleg. Co. (Mont.) 71 Pac. 311, 60 L. R. A.

IX. Receipts from commerce across state lines.

Cases of franchise and privilege taxation measured by corporate receipts are treated in the next division of this note.

In the note in this series on the *Taxation of corporate franchises in the United States* (Louisville Tobacco Warehouse Co. v. Com. (Ky.) 57 L. R. A. 33, the cases of United States Exp. Co. v. Ellyson, 28 Iowa, 370, and Western U. Teleg. Co. v. Ellyson, 28 Iowa, 380, were noticed sufficiently (*vide* div. VI., *subd.* f, 1, p. 60) to make it unnecessary to take them up again. In the same place (pp. 61-64) there were reviewed at length, in relation to the present theme, the cases of the State Tax on Railway Gross Receipts, 15 Wall. 284, *sub nom.* Philadelphia & R. R. Co. v. Pennsylvania, 21 L. ed. 164; Fargo v. Michigan, 121 U. S. 230, *sub nom.* Fargo v. Stevens, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857, Reversing Fargo v. Auditor General, 57 Mich. 508, 24 N. W. 538; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118, Reversing 104 Pa. 109; Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; and Cumberland & P. R. Co. v. State, 92 Md. 668, 52 L. R. A. 768, 45 Atl. 503.

As the first of these cases appeared, when decided, to be in conflict with the decision that immediately preceded it, *viz.*, that rendered in State Freight Tax Case, 15 Wall. 232, *sub nom.* Philadelphia & R. R. Co. v. Pennsylvania, 21 L. ed. 146, Chase, Ch. J., speaking for the court in Osborne v. Moblle, 16 Wall. 479, 21 L. ed. 470, essayed distinguishing them by saying that the tax on tonnage was held to be unconstitutional because it was in effect a restriction upon interstate commerce which by the Constitution was designed to be free, while the tax on gross receipts was held to be not repugnant to the Constitution because it imposed on the railroad companies what was in the nature of a general income tax incapable of being transferred as a burden upon the property carried from one state to another.

County in favor of defendants in a suit brought to restrain defendants from apportioning among the several townships, and entering upon the tax duplicates, taxes assessed against complainant under the law providing for the taxation of telegraph companies. *Affirmed.*

The facts are stated in the opinion.

Messrs. Butler, Snow, & Butler, for appellant:

The complaint states facts sufficient to constitute a cause of action, because it alleges that the sole authority upon which the appellees justify their action is Acts of 1893, chap. 171, which, upon the facts stated in the complaint as shown by the journals of the senate and house of representatives of Indiana, and admitted by the demurrer, has never been enacted as a statute of the state of Indiana; the senate and house of

representatives having passed the bill which was afterwards published as Acts of 1893, chap. 171, and caused it to be presented to the governor within two days next previous to the final adjournment of the general assembly, in violation of art. 5, § 14, of the Constitution of Indiana.

The journals of the senate and house are admissible as evidence to prove the facts stated therein as to the passage of bills passed over the governor's veto, even though such bills are signed by the presiding officers of the two houses.

McCulloch v. State, 11 Ind. 424; *Evansville v. State*, 118 Ind. 426, 4 L. R. A. 93, 21 N. E. 267; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 274; *Hovey v. State*, 119 Ind. 395, 21 N. E. 21.

The journals of the houses of the legislature may be received in proof of facts

The cases in the state courts of Pennsylvania, involving taxes like those passed upon by the Supreme Court of the United States in the State Freight Tax Case and the Railway Gross Receipts Tax Case, just referred to, should be noted here to complete the general view.

In *Com. v. Buffalo & E. R. Co.* 2 Pearson (Pa.) 376, it was held that a tax upon the gross receipts arising from all freights carried by a railroad formed by consolidating a domestic with a foreign corporation and operating partly within and partly without the state, proportioned to the internal mileage, was not inimical to the commerce clause. Upon this branch of the case, the court said, in substance: Our supreme court has decided that these taxes are not a regulation of commerce between the states, and, even if they were, that the state could act on this subject and tax the commerce carried over artificial navigation or railroads authorized by its laws until Congress passes laws regulating interstate commerce. At least, such is our understanding of the decisions, and they bind us until reviewed and changed. It was, however, intimated that the personal view of the court was that the tax was invalid, and held otherwise only in deference to the authority of the superior tribunal.

In the case between the same parties, reported in 3 Brewst. (Pa.) 386, the court said the points made were up in *Com. v. Philadelphia & R. R. Co.* and several cognate cases, and, although at first the law was held void, the holding was reversed by the state supreme court, and the reversal affirmed on error, adding: We must therefore consider the law as settled until reviewed and changed by the Supreme Court of the United States. We concede, it was said, that there is no difference between the tax charged on the freight as claimed here and on the goods as decided in those cases, but this point is negatived without qualification in obedience to those decisions.

In *Com. v. Delaware & H. Canal Co.* 21 W. N. C. 406; *Com. v. New York, L. E. & W. R. Co.* 21 W. N. C. 410; and *Com. v. Delaware, L. & W. R. Co.* 21 W. N. C. 412,—the statute taxing the gross receipts from tolls and transportation, telegraph and express business, was held unconstitutional so far as receipts from interstate commerce were affected, although operative with respect of receipts from commerce exclusively internal. In these cases the court deemed its former decisions to the contrary in *Philadelphia & S. Mail S. S. Co. v. Com.* 104 Pa. 109; *Pullman's Palace Car Co. v. Com.* 107 Pa. 148; and *Western U. Teleg. Co. v. Com.* 110 Pa. 405, 20 Atl. 720 (afterwards reversed in 60 L. R. A.

128 U. S. 39, 32 L. ed. 345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6); together with the case of the state tax on railway gross receipts upon which they rested,—overruled by *Fargo v. Michigan*, 121 U. S. 230, *sub nom.* *Fargo v. Stevens*, 30 L. ed. 888, 7 Sup. Ct. Rep. 857; and *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118.

In the like decision in *Delaware & H. Canal Co. v. Com.* 1 Monaghan, 36, 1 L. R. A. 232, 2 Inters. Com. Rep. 222, 17 Atl. 175, the court referred to the Freight Tax Case as holding that a state tax upon the freight or tonnage of a domestic corporation is a regulation of commerce and cannot be imposed; and to the Railway Gross Receipts Tax Case as holding that the receipts from such freight or tonnage carried by a domestic corporation may be taxed by its own state, and added: It was at once felt that the distinction thus drawn between freight and money paid for carrying freight was unsound in principle, and that the last decision must soon be overruled.

Com. v. Lehigh Valley R. Co. 129 Pa. 308, 18 Atl. 125, and 22 W. N. C. 525, affirmed the taxability of receipts from internal commerce exclusively, and the freedom from taxation of receipts from external commerce.

In *Com. v. New York, P. & O. R. Co.* 145 Pa. 38, 22 Atl. 212, it was decided that sums received by a foreign railroad company under a lease to another road for the use of a portion of its line within the state of Pennsylvania for the transportation of passengers and the carriage of coal and merchandise by the lessee over such portion of road, not only between terminals in that state, but as well for transportation begun in that state of freight shipped for a continuous journey under a single way bill to a destination beyond the state, are lawfully subject to a state tax upon gross receipts from tolls.

Passing to more general cases, the list is headed by the Delaware Railroad Tax Case. In that case it was decided that taxes imposed upon all domestic railroad and canal companies doing business in the taxing state, of, first, 3 per cent annually upon their net earnings or income from all sources, with a proviso that, when their lines extend beyond the state, only so much of such earnings or income of each company shall be subject to tax as will be in proportion to the whole, as the length of its line within the state bears to the total length thereof; second, $\frac{1}{4}$ of 1 per cent on the actual cash value of every share of corporate stock, with a like apportionment in like cases; and, third, specific sums for the use of each locomotive, pas-

showing a noncompliance with constitutional requirements in the passage of a bill authenticated by the signatures of the presiding officers of the two houses.

Skinner v. Deming, 2 Ind. 558, 54 Am. Dec. 463; *Coleman v. Dobbins*, 8 Ind. 156; *McCulloch v. State*, 11 Ind. 424; *Coburn v. Dodd*, 14 Ind. 347; *State ex rel. Brown v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *Cordell v. State*, 22 Ind. 1; *Sutherland*, Stat. Constr. §§ 30-52; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 661, 36 L. ed. 294, 301, 12 Sup. Ct. Rep. 495.

The collection of taxes is a deprivation of property. A tax law is constitutional or unconstitutional according as it does or does not provide, in itself, for such "process" or procedure by the taxing officers as the law recognizes as "due process."

Acts of 1893, chap. 171, violates the re-

quirement of "due process of law," because it fails to provide a tribunal having the duty, as well as the power, to hear and determine the state's claims of increase of valuation.

Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432.

It violates the requisites of "due process of law" in that there is no provision made whereby the owner of a telegraph plant is given any right, as against any tribunal whatever, to compel a hearing upon a state's specific public claim against him, and his defense thereto.

Cleveland, C. C. & St. L. R. Co. v. Backus, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421; *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 133 Ind. 625, 33 N. E. 432.

senger coach, freight car, and truck within the state,—do not conflict with the commerce clause. Although such taxes affect commerce among the states and impede the transit of persons and property from one state to another, yet they do so in the same way, and no other, that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality. *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888.

When a state grants a railroad company a franchise to construct a road between named terminals, and to employ thereon machinery and vehicles for transporting persons and property, with a right to charge a certain rate of fare; and, in the grant, stipulates for the semi-annual payment of a definite fraction of the prior receipts from such fares,—such stipulation does not constitute an unconstitutional restriction upon free intercourse and traffic between states. *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456, 22 L. ed. 678.

A state tax upon a railroad on account of tolls or rentals that it receives for the use of a part of its line within the taxing state from another road engaged in interstate commerce is not objectionable as a burden or restriction upon such commerce, although its incidental effect is to increase the amount of tolls exacted for such use. *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896.

A state corporation tax law, in so far as it seeks to tax the earnings derived from interstate commerce, is unconstitutional, and an interference with commerce, which is exclusively within the control of Congress. *Vermont & C. R. Co. v. Vermont C. R. Co.* 63 Vt. 1, 10 L. R. A. 562, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731.

A state law taxing the gross earnings of railroad corporations when a large proportion of these are derived from interstate commerce violates the commerce clause of the Federal Constitution, and is void. *Ibid.*

The court considered that the cases of *Fargo v. Michigan*, 121 U. S. 230, *sub nom. Fargo v. Stevens*, 30 L. ed. 888, 7 Sup. Ct. Rep. 857, and *Philadelphia & S. Mall S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118, holding unconstitutional a state tax upon corporate gross receipts from interstate commerce, being the latest, must be regarded as overruling the earlier decisions to the contrary in the case of *State Tax on Railway Gross Re-*

ceipts, 15 Wall. 284, *sub nom. Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 164, and the *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888. *Ibid.*

The Vermont court declared the facts in the *Philadelphia & Southern Mail Steamship Co. Case* to be quite like those in the case then at bar. It would serve no useful end, it said, to trace the line of reasoning adopted in that case, nor to attempt a reconciliation of that decision with the earlier ones of the same court claimed to be variant from it. We, as judges of a state court, are bound by the very language of the Federal Constitution to accept the construction of any part of it made by the supreme court; and in this case the reasoning of that court seems to us entirely unanswerable. We hold, therefore, that our corporation tax law, so far as it seeks to tax earnings derived from interstate commerce, is unconstitutional, as it interferes with that commerce the regulation of which is within the exclusive control of Congress. *Ibid.*

In the case of *Northern P. R. Co. v. Raymond*, 5 Dak. 356, 1 L. R. A. 732, 2 Inters. Com. Rep. 321, 40 N. W. 538, both sides agreed that a territorial statute imposing a percentage tax upon the gross earnings of a railroad corporation to the extent that these came from the transportation of persons and property across the territorial boundaries, was unconstitutional for conflict with the commerce clause.

A state statute providing that every joint-stock association, company, or corporation of foreign origin, conveying passengers to, from, or through any part of the enacting state, in palace, drawing-room, sleeping, or chair cars on contract with any railroad doing business in such state, shall annually, between stated dates, report on oath to the state auditor the gross amount of its receipts for the previous year both within and without such state, and pay into the state treasury 2 per cent of such a proportion of such gross receipts as the distance traversed within the state bears to the whole distance paid for,—is void for conflict with the commerce clause. *State ex rel. Carr v. Woodruff Sleeping & Parlor Coach Co.* 114 Ind. 155, 1 Inters. Com. Rep. 798, 15 N. E. 814; *Indiana v. Pullman Palace Car Co.* 11 Biss. 561, 16 Fed. 193.

And to the same effect is the case of *Indiana v. American Exp. Co.* 7 Biss. 227, Fed. Cas. No. 7,021.

A law defining any person, persons, joint-stock association, company, or corporation, of foreign origin, conveying to, from, or through the state

Due process of law, of course, requires some kind of notice to the taxpayer, either actual or constructive, of the state's specific public claim against him, in order to render his right to defend his property effective, and as incidental to such right.

It imposes an unnecessary burden upon the taxpayer to require him to examine each day the record of the taxing tribunal, and a slight burden upon the state to require the taxing tribunal to give special notice of the state's claim of increase of valuation.

1 Reeves, *History of English Law*, Finlason's ed. pp. 284-286; Coke, *Inst.* pt. 2, p. 50, pt. 1, p. 31a; 1 Broom & H. *Com.* pp. 163, 164; Cooley, *Const. Lim.* 4th ed. pp. 437, 438; *Bank of Columbia v. Okely*, 4 Wheat. 244, 4 L. ed. 561; *Westervelt v. Gregg*, 12 N. Y. 209, 62 Am. Dec. 160; 5 Webster's Works, p. 487; *Den ex dem. Murray v. Hoboken*

Land & Improv. Co. 18 How. 276, 15 L. ed. 374; *Stuart v. Palmer*, 74 N. Y. 195, 30 Am. Rep. 289; *San Matco County v. Southern P. R. Co.* 8 Sawy. 238, 13 Fed. 722; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Yick Wo v. Hopkins*, 118 U. S. 369-371, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064; *Lent v. Tillson*, 140 U. S. 326-329, 35 L. ed. 424, 425, 11 Sup. Ct. Rep. 825; *Paulsen v. Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 760; *Garvin v. Daussman*, 114 Ind. 429, 16 N. E. 826; *Campbell v. Duiggin*, 83 Ind. 482; *Tyler v. State*, 83 Ind. 565; *Fries v. Brier*, 111 Ind. 66, 11 N. E. 958; *Johnson v. Lewis*, 115 Ind. 492, 18 N. E. 7; *McEnaney v. Sullivan*, 125 Ind. 409, 25 N. E. 540; *Kuntz v. Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474; *Santa Clara*

money, metals, merchandise, etc., by express on contract with railroad or steamboat companies (except ordinary railroads and steamboats), to be an express company; and requiring every such express company to make a statement of all its receipts for business done within the state by each of its agents, and its proportion of gross receipts for such business done in connection with other companies, and to pay taxes thereon,—is a valid statute not repugnant to the commerce clause, for it applies only to internal commerce, and taxes only business begun, continued, and ended within the state. *Pacific Exp. Co. v. Selbert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

A state tax on the gross receipts from business done wholly within the state by a foreign express company is valid. *Southern Exp. Co. v. Hood*, 15 Rich. L. 66, 94 Am. Dec. 141.

The receipts of a foreign telegraph company from messages passing between places in different states are not the subject of taxation in the state where they are received. *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Western U. Teleg. Co. v. Alabama State Bd. of Assessment*, 132 U. S. 473, *sub nom.* *Western U. Teleg. Co. v. Seay*, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161, *Reversing* 80 Ala. 273, 60 Am. Rep. 99; *Western U. Teleg. Co. v. Pennsylvania*, 128 U. S. 39, 32 L. ed. 345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6, *Reversing* 110 Pa. 405, 20 Atl. 720.

These decisions must be regarded as overruling, so far as this point is concerned, *Western U. Teleg. Co. v. Mayer*, 26 Ohio St. 521.

When a state imposes a tax upon the receipts taken within its borders by a foreign telegraph company doing business therein for messages taken therein for transmission, and it is made to appear, or can be established by proof, how much of such receipts were for messages passing between places in different states, and how much thereof were for messages from place to place wholly within the state, the tax is not void *in toto*, but only so far as it affects business not local. *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127. In that case the Supreme Court of the United States declared that, under its decisions, there was really no question but that, in so far as a state tax was laid upon receipts properly appurtenant to interstate commerce, it was void; and, so far as it affected only commerce wholly within the state, it was valid.

60 L. R. A.

X. *Excises.*

a. *Domestic corporations.*

The exercise of the authority which every state possesses to tax corporations and all their property, real and personal, and their franchises, and to graduate the tax upon the corporations according to their business or income or the value of their property, when this is not done by discriminating against rights held in other states, and the tax is not on imports, exports or tonnage or transportation, cannot be regarded as conflicting with any constitutional power of Congress. *Delaware Railroad Tax*, 18 Wall. 206, *sub nom.* *Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888.

The state, said Field, J., in that case, may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation, or its separate corporate property. And the manner in which its value shall be assessed, and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion.

A tax imposed upon the franchise or business of every domestic corporation, joint-stock company, or association according to its capital stock employed within the taxing state, is neither in form nor substance obnoxious to any provision of the Federal Constitution. It interferes in no respect with commerce with foreign nations or among the several states. It is confined to capital employed in the state by an entity existing under its laws, and the manner in which its value shall be assessed and the rate of taxation are matters of legislative discretion. In no aspect does it profess to regulate commerce, nor, in any proper sense, does it have that effect. *People ex rel. Platt v. Wemple*, 117 N. Y. 136, 6 L. R. A. 303, 2 Inters. Com. Rep. 735, 22 N. E. 1046.

A domestic corporation carrying on both interstate and local commerce, subjected in its home state to taxation upon its corporate franchises, the tax being measured by the amount of capital stock employed within the state without distinction, whether employed locally or not, is not exempt from any part of the tax by reason of the commerce clause of the Federal Constitution. *People ex rel. Postal Teleg. Cable Co. v. Campbell*, 70 Hun. 507, 24 N. Y. Supp. 208.

When a tax imposed by a state is laid upon the franchise or business of a corporation, and not upon its property, although it is determined according to the amount of its property and assets employed within the state, the fact that

County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385; *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 189, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 28, 32 L. ed. 585, 586, 9 Sup. Ct. Rep. 207; *Home Ins. Co. v. New York*, 134 U. S. 606, 33 L. ed. 1031, 10 Sup. Ct. Rep. 593; *Cooper v. Wandsworth Dist. Bd. of Works*, 14 C. B. N. S. 181; *Scott v. Toledo*, 1 L. R. A. 688, 30 Fed. 385; *Palmer v. McMahon*, 133 U. S. 669, 33 L. ed. 776, 10 Sup. Ct. Rep. 324; *Spencer v. Merchant*, 125 U. S. 355, 356, 31 L. ed. 767, 768, 8 Sup. Ct. Rep. 921; *Cooley*, Taxn. 2d ed. pp. 363, 364, 51; 1 *Desty*, Taxn. § 114; *Burroughs*, Taxn. § 101; *Kentucky Railroad Tax Cases*, 115 U. S. 321, sub nom. *Cincinnati, N. O. & T. P. R. Co. v. Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep.

57; *Davidson v. New Orleans*, 96 U. S. 104, 24 L. ed. 619; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 711, 28 L. ed. 573, 4 Sup. Ct. Rep. 663; *Hurtado v. California*, 110 U. S. 535, 536, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; *Dent v. West Virginia*, 129 U. S. 123, 124, 32 L. ed. 626, 9 Sup. Ct. Rep. 231; *Williams v. Albany County*, 122 U. S. 163-165, 30 L. ed. 1089, 7 Sup. Ct. Rep. 1244; *State ex rel. Goff v. Dodge County*, 20 Neb. 595, 31 N. W. 117; *State v. Northern Belle Mill & Min. Co.* 12 Nev. 89; *South Platte Land Co. v. Buffalo County*, 7 Neb. 253; *Sioux City & P. R. Co. v. Washington County*, 3 Neb. 30; *Patten v. Green*, 13 Cal. 325; *People v. Reynolds*, 28 Cal. 111; *Los Angeles v. Los Angeles City Waterworks Co.* 49 Cal. 638; *Cleghorn v. Postlewaite*, 43 Ill. 429; *Darling v. Gunn*, 50 Ill. 424; *McConkey v. Smith*, 73 Ill. 313; *First Nat.*

part of such property and assets consists of merchandise imported from foreign countries by such corporation, and held in the original, unbroken packages as imported, and of open accounts arising from the sales of like merchandise in the same condition, will not entitle the corporation to a corresponding abatement of the tax. *People ex rel. Wiebusch & H. Co. v. Roberts*, 19 App. Div. 574, 46 N. Y. Supp. 570, Affirmed in 154 N. Y. 101, 47 N. E. 980.

A tax upon the corporate franchise of a domestic corporation computed according to the amount of capital employed by it within the state, in a case where the subject thereof is a manufacturer, and would, by the terms of the statute, be exempt if wholly engaged in manufacturing within the state, is not rendered invalid by the fact that, besides manufacturing within the state, the only other business the corporation does therein is the importation from foreign countries of goods of the same kind that it manufactures and the sale thereof in the original, unbroken, imported packages in connection with the sale of its own manufactures. *People ex rel. William J. Matheson & Co. v. Roberts*, 158 N. Y. 162, 52 N. E. 1102.

A domestic corporation organized under a general railroad act is liable, first, to a state tax upon its corporate franchise or business at a rate fixed by a percentage of its gross earnings for transportation business transacted within the state; and, second, for the privilege of exercising its corporate franchise, or carrying on its business in an organized or corporate capacity, to an annual excise tax or license fee equal to a percentage of its gross earnings from transportation or transmission business originating and terminating within the state, and not including earnings from interstate business, when its entire business consists of loading, unloading, and storing grain and freight going to or coming from places in other states, at an elevator and warehouse with appurtenant railroad tracks that it owns in a harbor of its own state, where it has no boats or railroad rolling stock of its own. *People ex rel. Connecting Terminal R. Co. v. Miller*, 82 N. Y. Supp. 582.

The subjecting of a domestic manufacturing company to a franchise or license tax because it does business without the state, when manufacturing companies that carry on their business within the state are exempted therefrom, is not a discrimination against those engaged in interstate commerce. *State v. Underground Cable Co.* (N. J. Eq.) 18 Atl. 581.

Because a corporation is engaged in making electric cables, and performs its functions in another state, it cannot be said, *ipso facto*, to 60 L. R. A.

be engaged in interstate commerce and for that reason not subject to a license tax on its franchise in the state where it was incorporated. *Standard Underground Cable Co. v. Atty. Gen.* 46 N. J. Eq. 270, 19 Atl. 733.

A state may constitutionally tax its own corporations upon their franchise, right, or privilege to be a corporation aggregate, and to do business as such, irrespective of the character of the investments or businesses. Hence, a tax upon the franchise of a domestic corporation empowered to do an interstate and foreign commercial business, even if actually exclusively engaged therein, is not violative of the commerce clause in the Federal Constitution. It is, of course, otherwise as to a tax upon the business itself, or on the privilege of doing it, instead of upon the right or privilege of corporate existence. *Honduras Commercial Co. v. State Board*, 54 N. J. L. 278, 23 Atl. 668.

A corporation is none the less a domestic one, and embraced by a statute imposing a franchise tax upon the right of such to corporate existence, because it also has been incorporated in an adjoining state, and, being a bridge company between two states, cannot lawfully exist and do business without both charters. Nor is it exempt from such a tax because wholly engaged in interstate commerce, or because the river it bridges has been by compact between the states it separates declared a public highway free to all. *Lumberville Delaware Bridge Co. v. State Board*, 55 N. J. L. 529, sub nom. *State, Lumberville Delaware Bridge Co., Prosecutors v. State Board*, 25 L. R. A. 134, 26 Atl. 711.

The right of a state to levy and collect taxes upon the value of the corporate franchise it has granted, in the same way and at the same rate that it taxes other franchises and property, is not at all affected by the circumstance that the corporation is solely one owning and maintaining an interstate bridge across a navigable river flowing between its own and an adjoining state, over which passes interstate commerce from which the corporation so taxed collects tolls. *Henderson Bridge Co. v. Com.* 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, Affirmed in 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532, Followed in *Henderson Bridge Co. v. Negley*, 23 Ky. L. Rep. 746, 68 S. W. 989.

And a tax upon the franchise of a domestic corporation owning and operating a ferry between its home state and another, and so engaged exclusively in interstate commerce, is not violative of the commerce clause of the Constitution of the United States. *Louisville & J.*

Bank v. Cook, 77 Ill. 622; *People v. Ward*, 105 Ill. 620; *Phillips v. Stevens' Point*, 25 Wis. 594; *Matheson v. Mzomanie*, 20 Wis. 191; *Griswold v. Union School Dist.* 24 Mich. 262; *People ex rel. Butler v. Saginaw County*, 26 Mich. 22; *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Whiteford Twp. v. Phinney*, 53 Mich. 130, 18 N. W. 593; *Phillips v. New Buffalo Twp.* 64 Mich. 683, 31 N. W. 581; *Leavenworth County v. Lang*, 8 Kan. 284; *Kansas P. R. Co. v. Russell*, 8 Kan. 558; *Griffith v. Watson*, 19 Kan. 23; *Relfe v. Columbia L. Ins. Co.* 11 Mo. App. 374; *Pulaski County Bd. of Equalization Cases*, 49 Ark. 518, 6 S. W. 1; *Brown v. Denver*, 7 Colo. 305, 3 Pac. 455; *Griffin v. Mixon*, 38 Miss. 424; *State, Clark, Prosecutor, v. Mulford*, 43 N. J. L. 550; *State, Mutual Ben. L. Ins. Co., Prosecutor, v. Utter*, 33 N. J. L. 183; *Philadelphia v. Miller*,

49 Pa. 440; *Ulman v. Baltimore*, 72 Md. 587, 11 L. R. A. 224, 228, 20 Atl. 141, 21 Atl. 709.

Acts of 1893, chap. 171, denies to complainant the equal protection of the laws because it requires appellant, unlike the great mass of Indiana taxpayers: (1) To deliver to the state of Indiana a part of its property wholly outside the jurisdiction of the state of Indiana; (2) to pay to the state of Indiana a tribute on account of its present, and expected, future, successful business management; and (3) to pay to the state of Indiana an indefinite amount in addition to the above amounts, dependent on special conditions of business having no direct relation to appellant.

The states in which the property is of maximum value per mile will not give up a part of the value which they might right-

Ferry Co. v. Com. 22 Ky. L. Rep. 446, 57 S. W. 624.

Although the decision in this case was reversed in the Supreme Court of the United States (188 U. S. 385, 47 L. ed. —, 23 Sup. Ct. Rep. 403), this proposition is unaffected. The reversal went upon the ground that a state, in subjecting a corporation of its own creation to a franchise tax computed by capitalizing the net earnings and deducting the value of the tangible property, was bound, also, to exclude the value of franchises granted by another state which it held and owned, and that were necessary to its operations. And, because this had not been done, the judgment was not allowed to stand.

In *Memphis & L. R. R. Co. v. Nolan*, 14 Fed. 532, the court refused an injunction to restrain the collection of a state tax laid upon a railroad corporation with a terminal at Memphis, Tennessee, and engaged wholly in interstate commerce, imposed as a license or privilege tax for the doing of an express business. The report does not show whether the railroad company was a domestic or a foreign one. If it was a domestic corporation the state which created it doubtless had the right to lay such a tax upon it; if not the tax was almost certainly illegal.

A limited partnership enjoying privileges essentially like franchises of corporations, and engaged in mining coal and shipping it to points outside of the state, is liable to a state tax on each ton mined in the state where it is organized, and such a tax is not a burden on interstate commerce, but really on privileges exercised wholly within the taxing state. *Com. v. Sandy Lick Gas, Coal, & Coke Co.* 1 Dauphin Co. Rep. 314.

A statute, however, which imposes a specific tax upon mining, smelting, and ore-refining companies, discriminating between minerals mined and reduced within the enacting state and those removed therefrom before smelting, whereby all the former are free from taxation and all the latter are taxed a cent and a half per ton, is a direct burden upon interstate commerce, and therefore unconstitutional and void. *Jackson Min. Co. v. Auditor Gen.* 32 Mich. 488.

A state may impose upon insurance corporations chartered by itself a tax upon their entire business as evidenced by their premium receipts from all sources, both within and without the state, without thereby coming in conflict with the Constitution of the United States. *Insurance Co. of N. A. v. Com.* 87 Pa. 173, 30 Am. Rep. 352.

That the premiums have been received for in-
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suring imported goods that remain in bonded warehouses in the original packages makes no difference. *People v. National F. Ins. Co.* 27 Hun, 188.

b. Consolidated corporations and corporations holding franchises from different governments.

The exaction by a state of any sum it chooses to name, or computes by any method it chooses to employ, as a condition upon which, alone, it will permit the consolidation of railroads incorporated in other states with one of its own, and permit the consolidated corporation to acquire, in its territory, the rights and privileges of its own corporation, is not in any sense a burden or restriction upon interstate commerce, whether the exaction is called a fee, a tax, or a license. The question is not one of the power of a state to lay a charge upon interstate commerce, nor yet of its right to prevent a corporation engaged therein from carrying it on within its confines, but simply its right to fix conditions upon which its law respecting the consolidation of corporations may be availed of. *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865.

A license fee exacted by a state from its own corporation (the operator of a ferry between it and an adjoining state), of a specific sum for each boat it owns not graduated by the tonnage, is constitutional. The fact that the boats are enrolled and licensed under the national laws does not render the corporation immune. Such an exaction is no tonnage charge, no duty or impost, nor any burden upon commerce. *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257.

A bridge company is lawfully subjected by the state which chartered it to taxation upon its capital stock, notwithstanding its bridge crosses a navigable river to another state, and it has been chartered, also, by such state, and received, as well, the consent of Congress to build and maintain its structure. *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 615.

The taxation by a state which granted the charter of one of the constituents of a consolidated corporation and gave it permission to consolidate, of the capital stock of the consolidated company, when such company exclusively owns and operates a bridge across a navigable river between two states over which interstate commerce passes upon payment of tolls, is not a burden upon such commerce. *Keokuk & H. Bridge Co. v. Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205.

fully assess for the benefit of their neighbors. On the contrary, if the corporation is chartered in one state, as is the appellant in this case (by the state of New York), that state may assess it upon the whole value of the capital stock.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 33, 35 L. ed. 613, 620, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

The market value of stocks is not a true measure of value of the property of any corporation.

Acts of 1893, chap. 171, denies to the appellant, as an incorporated owner of telegraph property in Indiana, the equal protection of the laws, because:

1. It establishes a compulsory rule of valuation which is not applied to other taxpayers, and which is unjust as necessarily imposing an exorbitant valuation on the

portion of appellant's telegraph plant situated in Indiana, a state in which appellant's plant is of minimum average value per mile, without the possibility of the appellant obtaining a corresponding deduction in other states and countries, where it owns connected property of greater average value per mile.

2. It establishes a compulsory rule of valuation which is not applied to other taxpayers, and which requires the state board to impose an exorbitant valuation on the appellant's telegraph plant in Indiana, by a process whereby it practically imports temporarily into Indiana many elements of value attaching actually, or in the belief of buyers and sellers of appellant's shares, wholly to the business of appellant, and having no relation to the value of its property; and whereby it practically imports tempo-

A general act relating to the imposition and collection of taxes, which, after enumerating certain corporations, embraces all others created pursuant to the laws of the enacting state, and requires each of them to pay yearly a license fee or tax of a specified per cent on the amount of its capital stock, is one taxing the franchise right of corporate existence; and, therefore, when it is applied to, and enforced against, a domestic corporation owning and operating a bridge across a navigable river flowing between the home state and another, which, also, has granted it a charter, and whose business is wholly interstate commerce, there is no violation of the commerce clause of the Federal Constitution. *Lumberville Delaware Bridge Co. v. State Board*, 55 N. J. L. 529, *sub nom. State, Lumberville Delaware Bridge Co., Prosecutors v. State Board*, 25 L. R. A. 134, 26 Atl. 711. Garrison, J., writing for the court in that case, carefully reviews and classifies the decisions of the Supreme Court of the United States annulling and sustaining state tax laws more or less affecting interstate commerce. And he lucidly states the distinction between a tax upon the right of corporate existence,—to do business at all in an organized corporate capacity,—and a tax upon the business actually done, or upon the privilege of doing a particular kind of business.

A state which charters a corporation to build a bridge across a navigable river which parts it from an adjoining state may properly include the franchise it has granted, in generally valuing the property of such corporation for the purposes of taxation. It may do this notwithstanding the other state has granted similar franchises to such corporation, and the corporation itself has conformed to the requirements of an act of Congress in respect of bridges across such river, and notwithstanding, too, the bridge is both a post route and a conduit for interstate commerce, and its maintenance the sole business of such corporation. *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532. The proposition is unaffected by the argument of the dissenting members of the court. They dissented because they thought the statute *sub judice* laid a burden upon interstate commerce by taxing the earnings of the bridge, and that the assessment under it necessarily included franchises granted by another state and the general government.

In *Louisville & J. Ferry Co. v. Kentucky*, 188 U. S. 385, 47 L. ed. —, 23 Sup. Ct. Rep. 463, Reversing 22 Ky. L. Rep. 446, 57 S. W. 624, the Supreme Court of the United States, having

held the tax in dispute invalid because foreign franchisees which the state had no jurisdiction to tax were included as elements of value in the assessment, declined to consider a question presented by the record and discussed by counsel, whether the taxation by the home state of the domestic corporation's franchise from the adjoining foreign state to transport by ferry persons and property from such other state to the home state was not, by necessary effect, a burden on interstate commerce forbidden by the Federal Constitution.

Under a statute for the payment of a state tax by every corporation formed for transportation purposes and doing business within the taxing state, as a tax upon its corporate franchise or business, of a fraction of per cent upon its gross earnings in such state for tolls, transportation, telephone, telegraph, or express business transacted in such state, the computation of the earnings of a domestic railroad corporation forming part of a consolidated company operating an interstate and foreign line may include, not only receipts from business begun, continued, and ended within the taxing state, but, as well, such part of the receipts as may be apportioned to it for business done within the state whether beginning or ending outside of it. There is no conflict in such case with the commerce clause of the Federal Constitution. *People ex rel. Dunkirk, A. Valley & P. R. Co. v. Campbell*, 74 Hun, 210, 26 N. Y. Supp. 832.

c. Foreign corporations.

1. Exclusion and conditional admission.

There is certainly one exception to the general rule that a state may, with or without reason, absolutely exclude from its territory any foreign corporation, or, admitting it, attach to its permission to come in any conditions it chooses. That exception is in favor of a foreign corporation which is an agency of the Federal government. If, said Mr. Justice Bradley in *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 9, 14, Congress should employ a corporation of shipbuilders to construct a man-of-war, it would have the right to purchase the necessary timber and iron in any state of the Union; and to this statement Mr. Justice Field in *Pembina Consol. Siliv. Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737, added, "without the permission, and against the prohibition, of the state."

There is, doubtless, one other exception.

rarily into Indiana all the property, rights, and franchises of appellant, regardless of the part of the world in which they may be situated, or under what exclusive jurisdiction they fall.

3. It establishes a compulsory rule of valuation which is not applied to other taxpayers, and which classifies the appellant on account of the character of its personality.

Santa Clara County v. Southern P. R. Co. 118 U. S. 394, 396, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Pembina Consol. Silver Mill. & Min. Co. v. Pennsylvania*, 125 U. S. 181, 189, 31 L. ed. 650, 653, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 28, 32 L. ed. 585, 586, 9 Sup. Ct. Rep. 207; *Home Ins. Co. v. New York*, 134 U. S. 606, 33 L. ed. 1031, 10 Sup. Ct. Rep. 593; *California v. Central P. R. Co.* 127 U. S. 1, 32 L. ed.

150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *San Francisco v. Central P. R. Co.* 63 Cal. 467; *Chicago & N. W. R. Co. v. Whiston*, 13 Wall. 283, 284, 20 L. ed. 575, 576; *Ohio & M. R. Co. v. Wheeler*, 1 Black, 297, 17 L. ed. 133; *Muller v. Dows*, 94 U. S. 447, 448, 24 L. ed. 208, 209; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.* 118 U. S. 295, 296, 30 L. ed. 87, 6 Sup. Ct. Rep. 1094; *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 375-381, 34 L. ed. 368-370, 10 Sup. Ct. Rep. 1004; *Racine & M. R. Co. v. Farmers' Loan & T. Co.* 49 Ill. 331, 95 Am. Dec. 595; *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 615; *Chicago & N. W. R. Co. v. Auditor General*, 53 Mich. 79, 18 N. W. 586.

Acts of 1893, chap. 171, is in violation of

Probably a foreign corporation which has complied with all the terms and conditions of the act of Congress of July 24, 1866, to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes, has an absolute right to enter any state and acquire therein necessary facilities for transacting the business of interstate and international telegraphy, and to carry on such business. *Pensacola Tele. Co. v. Western U. Tele. Co.* 96 U. S. 1, 12, 24 L. ed. 708, 711.

One of the qualifications upon the power of a state with respect of admitting foreign corporations, that was established by this decision, said Mr. Justice Field, afterwards, is that it cannot exclude from its limits a corporation engaged in interstate or foreign commerce. *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

But the decision did not go quite to this extent. It decided no more than that a state was powerless to exclude a foreign telegraph corporation engaged in foreign, interstate, and national business, which had complied with the act of Congress just referred to, from occupying national post roads within its boundaries.

Yet there are to be found in the decisions many expressions of opinion which appear to warrant the statement that a state has no power to keep out of its territory a foreign corporation whose business is exclusively foreign or interstate commerce, or both.

The only limitation, said Mr. Justice Field, on another occasion, upon the power of a state to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing it to do business or hire offices there, arises where the corporation is in the employ of the Federal government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal government, is not to be restricted. *Pembina Consol. Silv. Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 190, 31 L. ed. 650, 654, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737.

The question is squarely presented, it was said in another case, whether a state, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company a large part of whose business is the transmission of messages from one state to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress of July 24, 1866, and other acts in 60 L. R. A.

title 65, Rev. Stat. Can a state prohibit such a company from doing such a business within its jurisdiction unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business, altogether. We are not prepared to say that this can be done. *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 811, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

The exceptions to the rule that a corporation may not do business in a state which did not create it, save by its consent, which it is free to withhold without reason, embrace only cases where a foreign corporation rests its right to enter upon the Federal nature of its business, as where it has derived its being from an act of Congress, and is an agency of the government performing governmental, or quasi governmental, functions, or is an instrument of, or engaged in, interstate or foreign commerce. *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

The law is thoroughly settled that a state may exclude from its limits foreign corporations seeking to do business therein, and may impose whatever limitations and restrictions it may choose as conditions upon their right to come into the state and do business with its citizens. But the rule does not apply to foreign corporations engaged in interstate commerce. *State v. Canda Cattle Car Co.* 85 Minn. 457, 89 N. W. 66.

In a recent case in the New York court of appeals, O'Brien, J., points to the qualification of the doctrine that a state cannot exclude a foreign corporation engaged in external commerce. Making use of the language of Field, J., in *Pembina Consol. Silv. Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 190, 31 L. ed. 650, 654, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 737, above stated, he adds: If the contention of the learned counsel for the relator should prevail, then any manufacturing corporation of another state or foreign country could come here and establish an office or agency, and transact a part, or even the whole, of its business here, and escape taxation entirely on the ground that it was engaged in selling some part of its product in other states or in foreign countries, and therefore was engaged in interstate or foreign commerce within the meaning of the Federal Constitution. *People ex rel. Southern Cotton Oil Co. v. Wemple*, 181 N. Y. 64, 70, 29 N. E. 1002.

A state tax on the capital of a foreign corporation engaged in interstate commerce and nothing else, and necessarily requiring a wharf

art. 10, § 1, of the Constitution of Indiana, which reads as follows: "The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation of all property, both real and personal, excepting such, only, for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specially exempted by law."

Exchange Bank v. Hines, 3 Ohio St. 1; *Fields v. Highland County*, 36 Ohio St. 481; *Fayette County Treasurer v. People's & Drovers' Bank*, 47 Ohio St. 519, 10 L. R. A. 196, 25 N. E. 697; *Gilman v. Sheboygan*, 2 Black, 515, 17 L. ed. 308; *Knowlton v. Rock County*, 9 Wis. 410; *Weeks v. Milwaukee*, 10 Wis. 258; *Lumsden v. Cross*, 10 Wis. 284; *State ex rel. Atty. Gen. v. Winnebago Lake & F. River Pl. Road Co.* 11

to receive and discharge passengers and freight, cannot be justified upon the ground that it can lease such wharf only by the consent of the state in which it is located, and, therefore, is subject to taxation by such state, viz.: as a condition imposed by the state for the privilege of doing business therein. Such a tax (the amount being discretionary with the state legislature) would be inconsistent with and subversive of the power vested in Congress over such commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

But a state statute requiring every foreign corporation (except an insurance company) which does not invest and use its capital within the state to obtain a license and pay annually to the state $\frac{1}{4}$ of a mill on each dollar of its authorized capital stock before it is permitted to have an office in the state for the use of its officers, stockholders, agents, or employees, does not conflict with the commerce clause of the Federal Constitution. *Pembina Consol. Silv. Mtn. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24, 8 Sup. Ct. Rep. 787.

In following this decision, and sustaining a tax assessed in virtue of the same statute, the Pennsylvania supreme court held that a railroad corporation chartered by other states, whose main line and branches were wholly outside of Pennsylvania, but connected at various points with other lines that entered and departed from that state, and which had with such lines traffic agreements that made it a link in a chain of railroads carrying through freight and passengers, was liable to pay license fees required by the laws of Pennsylvania from all foreign corporations doing business in that state, because it maintained an office and made some purchases of supplies for its own use in that state. *Norfolk & W. R. Co. v. Com.* 114 Pa. 256, 6 Atl. 45.

But this decision was reversed by the Supreme Court of the United States because the tax in this case was considered to be in conflict with the commerce clause. *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958.

It is well settled by numerous decisions of this court, said Lamar, J., speaking for the court in this case, that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits. *Ibid.*

And this statement is quoted with approval by Bradley, J., for the court, in *Crutcher v. 60 L. R. A.*

Wis. 35; Cummings v. Merchants' Nat. Bank, 101 U. S. 158, 25 L. ed. 905; *McComb v. Bell*, 2 Minn. 205, Gil. 256; *Houell v. Bristol*, 8 Bush, 493; *Cincinnati Southern R. Co. v. Guenther*, 19 Fed. 395; *Central R. Co. v. State Board*, 49 N. J. L. 1, 7 Atl. 306; *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705; *Bright v. McCullough*, 27 Ind. 230.

Acts of 1892, chap. 171, is void as an attempt to usurp the exclusive power of the Congress to regulate commerce with foreign nations and among the several states granted by art. 1, § 8, of the Constitution of the United States.

State Tax on Foreign-held Bonds, 15 Wall. 319, sub nom. *Cleveland, P. & A. R. Co. v. Pennsylvania*, 21 L. ed. 187; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 424, 32 L. ed. 232, 2 Inters. Com. Rep. 59, 8 Sup. Ct.

Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

Yet the court afterwards decided that a state could lawfully require of a foreign railroad corporation engaged in interstate and foreign commerce an excise tax for the privilege of exercising its corporate franchises within such state. *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163.

But later still it was conceded that, although a state might lawfully tax local commerce, yet it could not tax or burden interstate commerce. Neither could it require the taking out of a license as a condition precedent to carrying on foreign or interstate commerce. *Osborne v. State*, 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 731, 14 So. 588, Affirmed in 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214.

A foreign corporation whose manufacturing operations are carried on in other states, and which maintains an office or sales agency, a storage warehouse, keeps a bank account, refines its crude products, sells and delivers to some extent its refined products, and employs a part of its capital within a state where it did not originate, having a statute for the taxation of foreign corporations doing business therein upon their franchise or business, is subject to taxation in virtue of such statute, notwithstanding it sells its products, purchases its materials, and does its first manufacturing in other states of the Union, or in foreign countries, and is thus engaged in interstate and foreign commerce, and invokes the protection of the commerce clause of the Constitution of the United States. *People ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N. Y. 64, 29 N. E. 1002.

The court grounded this decision upon the well-settled principles: (1) That a state has power to exclude foreign corporations from doing business within its jurisdiction; (2) that, if it permits them to come in and transact business, it may tax them for the privilege accorded; (3) that a lawful exercise of the power of taxing corporations for the time being within the jurisdiction of the state is not a regulation of commerce. All of which is indisputable; but the question presses, whether there is not the important proviso that the business is not exclusively interstate or foreign commerce. *Ibid.*

We are not called upon to determine, in this case, said the same court soon afterwards, whether the state, under the general rule that it may exclude foreign corporations from coming here, and that it is by comity, alone, that such corporations are permitted to exercise cor-

Rep. 1127; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Leloup v. Port of Mobile*, 127 U. S. 648, 32 L. ed. 314, 8 Sup. Ct. Rep. 1380; *Philadelphia & N. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 336, 30 L. ed. 1201, 7 Sup. Ct. Rep. 1118; *Western U. Teleg. Co. v. Alabama State Bd. of Assessment*, 132 U. S. 473, sub nom. *Western U. Teleg. Co. v. Seay*, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161; *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *Pacific Exp. Co. v. Seibert*, 142 U. S. 349, 35 L. ed. 1038, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *California v. Central P. R.*

Co. 127 U. S. 2, 41, 45, 32 L. ed. 150, 157, 159, 2 Inters. Com. Rep. 163, 8 Sup. Ct. Rep. 1073; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 464, 26 L. ed. 1067, 1068; *Chy Lung v. Freeman*, 92 U. S. 275, 280, 281, 23 L. ed. 550, 552; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Fargo v. Michigan*, 121 U. S. 230, sub nom. *Fargo v. Stevens*, 30 L. ed. 888, 9 Sup. Ct. Rep. 557; *Lyng v. Michigan*, 135 U. S. 166, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 200, 201, 36 L. ed. 158, 160, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Indiana v. Pullman Palace Car Co.* 11 Biss. 561, 16 Fed. 193; *Vermont & C. R. Co. v. Vermont C. R. Co.* 63 Vt. 1, 10 L. R. A. 562, 3 Inters. Com. Rep. 488, 21 Atl. 262, 731; *Chicago & N. W. R. Co. v. Auditor*

porate franchises outside of the jurisdiction of origin, could lawfully exclude a foreign corporation engaged in interstate commerce from landing its freight and passengers on our shores or at the wharves in the city of New York, or from there receiving freight or passengers. It is sufficient for this case to say that the state has not attempted to exclude the relator from doing business in this state, or withdrawn the comity under which it has been permitted to carry on its business here and acquire real and personal estate for the transaction of its business. *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720.

While it is firmly established that a state has power to prescribe the terms upon which a foreign corporation may do business within its territory unless the corporation is engaged in interstate commerce, and may even levy a tax upon its receipts if not so engaged, in matters of commerce between the states the power of the Federal government is exclusive and supreme, and a state law taxing the gross receipts of a foreign corporation derived from interstate commerce in part conducted within the taxing state is unconstitutional and void. *State ex rel. Carr v. Woodruff Sleeping & Parlor Coach Co.* 114 Ind. 155, 1 Inters. Com. Rep. 798, 15 N. E. 814.

A foreign corporation which merely sells through itinerant salesmen soliciting orders within the state, its product manufactured outside of the state, and delivers to customers secured on orders previously taken, is not subject to a state franchise tax imposed generally upon foreign corporations for the privilege of doing business in such state, nor to the penalties imposed for omitting to procure such a license, because such business is interstate commerce and beyond the power of state regulation. *Coit & Co. v. Sutton*, 102 Mich. 324, 25 L. R. A. 819, 4 Inters. Com. Rep. 768, 60 N. W. 690.

But, although no license is required to enable a foreign corporation to have transactions of this character, and it cannot be penalized for engaging in them without such license, because they constitute interstate commerce, yet, if a foreign corporation which does nothing else, and purposes doing nothing else, in the state, voluntarily takes out and pays for a license to do business in such state, mistakenly believing it is obliged so to do, it cannot recover back the payment. *Moline Plow Co. v. Wilkinson*, 105 Mich. 57, 62 N. W. 1119.

A state statute forbidding commercial fertilizers to be sold or offered for sale until the 60 L. R. A.

manufacturer or importer procures a license from the state treasurer, and for it pays annually a privilege tax of \$500 for each separate brand, although it in terms imposes a tax upon the selling privilege, in effect taxes the fertilizers themselves, and, therefore, as respects fertilizers brought from other states for sale, is void for repugnancy to the commerce clause of the Federal Constitution. *American Fertilizing Co. v. North Carolina Bd. of Agri.* 11 L. R. A. 179, 3 Inters. Com. Rep. 532, 43 Fed. 609.

But inspection laws of this character, passed in good faith in the exercise of the police power to protect agricultural interests against spurious and low-grade fertilizers, and which exact fees covering the actual cost of inspection, may operate on fertilizers brought in from other states. *State ex rel. Goodwin v. Caraleigh Phosphate & Fertilizer Works*, 119 N. C. 120, 25 S. E. 795; *Patapasco Guano Co. v. North Carolina Bd. of Agri.* 171 U. S. 845, 43 L. ed. 191, 18 Sup. Ct. Rep. 862.

The many cases which have decided controversies between private parties in actions to recover the purchase price of merchandise sold in the course of interstate commerce by foreign corporations without permission or license to do business within the purchaser's state, and the analogous cases not involving taxation, lie wholly without the scope of this note.

2. Business and the privilege of doing business.

It is not an easy matter to say how far a state may tax the business of a foreign corporation, or the corporation itself, for the privilege of doing business within its boundaries, when that corporation is more or less engaged in foreign or interstate commerce. The local business and the privilege of doing a local business, may certainly be taxed. The privilege of doing a business which is exclusively external commerce most certainly cannot be taxed. It is not safe to assert positively aught further.

A telegraph company, although it is engaged in interstate and foreign business, and has accepted the restrictions and obligations imposed by the act of Congress of July 24, 1866, may be taxed by a state in a proper way on account of its occupation and its business. *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067.

The privilege of keeping a ferry, with the right to take tolls for passengers and freight, is a franchise grantable by the state, to be exercised within such limits and under such regulations as may be required for the safety, com-

General, 53 Mich. 79, 18 N. W. 586; *North-ern P. R. Co. v. Raymond*, 5 Dak. 356, 1 L. R. A. 732, 2 Inters. Com. Rep. 321, 40 N. W. 538.

Messrs. Willard Brown, S. O. Pick-ems, and Charles W. Wells also for ap-pellant.

Messrs. A. G. Smith, W. A. Ketcham, J. W. Kern, A. J. Beveridge, L. O. Bailey, M. Moores, S. Claypool, and J. W. Claypool for appellees.

Howard, J., delivered the opinion of the court:

This was a suit for injunction, begun in the Marion circuit court against the auditors and treasurers of each of the counties of the state in which the lines of the appel-lant telegraph company are situated, to re-strain the county auditors from apportion-

fort, and convenience of the public. Still, the fact remains that a ferry from one state to another is a necessary means of commercial intercourse between the states, and must be conducted without the imposition by the states of taxes or other burdens on commerce between them. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

Speaking, afterwards, of this decision, **Brad-ley, J.**, in *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1118, said: It is hardly necessary to add that the tax on the capital stock of the New Jersey com-pany in that case was unconstitutional because, as the corporation was a foreign one, the tax could only be construed as a tax for the priv-ilege or franchise of carrying on its business, and that business was interstate commerce.

A privilege tax upon the right to run sleep-ing cars to bring passengers into, transport them through, or carry them out of, the taxing state is void. *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Tennessee v. Pullman Southern Car Co.* 117 U. S. 51, 29 L. ed. 791, 6 Sup. Ct. Rep. 643.

In this case, said **Blatchford, J.**, expressing the views of the court, the payment of the tax imposed was a condition prescribed, without complying with which what was done by the plaintiff was made illegal. The tax was imposed as a condition precedent to the right of the plaintiff to run and use the 36 sleeping cars owned by it as it ran and used them on railroads in Tennessee. The privilege tax is held by the supreme court of Tennessee to be a license tax for the privilege of doing the thing for which the tax is imposed, it being unlawful to do the thing without paying the tax. What was done by the plaintiff in this case in con-nection with the use of the 36 cars, if wholly a branch of interstate commerce, was made by the state of Tennessee unlawful unless the tax should be paid, and, to the extent of the tax, a burden was placed on such commerce; and, upon principle, the tax, if lawful, might equally well have been large enough practically to stop altogether the particular species of commerce. *Ibid.*

A railroad corporation organized under the laws of two states in which its entire line and branches lie, although by traffic agreements and connections with other lines that enter a third state it carries freight and passengers coming from and going to such other state, cannot, in the latter state, be subjected to a license tax for the privilege of maintaining, for the pur-

ing to the several townships of such coun-ties, and entering upon the tax duplicates, the amounts claimed as taxes against said appellant company for the year 1893, based upon the valuations certified to such county auditors by the state board of tax commis-sioners under provisions of an act of the general assembly of the state of Indiana ap-proved March 6, 1893 (Act 1893, p. 374; Rev. Stat. 1894, § 8478, and following), and from delivering the tax duplicates contain-ing such entries to the county treasurers. The grounds upon which the injunction was asked were that the act in question was not passed in accordance with the provisions of the Constitution of the state of Indiana; and, if duly enacted, that it is in violation of said Constitution and of the Constitution of the United States. To the complaint for injunction a demurrer was sustained, and

poses of its business merely, an office therein, when it owns no property and has no invested capital in such state, because the sole business of such office as it maintains is interstate com-merce. *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958.

A state law providing that every corporation, joint-stock company, or association, domestic and foreign alike, that does business in the state, to a tax upon its corporate franchise or busi-ness, computed at a certain percentage of its capital stock either at par value or actual value according as dividends of a stated per cent have or have not been paid thereon during the cur-rent year, is not, when applied to a foreign mining company which brings into such state bars of silver from other states and there makes them into standard bars, and does nothing else in such state except its financial business and correspondence, repugnant to the commerce clause of the Federal Constitution. *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. ed. 164, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

A state law providing that every corporation, person, or association operating a railroad shall pay to the state annually an excise tax for the privilege of exercising its franchises therein, the amount thereof being ascertained by divid-ing the gross transportation receipts of the previous year by the number of miles of rail-road operated, to get the average of such re-cceipts per mile, and then taking a larger or smaller percentage thereof according as they are less or more than certain stated sums, and, in case of railroads partly within and partly without the state, proportioning the mileage operated and the gross receipts within the state to both totals and averages,—is valid as against a foreign railroad corporation operating an in-terstate and international railroad, and engaged in external commerce, both foreign and between states. *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163. Four members of the court, **Bradley, Harlan, Lamar, and Brown, JJ.**, dissented in this case. They held that, although a state might have power to exact from a for-eign railroad corporation a tax for the priv-ilege of exercising its corporate franchises with-in the state limits, yet, an unconstitutional mode of doing this could not be adopted. They asserted that the mode adopted in the case at bar was to lay a tax upon gross receipts, and, inasmuch as the major part of these was de-rived from international and interstate com-

this ruling of the court is the only error assigned on the appeal.

The first proposition argued by the able counsel for appellant is that the act in question, and under the provisions of which the assessment of taxes was made, never became a law of the state of Indiana; for the reason that, as shown by the journals of the senate and house of representatives, the bill was passed by the legislature, and sent to the governor, within the two days next preceding the final adjournment of the general assembly, in violation of article 5, § 14, of the state Constitution. A demurrer admits facts well pleaded, but does not admit all the conclusions which may be drawn from such facts by the pleader. Because it is alleged in the complaint that the bill was passed and sent to the governor on March 6, 1893 (the last day of the session), it is

not, therefore, admitted by the demurrer that the statute was enacted in violation of the Constitution. The exact point here made was made and decided against the contention of appellant in the case of *Bender v. State*, 53 Ind. 254. It was there contended, as it is here, that the courts have the power to go behind the statute, and inquire whether or not the act was passed according to the Constitution; and numerous authorities, as here, were cited in support of the contention. The court in that case, however, deemed it unnecessary to review the decision cited, or to consider the arguments advanced, for the reason that the question had been fully considered and finally decided in the case of *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710, saying, expressly: "We regard the question as settled, and will not open it." In *Evans v.*

merce, the tax was laid upon such commerce, and, therefore, was unconstitutional and void.

A municipal ordinance requiring a license to be obtained by every person, firm, company, or corporation engaged in any trade, business, or profession within the city, and charging telegraph companies or agencies each for business done exclusively within the city, and not including any business done for the national government or between places of which one is outside the state, a license fee of \$500, is not, when enforced against a foreign telegraph company engaged in interstate and foreign business, void for conflict with the commerce clause. *Postal Teleg. Cable Co. v. Charleston*, 153 U. S. 692, 39 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094.

The questions here under consideration were involved and thoroughly discussed in an action brought by the revenue agent of the state of Mississippi to recover of a foreign telegraph corporation operating in that state a privilege tax imposed, by a state law, on each telegraph company operating 1,000 or more miles, \$3,000 in lieu of all other taxes, state or local, and on each such company operating a less mileage \$1 a mile. In the state court, Woods, J., in delivering the opinion sustaining the tax, naively writes: The record presents a Federal question, and we acknowledge ourselves bound to follow the decisions of the court of last resort of the United States, if that court shall be found to have adjudicated it. Our difficulty arises from our inability to say with confidence what the Supreme Court of the United States has finally determined in cases of like character. The reported decisions of that court are so irreconcilable in their variances and seeming conflicts, in our view, that it is with diffidence that the impartial student can affirm what will or will not follow in any given state of case. If the line of decisions adopted in *Pennacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co. v. Texas*, 105 U. S. 460, 26 L. ed. 1067; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34, 6 Sup. Ct. Rep. 635; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Leloup v. Port of Mobile*, 127 U. S. 640, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; and *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. Rep. 851,—stood alone, the settlement of the controversy in the case at bar would be made without great difficulty in accordance with the contention of the appellant. If we had for our guid-

ance only the other line of decisions, embracing *State Tax on Railway Gross Receipts*, 15 Wall. 284, *sub nom.* *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 164; *Ostborne v. Mobile*, 16 Wall. 479, 21 L. ed. 470; *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *St. Louis v. Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485,—the right of the revenue agent of the state to maintain this suit successfully would seem to be well established in accordance with the views of the counsel for the appellee. The learned judge thereupon proceeds to reason out a conclusion, as follows: This is the case of a foreign corporation admitted to the use and enjoyment of its corporate franchises in our state upon the terms of perfect equality with all others. It is freely permitted to engage in the vast and varied employments connected with its business; it has the use and enjoyment of the country highways of the state and the streets of our villages, towns, and cities for the planting of its poles and the construction of its lines; and it has the care and protection of our laws and government. In return, the state claims the right to treat it as she treats similar corporations chartered by her own authority. She asserts her authority to tax the exercise of its franchises in her midst as she does all others, domestic as well as foreign corporations. The state may tax its property as she does all other property of persons or corporations within her limits. She may tax the exercise of its franchises within her borders and under the sheltering protection of her laws and government. The privilege tax, the tax on the business, the occupation, the tax on the exercise of franchises, may be incidentally burdensome to interstate commerce. Every tax is a burden, and, to the extent imposed, is an interference with the pursuit or business on which it is laid. If the business is partly interstate commerce, then that commerce is incidentally affected and interfered with by every tax of any nature whatever that may be levied on it. In the case at bar there is no direct burden upon interstate commerce; there is no further interference with it than will be found necessarily to result from the imposition of any burden of taxation in any shape. *Postal Teleg.*

Browne, after a complete examination of the question, including a discussion of the authorities in this and other states, it was held that the courts of this state must take judicial notice of what is and what is not the public statutory law of the state, and also that, where a statute is authenticated by the signatures of the presiding officers of the two houses of the legislature, the courts will not search further to ascertain whether such facts existed as gave constitutional warrant to those officers to thus authenticate the act as having received legislative sanction in such manner as to give it the force of law. These holdings have been since adhered to by this court, and we are of opinion that they are in accordance with the weight of authority. *Edger v. Randolph County*, 70 Ind. 331; *Madison County v. Burford*, 93 Ind. 383; *Stout v.*

Grant County, 107 Ind. 343, 8 N. E. 222; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L. R. A. 65, 21 N. E. 274; *Hovey v. State*, 119 Ind. 395, 21 N. E. 890. In *State ex rel. Benton County v. Boice*, 140 Ind. 506, 39 N. E. 64, 40 N. E. 113, we have again considered this question, and reached the same conclusion. See also *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 249, 12 Sup. Ct. Rep. 495, where the question is discussed. The authentication of the act in the manner provided in art. 4, § 25, of the Constitution, that "all bills and joint resolutions so passed shall be signed by the presiding officers of the respective houses," is conclusive evidence that the act was duly passed in conformity with the provisions of the organic law of the state. Under the guaranty of the Constitution, the statute, enrolled and filed in the office of the secre-

Cable Co. v. Adams, 71 Miss. 555, 4 Inters. Com. Rep. 416, 14 So. 36.

This decision was affirmed, and the tax in question held not to conflict with the commerce clause, by the Supreme Court of the United States. Id. 155 U. S. 688, 39 L. ed. 811, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360. Two of the justices, Brewer and Harlan, JJ., dissented on the ground that the tax was one for the privilege of exercising the franchise of, or doing business as, an interstate carrier of telegraphic messages, and so was a regulation of interstate commerce and void.

A state tax law which requires all foreign corporations, save certain designated ones, doing business in the enacting state, to pay upon their franchise or business a state tax graded according to annual dividends, and based upon the amount of capital stock employed within the state, and by the terms of which there are exempted from such tax all corporations, both domestic and foreign, wholly engaged in manufacture, or in mining ores within the taxing state, does not, when applied to and enforced against a manufacturing corporation created by another state, and which does a general business in the taxing state of selling and delivering its manufactured products from a permanently maintained warehouse, conflict with the commerce clause of the Federal Constitution by discriminating against the manufactures of other states. *New York v. Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58.

Nor does the circumstance that such corporation also, through its managing agent, imports from foreign countries crude materials some of which are sold at such warehouse in the original and unbroken packages, render such tax invalid for repugnancy to the commerce clause. *Ibid.* Justices Harlan and Brown dissented in this case. They thought that, under the commerce clause, it was not competent for a state to impose a tax upon the franchise or business of manufacturing corporations which were not wholly engaged in manufacturing within its limits, and at the same time expressly exempt from such tax other manufacturing corporations because they were wholly engaged in manufacturing within such state. This kind of discrimination, in their opinion, not only operated against the products of other states contrary to the commerce clause, but against producers in other states to the extent of denying them the equal protection of the laws.

A tax upon privileges levied by virtue of a state statute embracing sleeping-car companies carrying passengers from one point to another 60 L. R. A.

within the taxing state, and charging a specific sum, and, in addition, a further sum per mile for each mile of railroad track within the state over which they run their cars, is not a burden upon, or regulation of, interstate commerce when enforced against a foreign corporation engaged therein, because it is imposed for the privilege which such company is free to forego, of carrying on a local business. *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. —, 23 Sup. Ct. Rep. 494, affirming 78 Miss. 814, 29 So. 917.

A state statute making the capital employed within the enacting state by a foreign corporation that does business therein the basis of a tax for the privilege of doing business as and in the name of a corporation does not conflict with the commerce clause. *People ex rel. Southern Cotton Oil Co. v. Wemple*, 131 N. Y. 64, 29 N. E. 1002.

The imposition of a tax upon a foreign corporation, by a state in which it does business, on its business therein, even when the subject of the tax is engaged in external, as well as internal, commerce, is not in conflict with the Federal Constitution. *People ex rel. Postal Tele. Cable Co. v. Campbell*, 70 Hun, 507, 24 N. Y. Supp. 208.

A statute providing for the taxation of domestic corporations, and of foreign ones doing business in the state which enacted it, upon their corporate franchises or business, imposes, not a property tax upon either class, but a tax upon the franchises only of domestic corporations and a tax upon the business only of foreign ones. And, when the business of a foreign railroad corporation is entirely interstate commerce,—when it carries on no interior commerce whatever, but has merely a terminal at the boundary line where all its business either begins or ends,—such business is not taxable, because the commerce clause of the Federal Constitution prevents. Such a tax cannot be sustained on the ground that it is laid upon the privilege the foreign corporation enjoys of coming into the state and exercising its corporate functions, since, granting the power of the state thus to tax a foreign corporation exclusively engaged in interstate commerce, such a statute is not cast in a form to attain such end, nor, in enacting it, has the legislature manifested any such purpose. *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720.

Mr. Chief Justice Andrews, who wrote for the court, reasons thus: The business in which the relator was engaged was exclusively that of interstate commerce. Whatever it did here

tary of state, comes to us as by the solemn authentication of the legislature itself, under the hand and seal of its presiding officers. Such authentication imports absolute verity as to the passage of the act, even as in the case of the acts of a court, which are authenticated by its certificate and seal under the hand of its clerk.

Counsel further contend, second, that the act is invalid, in that it fails to provide due process of law; third, in that it denies to the appellant the equal protection of the laws; fourth, in that it violates the provisions of the Constitution of the United States which prohibit any state from laying any imposts or duties on imports or exports; fifth, in that it is in violation of the provisions of the state Constitution which require a uniform and equal rate of taxation; sixth, in that it is in violation of the Consti-

tution of the United States, as being a regulation of interstate and foreign commerce; seventh, in that it is in violation of the Constitution of the state, as being a local or special law; and, eighth, in that it is in violation of the state Constitution, as conferring judicial powers upon executive and administrative officers.

We are of opinion that these propositions have already, in effect, been considered by this court and by the Supreme Court of the United States, and decided against the several contentions of appellant, in *Cleveland, C. C. & St. L. R. Co. v. Backus*, and other Indiana Railroad Tax Cases, 133 Ind. 513, 18 L. R. A. 729, 133 Ind. 609, 625, 33 N. E. 421, 432, 443, and 154 U. S. 421-447, 38 L. ed. 1031-1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1114, 1122. It is to be remembered that the law under consideration (Acts

was incident to and in aid of the business of interstate transportation. Interstate transportation was not a part only of its business in this state. It performed the work of an interior carrier in other states, but in this state its business was that of interstate commerce exclusively. There may, therefore, be eliminated from the discussion the question which would arise in the case of a foreign corporation conducting within this state both the business of strictly interior transportation and that of interstate carrier to points within and from points without the state. We do not intend to be understood, he is careful to add, whether, in that case, the state might not lawfully impose upon such a corporation, in common with all other corporations, domestic and foreign, doing business here, a business tax based upon its capital employed in this state. There would seem to be no question that domestic corporations engaged in both state and interstate commerce may lawfully be subjected by the state to a franchise tax measured by its whole capital or business, or in any other way in the discretion of the legislature, without taking notice of the part of its business arising from interstate commerce, provided no hostile discrimination is made against such part. Nor would there seem to be any valid reason why a foreign corporation, engaged both in the business of state and interstate transportation in this state, should not be subject to taxation in common with domestic corporations. But what Chief Justice Andrews styled the crucial question in the case, to wit: Can the state tax a foreign corporation upon its business carried on in the state which is exclusively interstate commerce? or, in another form, May a state tax a foreign corporation whose business in such state is exclusively interstate commerce, for the privilege of transacting that business there?—the court answered in the negative. *Ibid.*

The tax assessed under the statute which was involved in the last-cited case, and in the *Parke Davis & Co. Case* (*New York v. Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58), just before noticed, was contested by the American Soda Fountain Company. It has already been stated that such statute exempted from the tax all corporations that were wholly engaged in manufacturing within the state. *Parke Davis & Co.* complained that it was discriminated against because it did its manufacturing without the state. But the American Soda Fountain Company did manufacturing within the state. It would have been exempt from this tax in case it did nothing else within the state. Besides manufacturing, however, it 60 L. R. A.

was, according to the record, engaged in interstate commerce, and in that only. It would have been exempt, therefore, from this tax if that had been its sole business, under the decision last cited. In the supreme court of the state it was held not taxable. *Parker, J.*, for the majority, saying: It was evidently carrying on two lines of business in this state. One that of manufacturing only, in which all the capital it had in this state was employed. The other that of selling by samples. This latter business was, however, protected from taxation by the Federal laws regulating interstate commerce. And *Herrick, J.*, in dissenting, said: The relator is not wholly engaged in carrying on manufacture; it is doing other business within this state besides that of manufacture. It may be, and probably is, true that none of its capital stock is engaged in this state in any other than manufacturing business; but it has places of business, employees, and samples of its wares, and at those places of business, by those employees, and from those samples, sales are made. It is a business that is done in connection with its manufacturing, and in connection with the sales of those articles manufactured within the state; and the fact that part of that business is exempt from taxation does not make it a corporation wholly engaged in manufacturing. *People ex rel. American Soda Fountain Co. v. Roberts*, 29 App. Div. 585, 51 N. Y. Supp. 487.

The decision was reversed by the court of appeals, and the views of the dissentients prevailed. *Id.* 158 N. Y. 168; 52 N. E. 1104.

A corporation, six sevenths of whose business consists in the importation of foreign goods and the sale thereof in unbroken packages as imported, and the remainder in selling broken packages of such goods and similar goods of domestic production, is taxable, in virtue of said statute, upon its business in said state upon the basis of its whole capital employed therein, notwithstanding the commerce clause and import-duty clause of the Federal Constitution. *People ex rel. A. Klipstein & Co. v. Roberts*, 36 App. Div. 597, 55 N. Y. Supp. 950.

This decision was affirmed in the court of appeals upon the opinion below, without, as the court said, expressing any opinion as to the result had the relator's business been wholly that of foreign or interstate commerce. *Id.* 167 N. Y. 617, 60 N. E. 117.

The case rested upon the *Parke-Davis Case*, *sub nom.* *New York v. Roberts*, 171 U. S. 663, 43 L. ed. 325, 19 Sup. Ct. Rep. 58, but went much farther. In the *Parke Davis & Co. Case* the importing business was a mere

1893, p. 374; Rev. Stat. 1894, § 8478, and following), for the assessment and taxation of telegraph and other like companies, is supplementary to and amendatory of the general act for taxation (Acts 1891, p. 199; Rev. Stat. 1894, § 8408, and following); and also that the duties and powers of the state board of tax commissioners and other assessing and taxing officers of the state are defined and prescribed solely in said general tax law of 1891. The two acts are, therefore, to be treated not only as *in pari materia*, but as in fact but different parts of one and the same law of taxation; and hence all the sections of the act under consideration are to be so construed, if possible, as to harmonize the same with the provisions of the general law. All questions raised on this appeal, therefore, in relation to due process of law, the equal protection

of the laws, notice to appellant of the time and place of meeting of the state board of tax commissioners, the right of appellant to appear before said board, and be heard on the assessment of its property before the final assessment is made, taxation of interstate commerce, local or special laws, and the giving to executive and administrative officers judicial powers, were directly passed upon, and the provisions of the statute fully sustained, in the *Backus Cases*, above cited.

The additional provisions of the act of 1893, so far as they affect this case, are as follows:

"Sec. 1. Be it enacted by the general assembly of the state of Indiana, that any joint-stock association, company, copartnership, or corporation, whether incorporated under the laws of this state or of any other state, or of any foreign nation, engaged in

incident to the general business of marketing its manufactured products, and the contest waged over the question whether it was discriminated against because it did its manufacturing outside of the state. In the *Klipstein Case*, importing and selling imports in the original, unbroken packages was plainly the main business of the relator, and all else that it did merely incidental thereto. The tax in the *Klipstein Case*, in effect, rested upon foreign commerce.

A state tax laid upon the business of a foreign corporation doing business in the taxing state, measured by the amount of capital stock employed within such state, is not abated by the consideration that a part of such capital is employed in foreign commerce. *People ex rel. Kippens, S. & W. Co. v. Roberts*, 51 App. Div. 152, 64 N. Y. Supp. 627.

A foreign corporation without a place of business of any kind in another state, whose transactions therein are confined to filling orders taken by its traveling salesmen and sent to its home office, is not liable to a tax laid by such state upon corporations doing business therein as merchants. *Com. v. American Tobacco Co.* 178 Pa. 531, 34 Atl. 223; *Woessner v. H. T. Cottam & Co.* 19 Tex. Civ. App. 611, 47 S. W. 678; *Wagner v. J. & G. Meakin*, 33 C. C. A. 577, 63 U. S. App. 477, 92 Fed. 76.

A state statute enacting that owners of palace, parlor, or sleeping cars, except railroads operating domestic railways, shall not have a right to charge or collect fares for the use of such cars in the state without a license procurable only upon annually making a sworn statement of gross earnings from the use of such cars between places within the state, and the payment of a license fee of 2 per cent on such earnings, requires from a foreign palace-car company engaged in interstate commerce only a statement of its gross earnings from fares on journeys which both begin and end within the state, and not of the proportionate part of fares for such part of the journeys beginning or ending, or both, without the state, as the part traversed within the state bears to the fares paid for the whole passage. *State v. Pullman's Palace Car Co.* 64 Wis. 89, 23 N. W. 571.

This construction certainly left the statute free from objection upon the score of the commerce clause, and the court did not deem it worth while to say whether or not the act, differently construed, would be constitutional.

A county ordinance requiring a transcontinental railroad invested with Federal franchises to take out and pay for a license to continue

its business of carrying persons or freight for hire in railroad cars in such county is unconstitutional and void. *San Benito County v. Southern P. R. Co.* 77 Cal. 518, 19 Pac. 827.

The former decisions of the court in *Central P. R. Co. v. State Bd. of Equalization*, 60 Cal. 35; *Los Angeles v. Southern P. R. Co.* 61 Cal. 59; and *Santa Clara County v. Southern P. R. Co.* 66 Cal. 642, 6 Pac. 744,—were overruled, the court declaring that, in view of the decisions of the Supreme Court of the United States in *California v. Central P. R. Co.* 127 U. S. 1, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073, it would be useless to follow them, as it was clear that in a proper case the Supreme Court of the United States would hold the ordinance in the case at bar void.

A license tax which is a tax upon the privilege of doing business that involves interstate commerce is void. It cannot be saved by showing that the railroad subjected to it operates only a branch line wholly within the jurisdiction of the authority imposing the tax. *San Bernardino v. Southern P. R. Co.* 107 Cal. 524, 29 L. R. A. 327, 40 Pac. 796.

A statute requiring all foreign corporations regularly doing business in the state to be assessed and taxed, for and in respect of the business transacted by them in such state, a transit duty of a stated sum on every passenger and each ton of freight carried on any railroad or canal in the state beyond a named distance, except passengers and freight transported exclusively within the state, lays a burden upon interstate commerce, and, hence, is unconstitutional and void. *Erie R. Co. v. State*, 31 N. J. L. 531, 36 Am. Dec. 226.

But a foreign company whose entire business consists in transporting oil from points in other states to points in the taxing state, although engaged merely in interstate commerce, may none the less constitutionally be subjected to "an annual tax, for the use of the state, by way of a license for its corporate franchise," of a stated percentage of "the gross amount of its receipts from the transportation of oil or petroleum through its pipes in the state" during the preceding year; the said gross amount being such a proportion of the gross receipts for transportation of oil or petroleum over its whole line as the length of its line in the taxing state bears to the entire length thereof. *Tide Water Pipe Co. v. State Board*, 57 N. J. L. 516, 27 L. R. A. 684, 31 Atl. 220.

The court relied for its authority upon *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, saying that it was so apposite as to

transmitting to, from, through, in, or across the state of Indiana, telegraph messages, shall be deemed and held to be a telegraph company, and every such telegraph company shall, annually, between the 1st day of April and the 1st day of June, make out and deliver to the auditor of state a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the 1st day of April next preceding, showing: First. The total capital stock of such association, company, copartnership, or corporation. Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share. Third. Its principal place of business. Fourth. The market value of said shares of stock on the 1st day of April next preceding, and if such shares have no market value, then the actual value thereof.

preclude the need or utility of further investigation.

A state statute providing for the payment by express companies of yearly license or privilege taxes in lieu of all other than ad valorem taxes, if the lines are less than 100 miles long, \$1,000, and, if longer, \$3,000, for one or more packages taken up at one point and carried to another within the state, although purporting on its face to apply only to express business within the state, is none the less, when applied to an express company doing an interstate business, a burden upon interstate commerce. *United States Exp. Co. v. Allen*, 39 Fed. 712. The court said such statute was not an exercise of the police power. That the amount of business done had no relation to the tax. As much had to be paid for a license to carry one package 5 miles as to carry a million packages over 100 miles when the line was longer. The tax depended wholly on the length of the line, and was a mere device for taxing the express company.

The imposition of a heavy annual tax upon express companies doing business in the state for the privilege of doing such business, sanctioned by severe penalties for doing business without first paying it, upon a foreign joint-stock company engaged in interstate commerce, is void for repugnancy to the commerce clause, notwithstanding such company does local business, when the statute does not discriminate between internal and external business. *United States Exp. Co. v. Hemmingway*, 39 Fed. 60.

The cases of *Com. v. Smith* and *Com. v. United States Exp. Co.* 92 Ky. 38, 17 S. W. 187, are very similar, and were decided the same way.

A statute which requires every common carrier that conveys express matter from one place to another for hire to procure a license, and pay therefor a tax graduated according to the amount of business done, and which makes the obtaining of such license and the payment of such tax a condition precedent to the carrier's doing any business whatever, inasmuch as it does not discriminate between internal and interstate express business, and cannot be construed to apply alone to internal traffic, is void for conflict with the commerce clause of the Federal Constitution. *State v. Northern P. Exp. Co.* (Mont.) 71 Pac. 404.

A foreign corporation controlling and operating a line of steamships on the ocean, engaged in regular commerce between two foreign ports, whose boats stop during each voyage at an intermediate port to land passengers and discharge freight and to receive passengers and

Fifth. The real estate, structures, machinery, fixtures, and appliances owned by said association, company, copartnership, or corporation, and subject to local taxation within the state, and the location and assessed value thereof, in each county or township where the same is assessed for local taxation. Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership, or corporation, situate outside the state of Indiana, and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated. Seventh. All mortgages upon the whole or any of its property, together with the dates and amounts thereof.

cargo, and which, for these purposes, at such intermediate port, leases a wharf and has appliances for loading and unloading its vessels, hires stevedores, keeps an agent and clerks, an office with books and furniture, and a bank account, and, upon emergencies, purchases supplies,—is there engaged exclusively in interstate commerce, and is not subject to an occupation or license tax for doing business there. *Clyde S. S. Co. v. Charleston*, 76 Fed. 46.

A county cannot recover of a corporation created by, and domiciled in, another state, where its boats are enrolled and all its property has its situs, and whose exclusive business is ferrying across a navigable river between two states, penalties for not taking out a ferry license as required by the laws of the state in which such county is situated, merely because it maintains therein a landing place. *St. Clair County v. Interstate Car Transfer Co.* 100 Fed. 741.

A foreign telegraph corporation carrying on an interstate and foreign business, and operating in a state other than the one which gave it life, by virtue of its compliance with the act of Congress of July 24, 1866, is not to be subjected, in such other state (which has granted it no franchise), to a franchise tax, because of the protection of the commerce clause. *San Francisco v. Western U. Tele. Co.* 96 Cal. 140, 17 L. R. A. 301, 31 Pac. 10.

While a state cannot tax either the interstate or government business of a telegraph company, it has the power to tax so much of its business as is carried on wholly within the state lines, provided the tax is not levied in gross upon both external and internal business, but is restricted solely to that within the state. *Western U. Tele. Co. v. Fremont*, 39 Neb. 692, 26 L. R. A. 698, 5 Intern. Com. Rep. 48, 58 N. W. 415.

A statute requiring every person, corporation, or association doing business in the state as a telephone company to pay a license, in each county where such business is transacted, of 75 cents a year for each instrument in use, is not in conflict with the commerce clause of the Federal Constitution, since it is to be construed as limited in its application to instruments used for messages between points lying wholly within the state, because of the constitutional infirmity of the state to lay such an excise upon interstate telephonic communication. *State v. Rocky Mountain Bell Teleph. Co.* (Mont.) 71 Pac. 311.

d. Agents and agencies.

To carry on interstate commerce is not a

Eighth. (a) The total length of the lines of said association or company; (b) the total length of so much of their lines as is outside the state of Indiana; (c) the length of the lines within each of the counties and townships within the state of Indiana."

Section 5, p. 378, provides, amongst other things, that "upon the filing of such statements the auditor of state shall examine them, and each of them, and if he shall deem the same insufficient, or in case he shall deem that other information is requisite, he shall require such officer to make such other and further statements as said auditor of state may call for."

Section 6, p. 379, reads as follows: "Upon the meeting of the state board of tax commissioners for the purpose of assessing railroad and other property, said auditor of state shall lay such statements, with such

information as may have been furnished him, before said board of tax commissioners, who shall thereupon value and assess the property of each association, company, copartnership, or corporation in the manner hereinafter set forth, after examining such statements and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain. For that purpose they may require the agents or officers of said association, company, copartnership, or corporation to appear before them with such books, papers, or statements as they may require, or they may require additional statements to be made to them, and may compel the attendance of witnesses, in case they shall deem it necessary, to enable them to ascertain the true cash value of such property."

From information thus obtained, § 7 pro-

franchise or privilege granted by the state. It is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect of depriving citizens of such right, unless Congress should see fit to interpose some contrary regulation on the subject. *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 861.

A state has the right to regulate its internal commerce, and a license for the privilege of doing business within its limits is not a regulation of commerce. A business is exclusively local when a city office is maintained for the sale of merchandise to all comers, and packages brought in from other states are broken and their contents sold in the usual way of carrying on business in the state. *State v. Hammond Packing Co. (La.)* 34 So. 368.

These statements may well be regarded as guides pointing generally to a correct determination of particular cases as they arise.

1. Telegraph, railroad, express, and other transportation business.

A foreign corporation operating telegraph lines throughout the United States, and which has complied with the act of Congress relating to the constructing of telegraphs and the government use thereof, cannot be compelled to pay a municipal license tax imposed in lieu of ad valorem property taxes, greater in amount than would be such taxes if assessed at the same rate as other property in the same city is assessed, when the ordinance imposing the excise does not limit its application to business confined to the limits of the state, and does make the payment of the tax a condition precedent to the doing of business at all in the city. Such an ordinance is void for conflict with the commerce clause of the Federal Constitution. *Postal Teleg. Cable Co. v. Richmond*, 99 Va. 102, 37 S. E. 789, Overruling the earlier contrary decision in *Western U. Teleg. Co. v. Richmond*, 26 Gratt. 1.

A municipal ordinance, however, passed under legislative authority, imposing a yearly license tax for revenue upon the business or occupation of taking messages in the city from persons therein and sending them by telegraph from such city to persons and places in the same state, and of receiving and delivering in such city telegraph messages sent by persons at and from places in the same state, expressly excluding and declaring free messages between United

States government departments, agents, and agencies, and interstate commerce messages,—is not repugnant to the commerce clause of the Federal Constitution. *Western U. Teleg. Co. v. Fremont*, 39 Neb. 692, 26 L. R. A. 698, 5 Inters. Com. Rep. 46, 58 N. W. 415.

To the same effect are *Moore v. Eufaula*, 97 Ala. 670, 11 So. 921; *Postal Teleg. Cable Co. v. Charleston*, 56 Fed. 419, Affirmed in 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *Western U. Teleg. Co. v. Charleston*, 56 Fed. 419, Appeal Dismissed in 163 U. S. 711, 41 L. ed. 309, 16 Sup. Ct. Rep. 1208.

A municipal ordinance passed pursuant to a charter power requiring all in the city that engage in the business of operating a railroad for transporting freight or passengers, or both, to and from the city to and from other places in the same state, and who keep an office or place of business within such city, to pay an annual license tax for each main line of road used in connection with such business running into or through the city; and, before engaging in such business, to take out and pay for a license to carry it on,—is not in conflict with the commerce clause of the Federal Constitution, since it affects only business done within the city limits. *Anniston v. Southern R. Co.* 112 Ala. 557, 20 So. 915.

The same decision was made in *Alabama G. S. R. Co. v. Bessemer*, 113 Ala. 668, 21 So. 64, and in *Nashville, C. & St. L. R. Co. v. Alabama City*, 134 Ala. 414, 32 So. 731.

But a state statute which allows a municipality to exact license taxes from every railroad doing business within it, without limiting its application to internal state business exclusively, is void as an interference with interstate commerce, although the ordinance in pursuance thereof bases the tax upon internal business alone. *Southern R. Co. v. Asheville*, 69 Fed. 359.

The reason given for this conclusion is that, inasmuch as a municipality can tax only by virtue of legislative authority, an unconstitutional statute confers none.

In *Piedmont R. Co. v. Reldsville*, 101 N. C. 404, *sub nom.* *Richmond & D. R. Co. v. Reldsville*, 2 L. R. A. 284, 2 Inters. Com. Rep. 416, 8 S. E. 124, the opinion was expressed that a municipal ordinance imposing upon such railroad traversing the city a tax of \$50, being a tax upon business within the municipality, and such taxes having been authorized by the legislature, was not repugnant to the commerce clause; but no decision was rendered because of the incompleteness of the record in the case.

vides for the manner of assessing such property within the state as follows: The market value of the capital stock, added to the mortgages thereon, if any, shall be taken for the true cash value of the whole property. If there is no market value, then the actual value shall be taken. "For the purpose of ascertaining the true cash value of the property within the state of Indiana," the board shall next deduct from the value of the whole property "the assessed value for taxation in the localities where the same is situated, of the several pieces of real estate situate without the state of Indiana, and not specifically used in the general business of such associations." The true cash value of the property within the state of Indiana shall then be found by taking the proportion of such balance which the length of the telegraph lines within the state bears to

the total length of the lines. "From the entire value of the property within the state so ascertained, there shall be deducted, by said board, the assessed value for taxation of all the real estate, structures, machinery, and appliances within the state and subject to local taxation in the counties and townships, . . . and the residue of such value so ascertained, after deducting therefrom the assessed value of such local properties, shall be by said board assessed to said association."

By § 8 it is provided that the value of 1 mile in the state shall be found by dividing "the residue of such value so ascertained" by the total mileage in the state.

Section 9, p. 381, provides for certifying the valuation so found for each county to the several county auditors, and § 10 for a

The supreme court of Alabama, and afterwards the Supreme Court of the United States, held that a municipal ordinance requiring every express or railroad company whose business extended out of the state, and which was doing business within the ordaining city, to pay a stated annual license fee, imposed without discrimination alike upon residents and nonresidents, upon natural and artificial persons, and foreign and domestic corporations, under penalty of fine for neglect or refusal,—imposed merely a charge for the privilege of doing business within the city limits, irrespective of the character of such business: and, therefore, that it placed no burden or restriction upon external commerce, notwithstanding the subjects thereof were engaged therein. *Osborne v. Mobile*, 44 Ala. 493; *Southern Exp. Co. v. Mobile*, 49 Ala. 404; *Osborne v. Mobile*, 16 Wall. 479, 21 L. ed. 470.

But afterwards the Supreme Court of the United States, in referring to this decision, said: This court, in December, 1872, held that the ordinance was not unconstitutional. In view of the course of decisions which have been made since that time it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several states. *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 8 Sup. Ct. Rep. 1380.

Thereupon, it decided that a municipal ordinance adopted pursuant to a power given by the state legislature, laying a tax, called a license tax, but designed to afford revenue, of \$225 on telegraph companies, and imposing upon the agents thereof pecuniary penalties if they neglect or refuse to pay it, is, when applied to a foreign telegraph corporation authorized, under the act of Congress of July 24, 1866, to enter and do business in the state, a tax for the privilege of carrying on its business; and, as such business is transmitting telegrams between states and to and from foreign countries, the ordinance and tax are void for repugnancy to the commerce clause of the Federal Constitution. *Ibid*.

But when a state-license tax law, as construed by the highest court of the state that enacted it, in exacting from the agent of an express company engaged in interstate commerce a license fee for his business or occupation under pain of fine or imprisonment, applies only to the local business of such company, wholly within the state, and does not apply at all to its international or interstate business, which the company is left at liberty to carry on without a license or paying any tax, provided it does no local business,—there is no conflict

with the commerce clause of the Federal Constitution. *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214, Affirming 33 Fla. 162, 25 L. R. A. 120, 4 Inters. Com. Rep. 781, 14 So. 588.

A state law which requires from the agent of every express company, not incorporated in the enacting state, a license from an officer of such state before he is allowed to do any business for his company in that state, when such business embraces the carriage of express matter between different states as well as between places within the state; and which requires, also, a statement to be made and filed by the company itself showing the possession by it of a capital of \$150,000 in cash or safe securities not stock notes,—is plainly a regulation of, a burden or restriction upon, interstate commerce, and as such is void for repugnancy to the Federal Constitution. *Crutcher v. Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

Such a statute cannot be upheld as an exercise of the police power of the state to protect and secure citizens who intrust property to express companies for carriage, because, however promotive of the public good it may be, the subject is beyond the regulative power of the state, and belongs exclusively to Congress. *Ibid*.

We do not think, said the court, that the difficulty is at all obviated by the fact that the express company, as incidental to its main business, which is to carry goods between different states, does also some local business by carrying goods from one point to another within the state. It does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce,—manifestly the principal object of the organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not, they operate as such. *Ibid*.

This decision was followed in the state supreme court in *Com. v. Smith*, 92 Ky. 38, 17 S. W. 187.

A municipal ordinance to the effect that every express company, or agency thereof, doing an express business in the city, shall pay an ad valorem tax equal to that which is levied upon real estate within the city limits for general and special purposes, upon the gross amount of all moneys which, during the year, shall have been received by such company or agency within the city as a compensation for transacting such express business, does not violate the commerce clause of the Federal Constitution when

like distribution by the auditors to the townships.

It will be noticed that the method thus provided for assessing telegraph property in the state is not essentially different from that prescribed in the general tax law of 1891 for the assessment of railroad property. In both cases the local property is assessed by local officers, and the general or unit property by the state board of tax commissioners. In both the companies are required to make property statements to the auditor of state, to be by him laid before the state board. In both the time and place of meeting of the board is fixed by law. In both the companies may come before the board to make such further statements as they desire, and they may be required to do so. In both the board may seek such other information as they shall be able to find,

in order to enable them to discover the true cash value of the property in the state. In both it is the property in the state, and that alone, that can be assessed. And in both the standard of valuation is the same as in assessing all other property in the state; namely, "the true cash value."

In the *Backus Railroad Tax Cases*, 133 Ind. 513, 18 L. R. A. 729, 33 N. E. 421, it was contended by counsel for appellants, both in this court and in the Supreme Court of the United States, that the general tax law of 1891 authorized the importation of values into this state by the state board of tax commissioners, or the taxing by them of property of the railroads not within the jurisdiction of the state, for the reason that such taxation seemed to be implied in § 80 of that act, and also for the reason that the fourth item of the schedule filed with

set in operation against a foreign corporation whose business in such city consists in receiving packages to be transported from the city to points beyond the state. *American Union Exp. Co. v. St. Joseph*, 68 Mo. 675, 27 Am. Rep. 382.

But a municipal ordinance imposing a license tax on every express company having an office in the city, and receiving goods, wares, and merchandise, and forwarding them to points within the same state, or receiving goods, etc., within such state and delivering them in the city, is void for conflict with the commerce clause, because it includes business coming from without the state. *Webster v. Bell*, 15 C. C. A. 360, 25 U. S. App. 379, 68 Fed. 183.

This conclusion was reached upon a somewhat technical construction of the statute, *sub judice*, that plainly aimed at being confined to internal business, and might plausibly have been so construed.

The weight of authority, it is said in a very recent case, establishes, as a general rule, for the interpretation of license acts applying to corporations engaged in both local and interstate commerce, that, in the imposition of a tax upon such a corporation, the interstate business must be discriminated from the internal business, or it must be capable of being so discriminated so that it will clearly appear that the internal business alone is taxed. Whenever the subjects of taxation can be separated so that that which is interstate commerce can be distinguished from that which is commerce wholly within the state, the distinction will be made by the courts, and the state permitted to collect the tax upon the commerce solely within its own territory. If, however, the terms of the statute are such,—if the license fee is a unit charge upon the business as such; is strictly an occupation tax,—if there is no attempt to differentiate the local from the foreign business in the language of the statute, and the license is a prerequisite to commencing or continuing business,—the charge must be deemed an interference with, an attempt to regulate, interstate commerce; and, therefore, the statute imposing it is void. *State v. Northern Pacific Exp. Co.* (Mont.) 71 Pac. 404.

A municipal ordinance passed under powers granted by the legislature requiring a license to establish and operate a ferry between the United States and Canada, and exacting for it a fee sufficient and intended to afford revenue, and prohibiting unlicensed ferries under penalties, is not obnoxious to the commerce clause of the Federal Constitution, even when applied to a ferry enrolled and licensed under national

laws for coasting and foreign trade. *Chilvers v. People*, 11 Mich. 43.

The invalidity of a license tax-law upon the means of carrying on interstate commerce is unaffected by the fact that the commerce it relates to is wholly between states other than, and entirely without, the taxing state. If a state may not constitutionally tax commerce passing through, coming into, or going out of, it, *a fortiori* it may not tax commerce which does not come near it. Therefore, an ordinance imposing municipal license taxes, requiring the quarterly payment of a stated sum for every railroad agency, under penalty of a heavy fine or long imprisonment, when enforced against an agent of a foreign railroad whose entire line and terminals are in distant states, who neither receives nor disburses money, and who sells no tickets, but merely labors to induce passengers leaving the state to be booked over his road at the other end of their journeys,—is unconstitutional and void for repugnancy to the commerce clause of the Federal Constitution. *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Intera. Com. Rep. 181, 10 Sup. Ct. Rep. 881.

This decision in effect overrules *Lightburne v. Shelby County Taxing Dist.* 4 Lea, 219.

A municipal ordinance requiring every person who operates and maintains in the city any telephone instrument for which rent is charged to pay an annual license fee for each instrument so used was not intended to, and does not, apply to, or affect in any manner, business of an interstate character; but was intended to, and does, apply to and affect only local business done within the city as shown from the rental of instruments therein. It therefore does not burden or interfere with interstate commerce. *Ogden City v. Crossman*, 17 Utah, 66, 53 Pac. 985.

2. Trade.

A statute laying an annual tax of \$200 upon every sewing-machine company selling or dealing in sewing machines either by itself or agents, and upon all wholesale dealers in sewing machines made by companies that have not paid such tax; and requiring companies and wholesalers to furnish a list and pay annually \$10 for each of their county agents, whereupon a certificate of authority to do business in the state is to be issued,—is not, applied to a foreign corporation that manufactures its machines without the state, and sells them out of stocks brought into the state for the purpose by agents, resident or nonresident, repugnant

the auditor of state by the companies required them to report the value of their capital stock for the consideration of the state board, as provided in § 85 of that act (Rev. Stat. 1894, § 8503), as follows: "Fourth. A statement or schedule showing: (1) The amount of capital stock authorized and the number of shares into which such capital stock is divided; (2) the amount of capital stock paid up; (3) the market value, or if no market value, then the actual value of the shares of stock; (4) the total amounts of all indebtedness except for current expenses for operating the road; (5) the total listed valuation of all its tangible property in this state." We think that the schedule required of telegraph companies by the act of 1893, now under consideration, is not substantially unlike the foregoing, required of railroad companies

under the act of 1891. In one respect, at least, the schedule under the act of 1893 is more favorable to the companies; namely, in providing for a deduction of the valuation of real property outside the state from the total valuation.

In answer to the contention, made in the *Railroad Tax Cases*, as to assessment of imported valuations, and also that assessments ought to be made on a basis of cost of construction and maintenance and with reference to value of land and material in actual use by the companies, without regard to business connections or to "character and amount of business done and the financial credit of the different companies," both of which contentions are also urged in this appeal, the Supreme Court of the United States said in *Pittsburgh, O. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 38 L. ed. 1031,

to the commerce clause of the Federal Constitution, no discrimination being made between foreign and domestic corporations, citizens and strangers. *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 35 L. R. A. 497, 25 S. E. 249; *Singer Mfg. Co. v. Wright*, 33 Fed. 121, Appeal Dismissed in 141 U. S. 696, 35 L. ed. 906, 12 Sup. Ct. Rep. 103.

The cases of *Howe Mach. Co. v. Gage*, 100 U. S. 676, 25 L. ed. 754, Affirming 9 Bart. 518, and *Emert v. Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367, Affirming 103 Mo. 247, 11 L. R. A. 219, 3 Inters. Com. Rep. 527, 15 S. W. 81, are to the same effect; and both were followed upon this point in *Wrought Iron Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352.

One traveling with a team, and selling sewing machines carried with him, made out of the state by a foreign corporation, his stock being replenished from a depot within the state, is not engaged in interstate commerce, and may lawfully be penalized for so trafficking without a state license applying to all who travel and sell sewing machines, musical instruments, and lightening rods, without discriminating between residents and nonresidents, or home and foreign products. *State v. Richards*, 32 W. Va. 348, 3 L. R. A. 706, 9 S. E. 245.

A statute whereby the agent for the sale of articles made in other states must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them, while an agent for the sale of articles made within the state need not be licensed nor pay any license tax, is, because of discriminating in favor of home manufactures, and against those of other states, void as a regulation of commerce between the states. *Webber v. Virginia*, 103 U. S. 844, 26 L. ed. 565.

A foreign corporation selling, through traveling salesmen, by wholesale, its manufactures made at home, is engaged in interstate commerce in states where such sales are made. It is, therefore, not bound to comply with statutory conditions prescribed as precedents to such a business. *Com. v. Hogan, McM. & T. Co.* (Ky.) 74 S. W. 737.

Although a traveling salesman employed by a foreign corporation and furnished by his employer with a conveyance and samples of its wares, engaged in soliciting orders in Georgia, which his principal fills by shipments from the home state, either to the purchasers direct or to other agents to deliver, is a peddler, within the statutes of Georgia, requiring peddlers to take out licenses, and penalizing those who do 60 L. R. A.

not do so; yet, if he is a nonresident of the state, he is exempt, because his business is interstate commerce, and under the protection of the Federal Constitution. *Wrought Iron Range Co. v. Johnson*, 84 Ga. 758, 8 L. R. A. 273, 3 Inters. Com. Rep. 146, 11 S. E. 238.

But if such an agent, after he has taken for nonresident principals a number of orders for goods without the state at the time, receives them by shipments in bulk, and, breaking bulk, delivers to the respective purchasers, he is subject, in that state, to a license tax, notwithstanding the commerce clause. *Racine Iron Co. v. McComma*, 111 Ga. 536, 51 L. R. A. 134, 36 S. E. 866.

Inasmuch as the decisions of the Supreme Court of the United States on all questions appertaining to the construction of the Federal Constitution and the laws of Congress are paramount, then, under the interpretation of that tribunal of the Tennessee statute involved in *Robbins v. Shelby County Taxing Dist.* 120 U. S. 480, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, and the constitutional power of Congress to regulate interstate commerce, that part of the Louisiana statute (Act 101, of 1886, § 12) which declares all traveling agents offering any species of merchandise in this state for sale, or selling the same, by sample or otherwise, shall pay a license of \$50, must be held to violate the commerce clause of the Federal Constitution, and the license tax provided therefor must be adjudged to be illegal in respect of nonresident merchants sending into the state goods in unbroken packages for sale through traveling agents soliciting customers and selling by sample. *Simmons Hardware Co. v. McGuire*, 39 La. Ann. 848, 2 So. 592.

A state law declaring any person selling, or offering to sell, at retail, manufactured implements or machines other than sewing machines, unless he be the owner and duly licensed as a merchant, or taking orders therefor on commission, an agent for the sale of manufactured articles; and prohibiting him from acting as such without a license, and then only in person under penalty of a fine for each violation, and fixing the license fee for the privilege of transacting such business,—applies to the traveling agents of a foreign manufacturing corporation who take orders for its wares, to be filled from a general depot or warehouse within the state, and sell and deliver them to the purchasers they find. Such business is not interstate commerce. *American Harrow Co. v. Shaffer*, 5 Inters. Com. Rep. 336, 68 Fed. 750, Appeal Dismissed for lack of jurisdiction in

14 Sup. Ct. Rep. 1114; "Again, the act is challenged as permitting and requiring the assessment and valuation of property outside the state. . . . We do not think that the matters referred to justify any such imputation. It is not to be assumed that a state contemplates the taxation of any property outside its territorial limits, or that its statutes are intended to operate otherwise than upon persons and property within the state. It is not necessary that every section of a tax act should in terms declare the scope of its territorial operation. Before any statute will be held to intend to reach outside property, the language expressing such intention must be clear. . . . It is obvious that the intent of this act was simply to reach the property of the railroad within the state. . . . No intent to the contrary can be deduced from the provision

requiring the corporation to file a statement of its total stock and indebtedness, for that is one item of testimony fairly to be considered in determining the value of that portion of the property within the state. The stock and the indebtedness represent the property. As said by Mr. Justice Miller in *State Railroad Tax Cases*, 92 U. S. 605, *sub nom. Taylor v. Secor*, 23 L. ed. 670: 'When you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for these are all represented by the value of its bonded debt and of the shares of its capital stock.' In *Franklin County v. Nashville, C. & St. L. R. Co.* 12 Lea, 521,

166 U. S. 718, 41 L. ed. 1187, 17 Sup. Ct. Rep. 991.

One engaged in taking orders for a corporation of another state whose business office and factory are in its home state, for the enlargement of portraits afterwards shipped into the state for delivery to the customers, is not amenable to a municipal license ordinance making it unlawful to hawk, peddle, or solicit the sale or purchase of pictures save on payment of a specific monthly fee, because he is protected by the commerce clause of the Federal Constitution. *Re Tinsman*, 95 Fed. 648.

A municipal ordinance exacting a license from the agent of a foreign corporation, who receives from it portraits and their frames separately, to be put together by him and then delivered to customers who have previously placed orders therefor, is void as a regulation of interstate commerce. *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. —, 23 Sup. Ct. Rep. 229, Reversing 127 N. C. 521, 37 S. E. 138.

This decision weakens the authority of the above-cited case of *Racine Iron Co. v. McCommons*, 111 Ga. 536, 51 L. R. A. 134, 36 S. E. 866.

Books shipped by a foreign corporation into another state, consigned to an agent, who delivers them to purchasers upon the instalment plan, and afterwards collects payments as they become due, although received and delivered in the original packages as shipped, do not constitute interstate commerce so as to defeat the application of the laws of such state concerning peddling and the licensing thereof to the agent making the deliveries. *Collier v. Burgin*, 130 N. C. 632, 41 S. E. 874.

Municipal ordinances imposing license taxes on wholesale and retail dealers in meats, and burdensome restrictions as to the times when and places where, and the quantities of meats that may be sold, which have the effect, necessarily, to hamper and burden dealers in dressed meats brought in from other states; from all of which charges, restrictions, and burdens all persons selling the meat from animals they have themselves raised are expressly exempted and freed,—are unconstitutional and void as regulations of interstate commerce and denials of the equal protection of the laws. *Georgia Packing Co. v. Macon*, 22 L. R. A. 775, 4 Inters. Com. Rep. 508, 60 Fed. 774, Appeal Dismissed, because a constitutional question was involved. In 9 C. C. A. 262, 13 U. S. App. 592, 60 Fed. 781.

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e. Occupations.

A tax on the occupation of an importer is a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the Constitution. *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678.

The exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business. *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

No one questions, said Field, J., the general power of the state to require licenses for the various pursuits and occupations conducted within her limits, and to fix their amount as she may choose. And no one on this bench,—certainly not the writer of this opinion,—would wish to limit or qualify it in any respect, except when its exercise may impinge upon the just authority of the Federal government under the Constitution, or the limitations prescribed by that instrument. But where a power is vested exclusively in that government, and its exercise is essential to the perfect freedom of commercial intercourse between the several states, any interfering action by them must give way. This was stipulated by the indissoluble covenant by which we become one people. *Webber v. Virginia*, 103 U. S. 344, 26 L. ed. 565.

The invalidity of a license tax upon the occupation of carrying on interstate commerce is not affected by the fact that the business subjected to it may not be essential to such commerce, and that the latter is burdened thereby insignificantly and very remotely. If the business is actually a part of interstate commerce, and assists in any degree in increasing it, or aids in carrying such commerce on, it is beyond the power of a state to tax. *McCall v. California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881.

The cases of which *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Asher v. Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Ficklen v. Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Brennan v. Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; and *Stockard v. Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576,—

539, the supreme court of Tennessee, in a well-considered opinion, which was quoted with approval by this court in *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 479, 38 L. ed. 238, 242, 14 Sup. Ct. Rep. 396, thus referred to the means of ascertaining the value of a railroad track: 'The value of the roadway at any given time is not the original cost, nor a *fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value for taxation of a railroad track can only be

determined by looking at the elements on which the financial condition of the company depends,—its traffic as evidenced by the rolling stock and gross earnings in connection with its capital stock. No local estimate of the fraction in one county of a railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road.' . . . When a road runs through two states, it is, as seen, helpful in determining the value of that part within the state to know the value of the road as a whole. It is not stated in this statute that, when the value of a road running in two states is ascertained, the value of that within the state of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but

are typical,—sometimes styled "The Drummer Cases,"—involving merely the validity of taxes upon individuals selling property brought in from other states, whether belonging to corporations or not,—do not lie within the scope of this note. When cases of this character have been cited at all, they have illustrated some phase of excise taxation of corporations. This line of decisions embraces, besides the cases mentioned or elsewhere cited in this note, *Corson v. Maryland*, 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; *Stoutenburgh v. Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *State v. Agee*, 83 Ala. 110, 2 Inters. Com. Rep. 21, 3 So. 856; *Ex parte Murray*, 98 Ala. 78, 3 Inters. Com. Rep. 574, 8 So. 868; *Stratford v. Montgomery*, 110 Ala. 619, 20 So. 127; *Sydow v. Territory (Aris)*, 36 Pac. 214; *Ex parte Thomas*, 71 Cal. 204, 12 Pac. 53; *Ames v. People*, 26 Colo. 508, 55 Pac. 725; *District of Columbia v. Humason*, 2 MacArth. 158; *Re Wilson*, 8 Mackey, 341, 12 L. R. A. 624; *Bloomington v. Bourland*, 137 Ill. 534, 3 Inters. Com. Rep. 667, 27 N. E. 692; *McLaughlin v. South Bend*, 126 Ind. 471, 10 L. R. A. 357, 26 N. E. 185; *Ft. Scott v. Pelton*, 39 Kan. 764, 18 Pac. 954; *Pegues v. Ray*, 50 La. Ann. 574, 23 So. 904; *State v. Montgomery*, 92 Me. 433, 43 Atl. 13; *Rodgers v. Kent Circuit Judge*, 115 Mich. 441, 73 N. W. 381; *Ex parte Rosenblatt*, 19 Nev. 439, 14 Pac. 298; *Ferraris v. Kyle*, 19 Nev. 435, 14 Pac. 529; *State v. Wiggins*, 64 N. H. 508, 1 L. R. A. 56, 15 Atl. 128; *Wynne v. Wright*, 18 N. C. (1 Dev. & B. L.) 19; *Cowles v. Brittain*, 9 N. C. (2 Hawks) 204; *State v. Bracco*, 103 N. C. 349, 9 S. E. 404; *Baxter v. Thomas*, 4 Okla. 605, 46 Pac. 479; *Ex parte Mosler*, 8 Ohio C. C. 324; *Com. v. Gardner*, 133 Pa. 284, 7 L. R. A. 666, 19 Atl. 550; *Com. v. Walker*, 3 Pa. Dist. R. 584; *Com. v. Simons*, 8 Pa. Dist. R. 792; *Com. v. Dunham*, 191 Pa. 78, 43 Atl. 84; *Com. v. Mooney*, 12 Lanc. L. Rev. 209; *South Bethlehem v. Hackett*, 12 Lanc. L. Rev. 196; *State v. Rankin*, 11 S. D. 144, 76 N. W. 299; *Ex parte Butin*, 28 Tex. App. 304, 13 S. W. 10; *Talbutt v. State*, 39 Tex. Crim. Rep. 64, 44 S. W. 1091; *State v. Pratt*, 59 Vt. 590, 1 Inters. Com. Rep. 299, 9 Atl. 556; *Com. v. Myer*, 92 Va. 809, 31 L. R. A. 379, 23 S. E. 915; *Clements v. Casper*, 4 Wyo. 494, 35 Pac. 472; *Re Rudolph*, 6 Sawy. 295, 2 Fed. 65; *Ex parte Thornton*, 4 Hughes, 228, 12 Fed. 548; *Ex parte Stockton*, 33 Fed. 95; *Hynes v. Briggs*, 41 Fed. 468; *Re Kimmel*, 41 Fed. 775, 3 Inters. Com. Rep. 114; *Re White*, 11 L. R. A. 284, 3 Inters. Com. Rep. 531, 43 Fed. 913; *Ex parte Brown*, 48 Fed. 435; *Re* 60 L. R. A.

Rozelle, 57 Fed. 155; *Re Flinn*, 57 Fed. 496; *Oliver Finney Grocery Co. v. Speed*, 87 Fed. 408.

The general rules deducible from this line of cases are, that, if the statute imposing the occupation tax has a limited application to persons who are exclusively engaged in interstate commerce; or if it is made to operate upon goods made in, or the products of, other states, not yet brought in the taxing state, or upon agents who exclusively represent nonresident principals in commercial transactions only,—it is unconstitutional. But, if those who follow the taxed occupation are engaged in internal and local commerce, separately or even in combination with external commerce; or if the statute operates impartially, without discrimination, upon domestic and foreign products and residents and nonresidents alike, the commerce clause is not violated.

In so far as the cases of *Cumming v. Savannah*, R. M. Charlt. (Ga.) 26; *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *Sears v. Warren County*, 36 Ind. 267, 10 Am. Rep. 62; and *Biddle v. Com. 13 Serg. & R. 405*,—run counter to these rules, they may be said to be against the weight of authority.

The case of *Seymour v. State*, 51 Ala. 52, which was contrary to these principles, was afterwards, in *Vines v. State*, 67 Ala. 73, expressly overruled.

It was because these rules were broken by the state of Missouri that its statute respecting peddlers' licenses was condemned as a violation of the commerce clause, in *Welton v. Missouri*, 91 U. S. 275, 23 L. ed. 347.

The Missouri statute discriminated in favor of goods and merchandise the growth or product of that state, and against those grown or made in other states, in the conditions upon which sales were permitted to be made by traveling dealers.

The Wisconsin peddlers' license tax act (Laws 1870, chap. 72), which, in substance, was the same as that of Missouri, was held not to be in conflict with the commerce clause. *Morrill v. State*, 38 Wis. 428, 20 Am. Rep. 12.

But afterwards that decision was overruled upon the authority of the Missouri case just mentioned, and the latter decision was followed. *Van Buren v. Downing*, 41 Wis. 122.

A tax law operating by discriminating provisions against the citizens or products of other states, to fetter commerce among the states, would infringe the commerce clause of the Federal Constitution, and be void. But a simple tax on sales of merchandise, imposed alike upon

only that the total amount of stock and indebtedness shall be presented for consideration by the state board. Nevertheless, it is ordinarily true that, when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair. Thus, in *State Railroad Tax Cases*, on page 608 [92 U. S. on page 671, 23 L. ed.] it was said: 'It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the

whole.' And again, on page 611, 23 L. ed. page 673: 'This court has expressly held in two cases, where the road of a corporation ran through different states, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or the value of the franchise, and the length of the road within each state, as the basis of taxation. *Delaware Railroad Tax Case*, 18 Wall. 206, *sub nom. Minot v. Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Erie R. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. ed. 595.' The mileage basis of apportionment was also sustained in *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters.

all sales made in a city, whether by a citizen or a stranger, and whether the goods sold are the product of the state or not, without any attempt to discriminate injuriously against the products of other states or the rights of their citizens, is not an attempt to fetter commerce between the states, and is valid. *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382.

Grant, says Clifford, J., that states may impose discriminating taxes against citizens of other states, and it will soon be found that the power conferred upon Congress to regulate interstate commerce is of no value, as the unrestricted power of the state to tax will prove more efficacious to promote inequality than any regulation which Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several states. *Ward v. Maryland*, 12 Wall. 418, 20 L. ed. 449.

I concur, said Bradley, J., in the same case, in the opinion of the court that the act of the legislature of Maryland, complained of in this case, discriminates in favor of residents and against nonresidents of the state, and consequently is in violation of the 4th article of the Constitution of the United States, and therefore *pro tanto* void. But I am further of the opinion that the act is in violation of the commercial clause of the Constitution, which confers upon Congress the power to regulate commerce among the several states; and it would be so although it imposed upon residents the same burden for selling goods by sample as is imposed on nonresidents. Such a law would effectually prevent the manufacturers of manufacturing states from selling their goods in other states unless they established commercial houses therein, or sold to resident merchants who chose to send them orders. It is, in fact, a duty upon importation from one state to another under the name of a tax. I therefore dissent from any expression in the opinion of the court which in any way implies that such a burden, whether in the shape of a tax, or of a penalty, if laid equally upon residents and nonresidents, would be constitutional. *Ibid.*

Ficklen v. Shelby County Taxing Dist. 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810, is to be distinguished from *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592, which preceded it, and from *Stockard v. Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576, which followed it; both holding a privilege tax laid upon an agent of an out-of-the-state principal, selling merchan-

dise within the taxing state, coming from another state and doing such business exclusively, void for conflict with the commerce clause, by the circumstance that Ficklen, on the contrary, had an unrestricted license to do business generally as a broker, and was authorized to do any and all kinds of business for both residents and nonresidents, in state and local, as well as ultra state, products, and so was liable to pay the privilege tax, although, for the particular year that he disputed it, he had represented only nonresident owners and dealt in foreign goods.

The business of operating, under a United States license, towboats upon navigable waters between different states, is interstate commerce; and whose engages therein is not liable to a state or municipal occupation license tax. *Moran v. New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *Frere v. Von Schoeler*, 47 La. Ann. 324, 27 L. R. A. 414, 16 So. 808.

And a municipal ordinance exacting a license for the privilege of navigating a river flowing through the city and emptying into the harbor, from the owner of every tug, steam barge, or towboat, when such vessels are enrolled and licensed under the Federal laws, and are actually engaged in interstate and international coasting, and in towing vessels so engaged, is void as a burden upon external commerce. *Harman v. Chicago*, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306.

But a state revenue act requiring each money or exchange broker to pay a specified annual tax is not, when applied to a dealer in foreign bills only, in common and equally with other brokers doing a domestic business exclusively, in conflict with the commerce clause of the Constitution of the United States. *Nathan v. Louisiana*, 8 How. 73, 12 L. ed. 993.

XI. Charges for facilities, services, and piloting.

It has now become settled law that state statutes, such as pilotage and quarantine acts, and laws imposing charges for the use of wharves, the services of port officers and tolls for improved navigation, and the use of highway, although they are regulations of commerce and impose burdens upon it, are constitutional enactments. The exactions made in virtue of such laws are valid excises, and constitute an excepted class to ordinary burdens laid upon commerce.

A compulsory state pilotage law is not objectionable as violating the commerce clause, the prohibition against state imposts or duties on imports or exports or tonnage taxes, or of any preference by commercial regulation or rev-

Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163; *Charlotte, C. & A. R. Co. v. Gibbs*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 398." See also *Atty. Gen. v. Western U. Teleg. Co.* 141 U. S. 40, 35 L. ed. 623, 11 Sup. Ct. Rep. 889, and *State ex rel. Poe v. Jones*, 51 Ohio St. 492, 37 N. E. 945.

In again considering these questions, the Supreme Court of the United States, in *Cleveland, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122, said: "The true value of a line of railroad is something more than an aggregation of the values of separate parts of it, operated separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes

not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. . . . When a road runs into two states, each state is entitled to consider as within its territorial jurisdiction, and subject to the burdens of its taxes, what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single continuous road. It is not bound to enter upon a disintegration of values, and attempt to extract from the total value of the entire property that which would exist if the miles of road within the state were operated separately. Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of

enue act to the ports of one state over another; nor yet against entering, clearing, or paying duties by vessels of one state in the ports of another, in the Constitution of the United States. Such a law may lawfully require vessels of a stated tonnage and upwards, going to or coming from other state or foreign ports, to take aboard a pilot, or pay half fees if they refuse. It may devote such half fees to the relief of disabled and superannuated pilots, their widows and children, as that is germane to any system of pilot regulation. And it may exempt vessels in a particular trade, vessels of small tonnage, and vessels plying on particular waters, and still be constitutional. *Cooley v. Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996.

The mere grant to Congress of the power to regulate commerce, said Mr. Justice Curtis, in that case, writing for the majority of the court, did not deprive the states of power to regulate pilots. And, although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several states. The diversities of opinion, he continued, which have existed upon this subject, have arisen from the different views taken of the nature of this power. But, when the nature of a power like this is spoken of; when it is said that the nature of the power requires that it should be exercised exclusively by Congress,—it must be intended to refer to the subjects of that power, and to say they are of such a nature as to require exclusive regulation by Congress. Now, the power to regulate commerce embraces a vast field containing, not only many, but exceedingly various, subjects, quite unlike in their nature; some imperatively demanding a single, uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which, alone, can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress is to lose sight of the nature of the subjects of this power, and to assert, concerning all of them, what is really applicable to but a part. Whatever subjects of this power are, in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive regulation by Congress. That this cannot be affirmed of laws for the regulation of pilots and pilotage is plain. This view was shared by Taney, Ch. J., Catron, McKinley, Nelson, and Grier, JJ. *Dan-* 60 L. R. A.

iel, J., who concurred in the result, was of the opinion that the law, *sub judice*, was not a regulation of commerce at all, but only an exercise of the police power, and one not committed to Congress. McLean, J., dissented because he thought the act a regulation of commerce repugnant to the commerce clause under which the power of Congress was all in all exclusive. And in this view Wayne, J., concurred. *Ibid.*

In *Ex parte McNeil*, 13 Wall. 236, 20 L. ed. 624, Swayne, J., speaking for the court, and conceding pilot laws to be regulations of commerce, says that, in the Federal system, the governmental powers fall into four classes: (1) Exclusive state powers; (2) exclusive national powers; (3) concurrent powers; and (4) powers permitted to the states until Congress acts, when they become dormant until conditions recur to warrant their renewed exercise; and that the commercial power is, in part, a power of the fourth class. Some of the regulations of commerce, he says, must be uniform throughout the country from their very nature, and to that extent the Federal power is exclusive; others may well vary with varying circumstances of different localities. Pilot laws are of this nature, and states may, if Congress does not, act with respect of this subject.

Ex parte Loud, 154 U. S. 582, and 20 L. ed. 627, was decided the same way, and both sustained the validity of the challenged law.

It is the same regarding quarantine laws. While a quarantine law which detains at a station every vessel arriving at a state port until it is examined and certified by a health officer and fumigated, if infected; and which exacts from every such vessel, according to its character as ship, bark, brig, schooner, steamship, or steamboat, a larger or smaller specific fee devoted to the payment of official salaries and to the increment of a fund to meet quarantine expenses exclusively,—is undoubtedly a regulation of commerce, it is not in conflict with the commerce clause of the Federal Constitution, because the subject is local in its character, not national, and consequently within the police powers of the state, and not exclusively belonging to Congress. *Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

But, while the power to establish quarantine laws rests with the state, and has not been surrendered to the general government, and the states may lawfully raise a revenue from executing and enforcing them, notwithstanding they operate as burdens and restrictions upon commerce, yet the means employed by the state must be such as the United States' Constitution—

that road is partly attributed to the portion of the road in Indiana and partly to that in Ohio, and each state has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, How can equity be secured between the states? And to that a division of the value of the entire property upon the mileage basis is the legitimate answer. Taking a mileage share of that in Indiana is not taxing property outside of the state."

All that is thus forcibly and convincingly said as to the taxation of interstate railroad property is equally applicable to the taxation of interstate telegraph property. It is not easy to see how 1 mile of appellant's telegraph line connecting Chicago with New York could be of less value than any other mile of the same line. Cut out 1 mile, even though it be through a swamp or un-

al restrictions on the taxing power allow; and a duty of tonnage or impost without consent of Congress is not among them. *Peete v. Morgan*, 19 Wall. 581, 22 L. ed. 201.

And it is lawful to charge wharfage to all vessels making use of the wharves. Although such charges are burdens upon commerce, they are in the nature of compensation for facilities afforded. *Cannon v. New Orleans*, 20 Wall. 577, 22 L. ed. 417; *Keokuk Northern Line Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. ed. 377; *Northwestern Union Packet Co. v. St. Louis*, 100 U. S. 423, 25 L. ed. 688; *Vicksburg v. Tobin*, 100 U. S. 430, 25 L. ed. 690; *Guy v. Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg*, 105 U. S. 559, 26 L. ed. 1189; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; *Onachita & M. River Packet Co. v. Alken*, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907.

A state may lawfully exact payment for the services of its port officers, inspectors, etc., although rendered compulsorily. *Pittsburg & S. Coml. Co. v. Louisiana*, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459; *State ex rel. Ravenel v. Charleston*, 4 Rich. L. 286.

Provided the exaction does not take the form of a duty of tonnage. *Inman S. S. Co. v. Tinker*, 94 U. S. 238, 24 L. ed. 118; *Cole v. Johnson*, 10 Daly, 238.

And also provided there are services actually rendered. *Southern S. S. Co. v. New Orleans Portwardens*, 6 Wall. 31, 18 L. ed. 749.

And if a state makes improvements in a navigable stream, whereby its navigability is materially enlarged so as to be open for a greater distance, or for larger vessels, or be safer, she may lawfully charge tolls for the use thereof against such as avail themselves of the benefits. *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; *Sands v. Manistee River Improv. Co.* 123 U. S. 295, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; *Kellogg v. Union Co.* 12 Conn. 7.

And, without violating the commerce clause, a state may require the owner of every vehicle used upon the streets of a city to pay a license fee to augment a fund devoted to the care and repair of such streets. *Bogart v. Ohio*, 2 Inters. Com. Rep. 297.

We concede, said Strong, J., for the court in the *State Freight Tax Case*, the right of the owners of artificial highways, whether such owners be the state or grantees of franchises from the state, to exact what they please for

der a lake, and the value of the whole line is practically destroyed. The property is a unit, valuable as a whole, and by reason of its several connections, and not by virtue of any part taken by itself. No way, therefore, by which the value of the lines in this state can be determined, seems so just and equitable as to take that proportion of the whole value which the mileage in this state bears to the whole mileage.

A further contention made against the act of 1893, that it provides for a taxation of interstate commerce, is conclusively answered in *Cleveland, O. C. & St. L. R. Co. v. Backus*, 154 U. S. 445, 38 L. ed. 1046, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122: "It has been again and again said by this court that, while no state could impose any tax or burden upon the privilege of doing the business of interstate com-

merce, the use of their ways. That right is an attribute of ownership. A tax is a demand of sovereignty; a toll is a demand of proprietorship. 15 Wall. 232, sub nom. *Philadelphia & R. R. Co. v. Pennsylvania*, 21 L. ed. 146.

XII. Conclusion.

Can the conceded right of a state to exclude from its territory any foreign corporation be exercised against a corporation engaged in interstate or foreign commerce? Does the conceded right of a state to attach any conditions it chooses to its consent to the entrance upon its soil of a foreign corporation authorize it to impose upon such a corporation, seeking entrance and engaged exclusively in foreign or interstate commerce, a tax which in effect is a burden upon such commerce? No decision has explicitly answered these questions. In every case where they were propounded either the corporation involved was not exclusively engaged in interstate or foreign commerce, or else the tax laid upon it was considered to be no burden upon, interference with, or regulation of, such commerce. It may, however, be said with confidence that the decisions warrant the conclusion that a state may exclude the corporation, but not the commerce in which it is engaged. It may condition the foreign corporation, but it must leave unconditioned the commerce that it does. A foreign corporation may send its agents into another state to buy and sell property to be taken out of or sent into such state in the course of commerce; it may send its products to a market therein, without the consent, even against the will, of the state; but it cannot, without the state's permission, tacit or expressed, establish itself therein and carry on its business, even though that business is interstate or foreign commerce. The exception to this doubtless is a telegraph corporation that has complied with the terms of the act of Congress of July 24, 1866; and another exception probably is a corporation actually an agency of the national government in carrying into effect its constitutional powers. It is probable, also, that a foreign corporation, whose business was exclusively interstate or foreign commerce or both, would have the right, in spite of the objection of a state, to gain and maintain a foothold therein for the express and sole purpose of carrying on such commerce so far as it might be absolutely essential for it so to do. The cases of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 34

merce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce. See, among many other cases, *Marye v. Baltimore & O. R. Co.* 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876. The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitableness of that use, present and prospective, actual and anticipated. . . . If property is taxed at its actual cash value, it is taxed upon something which is created by the uses to which it is put. . . . Take, for illustration, property whose sole use is for purposes of interstate commerce; such as a bridge over the Ohio between the states of Kentucky and Ohio. From that springs its entire value. Can it be that it is on that account entirely relieved from the burden of state taxation? Will it be said that the taxation must be based simply on the cost, when never was it held that the cost of a thing is the test of its value? Suppose there be two bridges over the Ohio, the cost of the construction of each being the same; one between Cincinnati and Newport, and another twenty miles below, and where there

is nothing but a small village on either shore. The value of the one will, manifestly, be greater than that of the other, and that excess of value will spring solely from the larger use of the one than of the other. Must an assessing board of either state, assessing that portion of the bridge within the state for purposes of taxation, eliminate all of the value which flows from the use, and place the assessment at only the sum remaining? It is a practical impossibility. Either the property must be declared wholly exempt from state taxation, or taxed at its value, irrespective of the causes and uses which have brought about such value. And the uniform ruling of this court—a ruling demanded by the harmonious relations between the states and the national government—has affirmed that the full discharge of no duty intrusted to the latter restrains the former from the exercise of the power of equal taxation upon all private property within its territorial limits. . . . It is enough for the state that it finds within its borders property which is of a certain value. What has caused that value is immaterial. It is protected by state laws, and the rule of all property taxation is the rule of value; and by that rule property engaged in interstate commerce is controlled the same as property engaged in commerce within the state."

But counsel contend most earnestly that the act of 1893, in applying the mileage basis of valuation to appellant's lines of

L. ed. 394, 8 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958; *People ex rel. Pennsylvania R. Co. v. Wemple*, 138 N. Y. 1, 19 L. R. A. 694, 33 N. E. 720, and *Clyde S. S. Co. v. Charleston*, 76 Fed. 46, support such a conclusion.

Memphis & L. R. Co. v. Nolan, 14 Fed. 532, abstracted in 27 Alb. L. J. 217, and in 4 Ky. L. Rep. 840, under the title *Memphis & L. R. Co. v. Nelson*, is apparently alone upon the other side. But the reasoning in that case is certainly faulty, and it rests on *Osborne v. Mobile*, 16 Wall. 479, 21 L. ed. 470, which was discredited in *Leloup v. Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

The business which the *Memphis & L. Railroad Company* did in *Memphis* was identical with that done by the *Pennsylvania Railroad Company* in *New York*, and by the *Clyde Steamship Company* in *Charleston*; and the tax was of the same nature in each case. The one decision cannot be reconciled with the other two.

Mr. Justice Brewer, in the latest decision of the Supreme Court of the United States upon the questions discussed in this note, states and cites cases at length to prove that the following propositions have been adjudicated so often as to be no longer open to discussion. First. The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation. Second. No state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce. Third. This immunity does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory, and employed

in interstate commerce. Fourth. The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided, at least, the franchise is not derived from the United States. Fifth. No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor. *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 47 L. ed. —, 23 Sup. Ct. Rep. 817.

An interesting question that has not been discussed much, if any, arises upon the decision in *Re Rahrer*, 140 U. S. 540, *sub nom.* *Wilkerson v. Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865, and the act of Congress of which it was predicated. It is as to the right of Congress to abdicate in favor of the states its constitutional power to regulate interstate, foreign, and Indian tribal commerce. Does the power conferred upon Congress in the commerce clause go beyond the power to regulate or leave free? Can Congress at once refuse to regulate, and yet declare that commerce shall not be free? Can Congress surrender to the states any power which the Federal Constitution has conferred upon it and taken away from the states? The logic of the decision just cited appears to require an affirmative answer to each of these questions. It is to be regretted that no member of the court in that case dissented from its conclusion and that the three who withheld approval from the reasoning of the chief justice omitted to give their own views. The principle of the decision will cover commerce in other things than intoxicants. Congress consenting, states may wholly interdict commerce with sister states in, say, tobacco, oleomargarine, convict-made goods, articles not stamped by labor unions, and divers other products. If the as-

telegraph, compels the state board of tax commissioners to add large outside values to the values of the Indiana portions of the lines, for the reason, as claimed, that the extra state parts of appellant's property are proportionately of greater value than the parts within the state. In this counsel do not interpret the law correctly. The act, it is true, provides a method of valuation—the mileage method—as a basis for the taxation of certain property within the state of Indiana. But this is simply a means for determining the true cash value of the property within the state; and if in the case of appellant's property, or in any other case, it is shown to the board, or is discovered by them, that still further deductions should be made, on account of larger proportional values outside of the state, or for any other reason, then the board must make such deductions, so that, finally, only the property within the state of Indiana shall be assessed, and that at its true cash value.

As said already, and as appears from the title and from § 12 of the body of the act of 1893, p. 382, here in review, that statute is "supplementary to and amendatory of" the general tax law of 1891, and must therefore be construed in connection therewith. By the act of 1893, §§ 68, 69, 70 and 71 of the act of 1891, for which the act of 1893 was substituted, "and all other laws and parts of laws in conflict with this act," were expressly repealed. The express repeal of

those sections left all the other sections of the act of 1891 in full force, showing that it was not the intent of the legislature to abridge or change in any respect the duties and powers of the state board as fixed by the act of 1891. Neither is the ultimate basis of taxation as there fixed changed by the act of 1893. The cardinal rule remains that it is the property within the state not expressly exempt from taxation, and that alone, which is to be assessed, and that at its true cash value. By § 3 of the act of 1891, "all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." Authority is given to tax no other property. By §§ 33, 48, 53, 61, 74, 90, 95, 97, 102, 105, 112, 114, 129, 130, 137, and perhaps other sections, all assessing officers, from the township assessor to the state board of tax commissioners, are required and bound by their oaths of office to assess all property at its "true cash value." By § 120, p. 252, it is made the particular duty of the state board, among other things, "to see that all assessments of property in this state are made according to law." By § 129, p. 252, it is provided that "the state board of tax commissioners is hereby given all the powers given to county boards of review. They shall not be bound by any reports or estimates of value of railroad property, real estate, or other property, as returned to the county auditors or to the auditor of state, but shall

asserted power exists at all it is unlimited, and it is conceivable that a coterie of congressmen may sometime be formed and be sufficiently powerful over legislation to enable particular sections or states to annihilate commerce with others in the staple products of the latter,—the cotton and rice of the south, the maple sugar of Vermont, the coal of Pennsylvania.

The New York decisions in *People ex rel. William J. Matheson & Co. v. Roberts*, 158 N. Y. 162, 52 N. E. 1102, and *People ex rel. American Soda Fountain Co. v. Roberts*, 158 N. Y. 168, 52 N. E. 1104, reversing 29 App. Div. 585, 51 N. Y. Supp. 487, deserve a passing notice in conclusion. The practical effect of these decisions runs to this: That when a corporation does two kinds of business, each exempt from a particular tax if carried on separately, it may be taxable on both by doing them in combination. The statute under which these two corporations were taxed—the domestic one upon its franchises, and the foreign one upon its business within the state—expressly exempted manufacturing companies wholly engaged in manufacturing within the state. Both these corporations were engaged in manufacturing within the state under such circumstances that neither would have been taxable if not engaged, the one in foreign, and the other in interstate, commerce. Both, too, would have been exempt if neither had carried on manufacturing in the state, since the business of one was foreign, and that of the other interstate, commerce. Either can now secure that exemption by discontinuing one branch or the other of its business, and it will not matter which. Each in carrying on its two lines has lost all exemption.

Of the latest New York decision, that rendered in *People ex rel. Connecting Terminal R. Co. v. Miller*, 82 N. Y. Supp. 882, it may be said that, granting the business of the relator to be "transportation," and its earnings "re-

ceipts from transportation," the conclusion doubtless follows that it was taxable under the statute in its first form upon its corporate franchise because it was a domestic corporation; but it is not at all clear that it is liable under the statute in its later form, since the measure of the tax under that law is "gross earnings from transportation or transmission business originating and terminating within this state, and not including earnings derived from business of an interstate character." It may plausibly be argued that, under this language, no basis is afforded for taxing the relator, whether its business is or is not technically interstate commerce.

The decision in *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. —, 23 Sup. Ct. Rep. 214, leaving undisturbed, as it does, *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 201, 36 L. ed. 675, 4 Inters. Com. Rep. 90, 12 Sup. Ct. Rep. 808, warrants the conclusion that, while a state may constitutionally tax as internal and domestic a commerce between terminals in its own territory, although its boundary be passed and repassed in transit, yet it may not burden or interfere with it in the way of regulating fares, tolls, rates, and charges for passage, carriage, or transmission.

The trend of the decisions is that if, in a statute or an ordinance imposing taxes upon a corporation engaged in interstate or foreign commerce, pains are taken, either by express words of disclaimer, or by language from which courts may spell out an intention to exclude from its application all governmental, foreign, and interstate transactions, and to confine its operation to internal business exclusively, its validity is assured, and the tax may be made as onerous as the will of the authority imposing it dictates. It is all so very simple that one wonders why any tax upon interstate commerce need ever be illegal.

J. B. G.

appraise and assess all property at its true cash value, as defined by this act, according to their best knowledge and judgment, and so as to equalize the assessment of property throughout the state." And, by § 130, each member of the board is required to declare, as a part of his oath of office: "I will in no case assess any property at more or less than its true cash value." Interpreting the act of 1893 in the light of the foregoing provisions of the act of 1891, as we must, we can have no difficulty in concluding, as we do, that in the act of 1893 the legislature provided the mileage method as the basis for the assessment of telegraph and other like property, both as to lines situated partly within and partly without this state, and also as to lines running through several counties or other subdivisions of the state; but that it was not the intention of the legislature, nor is it the meaning of that act, that any property outside of the state should be assessed by importation of values or otherwise, or that any property should be assessed at more or less than its true cash value. Construing the acts of 1891 and 1893 together, it will therefore be presumed, in the absence of evidence to the contrary, that the state board has deducted from the total valuation of all interstate property such values, if any, of extra state property, as will leave the remaining property within and without the state, as near as may be, of equal proportional value.

The possibility of such exceptional cases in the assessment of railroad property is referred to in *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 431, 38 L. ed. 1038, 14 Sup. Ct. Rep. 1114: "As, for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business, requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment, . . . took into account the peculiar and large value of such facilities and such extra rolling stock." So in this case. The act of 1893 provides generally for a mode of ascertaining the true cash value of that part of interstate telegraph and other property which is within the state of Indiana, to wit, the mileage method. But, should there be particular cases where that method must be modified in order to reach the necessary result,—namely, the true cash value of such part of the property as is within the jurisdiction of the state,—the law of 1893 itself supplies the means of doing so. In § 6 of the 60 L. R. A.

act, after speaking of the reports and schedules filed with the auditor, and by him laid before the board, it is said that the board shall proceed to assess the property according to the mileage method, "after examining such statements, and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain. For that purpose they may require the agents or officers of said association, company, copartnership, or corporation to appear before them with such books, papers, or statements as they may require, or they may require additional statements to be made to them, and may compel the attendance of witnesses in case they shall deem it necessary, to ascertain the true cash value of such property."

Were it true, as counsel for appellant contend, that the act of 1893 provides an iron-clad mode of assessment by which the board is required to import and assess valuations of property outside the state, there would be no need of any further information than that given by the schedules filed in the first instance. The fact that other information is provided for, and agents of the companies and other witnesses may be called, shows that the intention was, as expressly provided in the general tax law of 1891, that the board should assess only property within the jurisdiction of the state, and that only at its true cash value.

That the valuation is upon the capital stock is no objection to the statute. The law looks through forms, and rests upon things. In speaking of the Massachusetts statute, similar to that here under consideration, it was said by the Supreme Court of the United States in *Western Union Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961, and approved in *Atty. Gen. v. Western Union Teleg. Co.* 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889: "The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the state of Massachusetts; and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertaining the value of that property." To the same effect is *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876,—both cases cited already.

The objection that the company paid taxes under the act of 1891 for the year ending April 1, 1893, is not well taken. The act of 1893, by its terms, imposes taxes on appellant's property only from and after the 1st day of April, 1893.

Finding no error in the record, the judgment is affirmed.

NEBRASKA SUPREME COURT.

Lucy PARKER, *Plff. in Err.*,

v.

Michael J. NOTHOMB.

(.....Neb.....)

- *1. In construing a statute, the strict letter of the law ought not to be followed when such an interpretation would lead to an unreasonable or absurd conclusion. The court will endeavor to ascertain the true intention of the legislature, and give it effect, rather than the literal sense of the terms employed.
2. At common law, a bastard child was one born neither in lawful wedlock, nor within a competent time after its termination, or under circumstances which render it impossible that the husband of its mother can be its father.
3. Under the statute entitled "Illegitimate Children," prior to its amendment in 1875, an action in bastardy could be maintained by any woman giving birth to an illegitimate child, even though begotten and born during the existence of the married state.
4. By the amendment of the statute in 1875, which was entitled "An Act for the Maintenance and Support of Illegitimate Children," an action can be maintained only by a woman who, while unmarried, has become pregnant with child, which, if born alive, would be a bastard, or has been delivered of an illegitimate child.
5. The word "unmarried," as used in the statute as amended in 1875 (Comp. Stat. 1901, chap. 37, § 1, entitled "Illegitimate Children"), properly refers to the status of the mother at the time her child is begotten and born, and does not relate to her situation at the time of making the complaint therein referred to.

(February 4, 1908.)

ERROR to the District Court for Seward County to review a judgment in favor of defendant in a bastardy proceeding. *Reversed.*

The facts are stated in the opinion of the Commissioner, rendered after the first hearing, which was as follows:

Only one question is presented in this case,—the construction to be placed upon the opening clause in § 1, chap. 37, Comp. Stat., relating to illegitimate children. The provision is "that on complaint made to, any justice of the peace in this state by an unmarried woman resident therein, who shall hereafter be delivered of a bastard child, or being pregnant with a child which, if born alive, may be a bastard, accusing on oath or affirmation any person of being the father of said child, the justice shall," etc. The complaining witness made the following complaint: "On this 2d day of April, A. D. 1900, Lucy Parker, formerly Lucy West, a resident of Seward county, Nebraska, personally appeared before me, J. J. Thomas,

county judge in and for Seward county and state of Nebraska, who, being by me first duly sworn, on her oath says that she is now a married woman, but at the time of the birth of the child hereinafter set forth, and at the time the same was conceived, was an unmarried woman, and resident of said county and state, and that she was on the 29th day of April, 1897, delivered of a male bastard child, and that said child is now living; and affiant further says that Michael Nothomb, name otherwise unknown, is the father of said child, and further affiant saith not." Examination was held, and defendant gave bail for his appearance in district court. There he pleaded "Not guilty." A jury was impaneled. Objection was then made to the introduction of any evidence on the ground that the complaint stated no cause of action. This was sustained, and by instruction of the court a verdict of not guilty returned. Motion for new trial was overruled, and error is brought to reverse the judgment of dismissal.

The sole question is whether "unmarried," in the statute, relates forward to the following clauses, or back to the complaint. Must it be the complaint of a woman unmarried at the time of making it, or merely the complaint of a woman unmarried when delivered of a bastard child, or pregnant with one? It is held in *Johnson v. State*, 55 Neb. 781, 76 N. W. 427, that the complainant at the time of the birth of the child must be an unmarried woman, and that the evidence must affirmatively show it. Her status at that time fixes that of her offspring. If she was then a married woman, her child will not be a bastard. It is held in *Myers v. Baughman*, 61 Neb. 820, 86 N. W. 507, that the purpose of the statute is twofold: To require the putative father to support his offspring, and to protect the county in which the child is born. *Stoppert v. Nierle*, 45 Neb. 105, 63 N. W. 382, and *Ex parte Cottrell*, 13 Neb. 193, 13 N. W. 174, are cited, and are to the same effect. That the marriage of the mother after the status of her illegitimate child is fixed should be made to relieve its father of all responsibility is clearly against the general intention and object of this statute. Her husband, by the mere fact of marriage, would not be under any obligation to support the child. *Schouler*, Dom. Rel. § 273; *Moubry v. Moubry*, 64 Ill. 383.

It is claimed that this statute is penal, and its provisions should be strictly construed. Such a holding is not in conformity with the rulings of this court. In *Stoppert v. Nierle*, 45 Neb. 105, 63 N. W. 382, it is held that the number of challenges allowed in the selection of the jury are those provided in civil actions, and not those in criminal proceedings. It has also been frequently held that a mere preponderance of the evidence is all that is necessary to uphold a verdict of guilty in these cases. *Robb v. Hewitt*, 39 Neb. 217, 58 N. W. 88. A provision for the maintenance of helpless chil-

*Headnotes by HOLCOMB, J.

NOTE.—The authorities on the question involved in the above case seem to be quite fully collected in the briefs and opinion of the court. 60 L. R. A.

dren otherwise without claim upon anyone but the mother is certainly remedial in its nature, and, it would seem, should be construed as a remedial statute.

The industry of counsel has brought together the adjudications upon this subject. The holdings, where the question has been directly raised in courts of last resort, seem to be uniformly to the effect that the provision of the statute has relation to the status of the mother at the time of the conception and delivery of the child, and not at the time of making the complaint. In England, under a provision that a "single woman" may make a complaint, it is held that a woman living without access of the husband answers to the description. *Queen v. Pilkington*, 2 El. & Bl. 546; *Reg. v. Col-lingwood*, L. R. 12 Q. B. 681; *King v. Luffe*, 8 East, 193. In Illinois, under a statute identical in meaning, and almost so in form, with ours, in *People ex rel. Wilmers v. Volkendorf*, 112 Ill. 292, the precise case here was held to entitle the complainant to proceed; and the opposite holding of the appellate court in the same case, in 12 Ill. App. 534, was reversed. In Vermont, under a statute as follows, that when any single woman shall be delivered of any bastard child, or shall declare herself to be with child, and such child is liable to be born a bastard, and shall in either case, in writing or on oath, etc. It was held that it was competent to proceed in the name of the woman under a complaint almost identical in terms with the one that we have here, although in that case the action was carried on jointly by the complainant and the town. *Sisco v. Harmon*, 9 Vt. 129. The court, both in Illinois and in Vermont, holds that the provision as to the status of the complainant has reference only to the time when her child is conceived and born. In North Carolina, under a statute like that of Vermont, a woman who was unmarried at the time of the birth of two children, after marriage to another party, entered bastardy proceedings against the father; and the court held that she was entitled to carry them on,—making the same holding as in Vermont as to when the requirement that she be a single woman should be held to have application. *Wilkie v. West*, 5 N. C. (1 Murph.) 319. These are all the cases which counsel's industry has brought forth where courts of last resort have passed upon this point under the state of facts here presented.

In Ohio, in *State ex rel. Ross v. Brill*, 29 Ohio L. J. 190, the court of common pleas dismissed the complaint of a woman who was married at the time of filing it, though unmarried when her child was begotten and delivered. Such action is based on several opinions of the supreme court of that state, which are broad enough in their terms to include the case which the common pleas court had under consideration, but in each of which the status of the complainant was wholly omitted to be mentioned, or else it appeared that she was a *feme covert* at the time of the conception and of the birth.

It is contended that to restrict the appli-

cation of the term "unmarried woman" to the time of the conception and birth of the child is judicial legislation, and violates the plain intention of the statute. It is further claimed that this is unnecessary, because of the following section, which makes provision for the county authorities bringing the action where the mother neglects to bring or to prosecute it. It certainly seems harder to find authority under that section for the county to take action where the woman has done so and been denied than it is to find authority for her proceeding after her marriage under the previous section. It could not be a neglect to bring or to prosecute an action which produced the failure, except on a much more forced construction of the statute than plaintiff asks here.

Citations are given us from other states, including Alabama, Florida, Kentucky, and Indiana, where holdings have been made that it must appear that the complainant was unmarried. But these cases, like those in Ohio, fail to indicate any conclusion as to the precise question here, namely, when she must be unmarried. They are all cases in which the woman's status does not appear at all, or else where her coverture at the time of birth or conception of the child prevented her recourse to the statute.

It is urged that the construction sought by plaintiff in error would render the amendment of 1875, inserting the word "unmarried" in place of "any," meaningless. This seems not to be the result. The intention of that change apparently was to do away with any attempt to establish bastardy by reason of nonaccess of the husband in the case of a child born to a married woman. It seems also to have been intended, as is held in *Johnson v. State*, 55 Neb. 781, 78 N. W. 427, to do away with any attempt on the part of married persons to avoid responsibility for the support of offspring. Both of these objects are as completely reached by holding that the term "unmarried" has application only to the time of the conception and birth of the child, as by including also the time of making the complaint. As is before suggested, the husband would by the marriage incur no liability for another man's child previously born. The sole reason for holding that this required status of the mother has relation to the time of filing the complaint seems to be the collocation of the word in the statute, and the grammatical effect of such collocation. This, of course, must not be arbitrarily disregarded in construing a statute. It, however, should not control where the intention of the legislature requires it to be disregarded. *Schuyler v. Hanna*, 31 Neb. 307, 11 L. R. A. 321, 47 N. W. 932. The recent case of *McGavock v. Omaha Nat. Bank* (Neb.) 90 N. W. 230, makes a similar holding in regard to the words of a contract. In that case the contract had reference to an extension of time on a note, which the circumstances indicated was only to be until a certain case was decided in this court. The agreement provided that it should only be good "until said case should be decided

in the supreme court, or for not to exceed two years from this date." This court held that the intention should be gathered from the whole circumstances, and that the final clause did not grant an alternative for, but provided a limitation upon, the preceding one. The argument would seem at least as strong that the intention of the legislature was to establish a provision for bastard children; that the amendment of 1875, introducing the word "unmarried" into this section, meant only to shut out the inquiry as to nonaccess of the husband, and the question of liability for the child by one marrying a pregnant woman. To do this it is only needed that the requirement as to the status of the mother be held to apply to the time of the child's conception and birth. It has been so applied in *Johnson v. State*, 55 Neb. 781, 76 N. W. 427. To hold that it applies also to the time of filing the complaint would be to defeat the main purposes of the act, as to one class of children, by a provision as to means. It would be to leave the bastard whose mother should marry before the institution of proceedings remediless. "It is, as will be seen presently, construction alone which saves us, in many instances, from sacrificing the spirit of a text or the object to the letter of the text, or to the means by which that object was to be obtained. And without construction, written laws—in fact, any laws or other texts containing rules of actions, specific or general—would in many cases become fearfully destructive to the best and wisest intentions; nay, frequently, produce the very opposite of what it was purposed to effect." Lieber, *Hermeneutics*, 45.

It is recommended that the judgment of the district court be reversed, and the case remanded for further proceedings.

Messrs. Abbott & Abbott, T. B. Parker, and D. C. McKillip, for plaintiff in error:

The statute means "unmarried" at the conception and delivery of the child, and does not relate to the time of making the complaint.

People ex rel. Wilmers v. Volksdorf, 112 Ill. 292; *Brush v. Blanchard*, 18 Ill. 46; *Mowbry v. Mowbry*, 64 Ill. 383; Schouler, *Dom. Rel.* pp. 321, 378; 17 Am. & Eng. Enc. Law, p. 349, note; *Sisco v. Harmon*, 9 Vt. 129; *Sword v. Nestor*, 3 Dana, 453; *Wilkie v. West*, 5 N. C. (1 Murph.) 319; *Johnson v. State*, 55 Neb. 781, 76 N. W. 427.

Messrs. Norval Brothers and M. D. Carey for defendant in error.

Holcomb, J., delivered the opinion of the court:

This cause is submitted on a rehearing heretofore allowed. The controversy is with respect to the proper construction of § 1, chap. 37, Comp. Stat. 1901, entitled "Illegitimate Children." The direct question presented is whether, under the statute referred to, an unmarried woman who has given birth to an illegitimate child, and subsequent thereto marries, may, after such marriage, 60 L. R. A.

maintain an action against the putative father for the support of her illegitimate offspring. At the former hearing the word "unmarried," in the section referred to, it was held, does not properly refer to the mother's status at the time of making the complaint in bastardy, but only to such status at such time as will affect the question of the legitimacy of the child, or the liability of the husband to support it. The former opinion treats of the propositions involved at some length, and is referred to, in connection with what is here said, for a more comprehensive understanding of the views we entertain regarding the matter. Reiteration will serve no useful purpose, and we shall attempt to avoid it. A brief in support of the application for a rehearing so ably and persuasively argued the question in favor of a contrary construction as to induce the court to grant the motion, for the purpose of more fully investigating and considering the subject, and to arrive, if possible, at a right decision of the controversy.

The statute reads: "That on complaint made to any justice of the peace in this state by any unmarried woman resident therein, who shall hereafter be delivered of a bastard child, or, being pregnant with a child which, if born alive, may be a bastard, accusing on oath or affirmation any person of being the father of said child, the justice shall take such accusation in writing," etc. Comp. Stat. 1901, chap. 37, § 1. It is earnestly insisted by defendant's counsel that, because of the language just quoted, the mother of a bastard child, who, subsequent to its birth, and before instituting the proceedings therein contemplated, marries, cannot thereafter bring or maintain an action under the statute. It is argued that the construction given the statute in the prior opinion is contrary to the clear import of the language therein used, and against the weight of adjudged cases bearing on the question. Chief reliance for the construction contended for by the defendant is placed on the wording of that part of the section we have quoted, and it is urged that the intention of the legislature is made so apparent therefrom that there is left no room for any other construction as to the meaning of the language than that the mother of the illegitimate child must be an unmarried woman when she makes the complaint in bastardy, and that an allegation that she is at the time of filing the complaint an unmarried woman is essential and necessary to be made and proved in order to give her and her illegitimate child the benefit and advantage afforded by the statute. It should, perhaps, here be said that on a first reading of the statute no other view seems admissible. Nevertheless maturer reflection and full consideration of the entire act, bearing in mind the object and purpose which the legislature had in view in adopting the statute, as gleaned from the title as well as the act itself, produces in our minds a well-settled conviction that such construction would, in a measure, defeat the intention of the law-making body which

passed the measure. In a very recent decision we have said. "It is a well-settled rule in the interpretation of statutes that the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice or absurdity." *Kelley v. Gage County* (Neb.) 93 N. W. 194. In the interpretation of statutes, courts ascertain the intention of the legislature, and give effect to it, rather than to the literal sense of the terms employed. *State ex rel. Marquett v. Baushausen*, 49 Neb. 558, 68 N. W. 950. The law is manifestly one created by a statute remedial in character, and to which resort must be had in the first instance in order to determine the legislative intent, and the objects and purposes sought to be accomplished by its enactment. In determining the character and proper construction to be given a law of the kind under consideration, we should, perhaps, first consider the action taken by the lawmaking body, the changes, if any, which have been made, the reasons for such changes, and the evils sought to be remedied thereby, and thus more certainly ascertain the legislative intent and purpose. The first act on the subject was passed and approved in 1869, and was entitled "An Act to Provide for the Support of Illegitimate Children." In that act it was provided that on complaint made by "any woman," etc., proceedings should be had for the purpose of compelling the father to support his illegitimate offspring. By the wording of the statute as then enacted, the question of the status of the woman making the complaint, with reference to her being married or unmarried at the time of the birth of the child, was not made the test as to her right to maintain an action against the putative father for its support. Under such statute the questions to be determined were whether the woman, be she married or unmarried, had been delivered of a bastard child, or was pregnant with a child which, if born alive, would be a bastard. The illegitimacy of the child was the sole test of the mother's right to prosecute the action. "At common law," it is said, "a bastard is one who is born neither in lawful wedlock, nor within a competent time after its termination, or under circumstances which render it impossible that the husband of his mother can be his father." 5 Cyc. Law & Proc. 625; *Com. v. Shepherd*, 6 Binn. 283, 6 Am. Dec. 449; *Smith v. Perry*, 80 Va. 563. See also *Wilson v. Babb*, 18 S. C. 59. Thus, by the old statute a married woman, although such at the time a bastard child was begotten and born, could maintain an action in bastardy for the support of such child. It is said (and, we are convinced, with much merit) that a law of this character was subject to much abuse, and permitted the prosecution of an action by a woman who while in lawful wedlock gave birth to an alleged illegitimate child, and resorted to the statute solely for the purpose of gain, in an attempt to bastardize a child begotten and born in lawful wedlock, and thus stigmatize as a bastard one whose com-

ing into the world was sanctioned by every law governing the marital relations. To avoid this possible condition of things, we apprehend, was the sole aim and object of the legislature in amending the law as it did in 1875 by inserting the word "unmarried" after the word "any," so that the section should read that on complaint made by "any unmarried woman," instead of "any woman," as originally existing. It cannot, we think, be successfully controverted that this was the prime aim and purpose of the amendment of the statute which in all other respects was left substantially unchanged. What we conceive to be the intention of the legislature by making the amendment was to deny to the married woman giving birth to a child, even though in truth and fact not begotten of her husband, the right to maintain an action against some third party for its support, who is alleged to be its father. The amended act is entitled "An Act for the Maintenance and Support of Illegitimate Children." The title is, we assume, an unerring index, disclosing the object and purpose of the act. These were to provide for the support and maintenance by the putative father of his illegitimate child, begotten and born out of lawful wedlock. It is hard to conceive of any good reason, and we know of none, for saying that an illegitimate child should be denied the protection afforded by the statute because the mother, subsequent to its birth, enters into a contract of marriage with one other than its father. The law does not discourage marriages, and certainly the legislature did not intend to throw any impediment in the way of the unfortunate mother who had given birth to an illegitimate child to enter into a marriage alliance. It cannot be doubted, as was held to in the former opinion, that the husband of a woman contracting such marriage would sustain the legal relation only of stepfather to the illegitimate child, and would be under no legal obligation for its nurture, support, and maintenance. The child, notwithstanding such marriage, is in the same attitude with respect to the law, and in the same need of its beneficent provisions, as before the marriage. It is as much an object of legislative solicitude as other innocent unfortunates of its kind whose mothers have contracted no such alliances. There is in fact no substantial reason, nor can any be advanced, why the legislature intended to deny to the illegitimate child, whose mother after its birth has married, the protection of the statute, and yet extend such protection to those in exactly the same condition whose mothers have not married. The rule is unvarying, so far as we have examined, to the effect that if the mother of an illegitimate child shall marry one other than the father, after the commencement of bastardy proceedings, such marriage will not have the effect of abating the action, or relieving the putative father of the legal obligations imposed upon him by the statute. *Austin v. Pickett*, 9 Ala. 102; *Roth v. Jacobs*, 21 Ohio St. 646; *State v. Ingram*, 4 Hayw. (Tenn.) 221. See also *Swett v.*

Stubbs, 34 Me. 178. If a marriage of the mother after the action is instituted, and before judgment, will not operate to discontinue the action, upon what substantial grounds can it be argued that a marriage before the action is instituted will be a bar to the proceedings? By what course of reasoning can it be said that a distinction exists, affecting rights under the statute, between the woman who institutes an action, and then immediately marries, and one who marries, and immediately begins such action? As regards the illegitimate children, their legal status is exactly the same, and, if one is to be denied the benefit of the law because its mother has married before instituting an action, then the legislature has not extended to it the equal protection of the law. We cannot believe that this situation was in contemplation by the legislature when it amended the act by inserting the word "unmarried" between the words "any" and "woman." An examination of the entire act as originally passed, and its subsequent amendment, the title to the act, and the language used in expressing the will of the legislature, constrains us to the view, as expressed in the original opinion, that the word "unmarried," as used in the statute, refers solely to the status of the complainant at the time the illegitimate child is begotten and born, and does not have reference to her situation when proceedings are begun against the father to compel him to contribute to the child's support. What the statute does say, we think, is that when any unmarried woman who has been delivered of a bastard child shall afterwards, and regardless of her status at the time, make complaint in writing as is required by statute, then the proceedings shall be had to charge the father with the support of his child, such as is contemplated by the statute. The word "unmarried" can only mean, if we give the language used an interpretation based on reason and in consonance with the manifest intention of the legislature, the status of the mother at the time of the begetting and birth of the illegitimate child. And this is the construction given in the case of *Johnson v. State*, 55 Neb. 781, 76 N. W. 427. But it is said such a construction conflicts with the prior decision of this court in the case of *Olson v. Peterson*, 33 Neb. 358, 50 N. W. 155. While the language used in that case appears on the face of the opinion to be inconsistent with the views herein expressed, yet, when considered in connection with the vital issues presented, the apparent conflict is dissipated. In that case it appears, from an examination of the record and the statements of counsel in their briefs, that the proceedings were first begun during the pregnancy of the mother, and that after the birth of the child, because of some irregularity, a new complaint was filed, and yet the action was substantially a continuation of those proceedings begun before its birth. This, we think, accounts for some of the language used in briefs of counsel and in the opinion, to the effect that it is essential that the complainant be an unmarried wo-

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man when the action is begun. At the trial the defendant sought to show that for about two months during the time of gestation the complainant and a third party lived together as man and wife, and that they had in fact contracted a valid common-law marriage. On cross-examination questions were asked of the complainant by which this alleged marriage was sought to be established, the answers to which were excluded by the trial court; and because of such exclusion the judgment rendered was, on error to this court, reversed. What was sought to be established as a defense in that case, and regarding which, only, the cause was reversed, was the alleged common-law marriage of the complainant prior to the birth of the child, and not subsequent thereto, and prior to the commencement of the proceedings, as some of the language in the opinion would seem to indicate. Under the issues as presented, all the court was called upon to decide, and which was in fact decided, in that case, was that a marriage prior to the birth of a child, even though illegitimately begotten, would bar a prosecution by the mother against the putative father for the child's support. Such a construction of the statute is, we think, sound, and in accordance with *Johnson v. State*, 55 Neb. 781, 76 N. W. 427.

We are committed to the doctrine that the status of the mother must be that of an unmarried person at the time the illegitimate child is begotten and born, and we are now asked to go a step further, and unequivocally decide that she must also be unmarried when the complaint is filed and the prosecution begun. The decisions of the supreme courts of other states are appealed to in support of the construction contended for, which will now be briefly considered. In many of the authorities to which our attention has been called, as well as some found by an original investigation on our part, some things are said and language used which give countenance and support to the contention of counsel for defendant. A thorough consideration, however, of these numerous cases, discloses that in no instance was the question now being considered directly involved in the decision of a court of last resort. Much that is said, and in many instances loosely spoken, when considered in connection with the facts and surrounding circumstances of the particular case, and the real controverted points therein decided, are altogether reconcilable with the views expressed in our former opinion, and which we yet entertain regarding the matter. A discussion of several of these cases will elaborate somewhat our views as already expressed.

As was noted in the former opinion, one of the inferior courts of Ohio has held that a prosecution under the bastardy act could be maintained only by a woman who was unmarried at the time of making the complaint, and we need not here further advert to such holding. *State ex rel. Ross v. Brill*, 29 Ohio L. J. 190. The decision, however, it is manifest, was the result of a supposed

following of the case of *Devinney v. State*, Wright (Ohio) 564. In that case the complainant failed to allege in the complaint that she was unmarried either at the time of coition and birth of the child or at the time of filing the complaint. The law of Ohio authorized proceedings in bastardy by an unmarried woman who shall be pregnant with, or has been delivered of, an illegitimate child. It is said in the opinion, "As none but an unmarried woman resident in the state can commence and carry on this prosecution, the fact of the prosecutor being unmarried should be set forth, to show the jurisdiction or authority of the court to proceed, and we hold the omission fatal." Whether the court had in mind the situation of the complainant at the time of the birth of the illegitimate child, or when the complaint is filed, we are not advised from anything that appears in the opinion. It is apparent, however, from the later decisions, that it must appear from the complaint that the mother was unmarried at the time of the birth of the child, and it has not yet been directly decided by the court of last resort of that state that the marriage of the mother after the birth of an illegitimate child would debar her from prosecuting an action for its support by its natural father. In this connection, counsel for defendant say that it has been the universal practice in this state to allege in the complaint that the prosecutrix is unmarried when she makes the same, and to insert no averment with reference to her status at the time of coition and birth of the child; that this is a practical construction of the statute, which should have its due weight in the determination of the question. A sufficient answer to this is, we think, that, without exception, until the present case arose, the mother was unmarried when the prosecution was begun, and the general allegation in a complaint that the complainant was an unmarried woman includes the essential averment as to her status at the time her illegitimate child was begotten and born. As heretofore noted in the case of *Johnson v. State*, 55 Neb. 781, 76 N. W. 427, it is held that it is necessary to aver and prove her status at the time of coition and birth of the child, and this ordinarily is accomplished by the general averment that she is an unmarried woman.

In *Haworth v. Gill*, 30 Ohio St. 627, relied on by counsel for defendant, it is decided that, under the bastardy act of that state, proceedings cannot be maintained on complaint of the mother when the child in question is begotten and born during lawful wedlock. It is said in the opinion, in discussing the question at issue, that the law "was intended to provide for the support and maintenance of an unfortunate class of children, whose condition of illegitimacy would be apparent and unquestionable, by reason of their being begotten and born out of wedlock. The statute authorizes the complaint to be made either during pregnancy or after delivery. If made during pregnancy, it is certain that the pregnancy alleged must be

that of an unmarried woman, and, if not made till after delivery, it is equally certain that the complainant must still continue to be unmarried." Whether we are to understand from the language last quoted that it refers to the status of the mother up to the time of the birth of the child, or to the time of making the complaint, is not entirely clear. The words, as used, may very properly refer to the fact that her status during her time of pregnancy, and until the birth of the child, must be that of an unmarried woman. It does not necessarily follow from what is said that the court is committed to the doctrine that if the mother of an illegitimate child, who is unmarried when it is begotten and born, marry after its birth, she cannot thereafter maintain a bastardy action for the child's support. In that case the child's mother was a married woman at the time of coition and for eight months after the child's birth, and it was with reference to this condition of affairs that the court was discussing the matter. In a late case from Ohio (*Miller v. Anderson*, 43 Ohio St. 473, 54 Am. Rep. 823, 3 N. E. 605) the court holds that the natural father of a child could not be held for its support, under the law of that state, if the mother, after the child was begotten, and during pregnancy, contracts a marriage with another man, who marries her with full knowledge of her condition; that by such marriage the man so marrying consents to stand in loco parentis to such child; and that this presumption is conclusive. The rule thus announced is in harmony with the principle controlling the decision in *Johnson v. State*, 55 Neb. 781, 76 N. W. 427.

In Kansas the court of appeals (*Blush v. State*, 4 Kan. App. 145, 46 Pac. 185) has directly decided that a prosecution for the maintenance and support of an illegitimate child can only be maintained when the complainant at the time of the commencement of the action is an unmarried woman. The decision follows *Willetts v. Jeffries*, 5 Kan. 470. In the latter case the supreme court construes the statute of that state, which is similar in terms to ours, to mean that a woman must be unmarried at the time of commencing an action in bastardy, and that the word "unmarried" does not refer to her status at the time of the begetting and birth of the child. It is there held that a married woman who has given birth to an illegitimate child may maintain an action in bastardy, provided she is divorced or unmarried when the complaint is filed. This holding is in direct conflict with the principle announced in *Johnson v. State*, 55 Neb. 781, 76 N. W. 427, and should not, in our judgment, be followed or accepted as authority in the case at bar. Regarding the two different constructions, we are of the opinion that ours is the more reasonable, and more nearly in accord with the true intention of the legislature.

In the states of Florida (*Andrew G. v. Catherine A.*, 16 Fla. 830; *William H. T. v. State*, 18 Fla. 883; *C. T. v. State*, 21 Fla. 171; *Thomas v. State*, 37 Fla. 378, 20 So.

529), Alabama (*Pruitt v. County Court Judge*, 16 Ala. 705; *Limestone County Court Judge v. Kerr*, 17 Ala. 328), and Kentucky (*Sword v. Nestor*, 3 Dana, 453), the cases go no further than to hold that the several statutes of those states apply to single or unmarried women who have been delivered of bastard children, and who alone can maintain an action under the statute. Stating the corollary of the proposition, the rule seems to be that married women who have, during coverture, given birth to illegitimate children do not come within the purview of the statutes, and cannot maintain an action thereunder. While in the several opinions it is said, in general terms, that single or unmarried women only can maintain the action, it is quite apparent from a reading of the several decisions that the language used by the court was with reference to the status of the complainant during pregnancy and at the time of giving birth to the illegitimate child, and not to her situation at the time proceedings under the several bastardy acts were instituted. In none of these cases is it fairly decided, nor do we think it is properly inferable from the opinions themselves, that a single or unmarried woman who has been delivered of an illegitimate child cannot maintain an action under the statute if she marries after the child is born and before the proceedings are begun.

In support of the view we have adopted as to the proper interpretation of the statute, it is stated in the text in 5 Cyc. Law & Proc. 650, that the fact that the mother is a married woman will not preclude her from instituting proceedings under the bastardy act. The keynote of the controversy is, we think, fairly stated by the supreme court of Vermont (*Gaffery v. Austin*, 8 Vt. 70), where it is held that a married woman cannot sustain a prosecution under the statutes relating to bastardy for the purpose of compelling the father of the child begotten and born during the coverture to contribute to its support. Such a case, says the court, is one not provided for by the statute. In the opinion it is said: "No doubt, such offspring is illegitimate and bastard. It is well settled at common law that the issue may be bastardized, although born during coverture, by showing want of access, immaturity or imbecility of the husband, or any other cause which renders it impossible he should have been the father of the child; but want of access cannot be proved by the wife." Citing *King v. Kea*, 11 East, 132; *Rex v. Reading*, cited in 4 Petersdorff Abr. 180; *Goodright ex dem. Thompson v. Saul*, 4 T. R. 356; *King v. Luffe*, 8 East. 199; *Lomax v. Holmden*, 2 Strange, 940. The meaning of the statute is then discussed, and it is held that it applies only to single women who have been delivered of bastard children. Shortly after the decision in the case last cited, the same question presented in the case at bar came on for consideration, and the court decided (*Sisco v. Harmon*, 9 Vt. 129) that a prosecution under the statute could be sustained against the putative father, though the mother after the

birth of the child was married, and was at the time of the prosecution a *feme covert*. In North Carolina (*Wilkie v. West*, 5 N. C. [1 Murph.] 319—a very early adjudged case on the subject), under a statute speaking of single women only, it is held that a married woman could maintain an action against the father of her illegitimate child, begotten previous to her marriage. *People ex rel. Wilmers v. Volksdorf*, 112 Ill. 292 (a case decided by the supreme court of Illinois in 1884, cited in the former opinion), holds uncompromisingly to the rule that under the bastardy act of that state, similar in its general terms to ours, complaint during pregnancy, and before the delivery of the child, can only be made by an unmarried woman; but after delivery, while she is single, the subsequent marriage of the mother will not prevent her from making complaint against the reputed father of the child. Says the court, "The true construction of the statute is that the mother shall be unmarried at the time the child is born; and the word 'unmarried,' in the law, does not properly relate to the time of making the complaint." This construction appears to us as being grounded upon sound reasoning, and results in giving to the statute an interpretation in consonance with what we conceive to be the legislative will. Any other construction, it appears to us, will lead to an absurdity, and create a distinction as to the protection afforded by the statute to illegitimate children which is without a substantial foundation in reason for its support, and is unwarranted from any consideration, save alone the mere collocation of the words used in the statute. We must ignore altogether the spirit of the law, and the humane aims and objects sought to be attained by its enactment, if we adopt the construction contended for by defendant. It is urged that the construction contended for is admissible because of the provisions found in the statute authorizing county authorities to prosecute an action in the event the mother refuses to do so. But this to us appears to necessitate a very strained construction of the provision of the statute referred to. It hardly seems permissible to say that the marriage of the mother before the action is begun must be regarded as a refusal on her part to institute proceedings to compel the putative father to discharge a moral obligation resting upon him, and a legal one imposed by the statute. In this case the mother not only does not refuse to prosecute the action, but is and has been persistently knocking at the door of the court for leave to proceed with her suit. The authorities can only prosecute an action when the mother refuses.

Upon full consideration of the subject in all the different phases in which it is presented, and with all the research we have been able to give to the questions involved, we are of the opinion the conclusion reached at the former hearing is the correct one, and should be held to as the law in this jurisdiction.

The judgment of reversal is accordingly adhered to.

CONNECTICUT SUPREME COURT OF ERRORS.

James A. CAHILL *et al.*, Appts.,
v.

Mary CAHILL *et al.*

(75 Conn. 522.)

1. Possessory rights only will not sustain an action of ejectment without showing the legal title.
2. Title to real estate which will sustain an action of ejectment cannot be created or established by the presumptions flowing from peaceable possession of it for a period of years short of the time prescribed by the statute governing title by adverse possession.
3. Direct proof of the existence of a deed may be aided by the presumption to be derived from possession and repeated acts of ownership in establishing the title to real estate.
4. That a man refrained from all manner of acts appropriate to ownership is admissible in evidence in a suit to recover, in the right of his wife, real estate occupied by them jointly, as tending to show who was in possession.

(Hamersley, J., dissents.)

(March 4, 1903.)

APPEAL by plaintiffs from a judgment of the Superior Court for New Haven County in defendants' favor in a suit to recover possession of certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. Munger & Munger, for appellants:

For over sixteen years Richard Cahill never claimed any interest in the property. He had permitted his wife to use it, control it in all respects as her own, without any interference or suggestion from him, and such acts were conclusive evidence that he had, in fact, disclaimed any rights which he might have as trustee for his wife.

Williams v. King, 43 Conn. 574; *State v. French*, 60 Conn. 481, 23 Atl. 153; *Coe's Appeal*, 64 Conn. 361, 30 Atl. 140.

Julia Cahill exercised certain rights upon the property. Her declarations, which characterize those acts, are admissible in evidence.

Potter v. Waite, 55 Conn. 236, 10 Atl. 563; *Peck, S. & W. Co. v. Atwater Mfg. Co.* 61 Conn. 32, 23 Atl. 699; *Comins v. Comins*, 21 Conn. 413.

Plaintiffs are unable to prove a title by

NOTE.—As to presumption of ownership of land in possession, see also, in this series, *Teass v. St. Albans (W. Va.)* 19 L. R. A. 802.

As to what title or interest will sustain ejectment, see also *note* to *Hancock v. McAvoy (Pa.)* 18 L. R. A. 781; *Pittsburgh, Ft. W. & C. R. Co. v. Pest (Pa.)* 19 L. R. A. 467; *Thomas v. Hunt (Mo.)* 32 L. R. A. 857; *Postal Teleg. Cable Co. v. Eaton (Ill.)* 39 L. R. A. 722; *San Francisco v. Grote (Cal.)* 36 L. R. A. 502, 41 L. R. A. 335; and *Slauson v. Goodrich Transp. Co. (Wis.)* 40 L. R. A. 825.
60 L. R. A.

the best evidence, namely, by the production of the deed; but the law does not shut the door in such a case.

Starkie, Ev. p. 469; *Hollis v. Goldfinch*, 1 Barn. & C. 220; 1 Swift's Dig. p. 171; 2 Greenl. Ev. § 311; 1 Taylor, Ev. § 123; *Phillipps*, Ev. p. 483; *Ricard v. Williams*, 7 Wheat. 50, 5 L. ed. 398.

The declarations of Julia Cahill as to her rights and the extent of those rights,—whether she claimed a complete title or only a limited estate, whether she was claiming in her own right, or under some third person,—were important elements to be considered by the court in determining whether she was the owner or not.

Burt v. Panjaud, 99 U. S. 180, 25 L. ed. 451.

In ejectment, proof of actual possession of the premises by a person claiming title in fee simple is presumptive evidence of title in him to that extent, and throws upon the party contesting his title the burden of rebutting the presumption thus raised.

Mason v. Park, 4 Ill. 532; *Davis v. Easley*, 13 Ill. 200; *Gosselin v. Smith*, 154 Ill. 78, 39 N. E. 980; *Ludlow v. McBride*, 3 Ohio, 246; *Jackson ex dem. Ludlow v. Myers*, 3 Johns. 388, 3 Am. Dec. 504.

If a party attempts to prove a paper title and fails, but does prove possession under claim of title, he can recover as against a wrongdoer.

Every v. Smith, 26 L. J. Exch. N. S. 344; *Davison v. Gent*, 26 L. J. Exch. N. S. 122; *New York v. Carleton*, 113 N. Y. 286, 21 N. E. 55.

What circumstances furnished a presumption of a grant is a question of law.

Sumner v. Child, 2 Conn. 607.

The facts in this case raised, as against these defendants, the presumption that the deed, whose existence we established beyond question, was a valid grant. The law raised such a presumption.

Jackson ex dem. McDonald v. McCall, 10 Johns. 377, 6 Am. Dec. 343; *Gray v. Gardner*, 3 Mass. 399; *Colman v. Anderson*, 10 Mass. 105; *Bunce v. Wolcott*, 2 Conn. 27; 1 Greenl. Ev. § 46; 1 Taylor, Ev. §§ 79, 123, 126, 127, 133, 183; *White v. Loring*, 24 Pick. 319; *Melvin v. Proprietors of Locks & Canals*, 17 Pick. 255; *United States v. Chaves*, 159 U. S. 452, 40 L. ed. 215, 16 Sup. Ct. Rep. 57; *Arnold v. Stevens*, 24 Pick. 106, 35 Am. Dec. 305; *Valentine v. Pipcr*, 22 Pick. 85, 33 Am. Dec. 715; *McKelvey*, Ev. 75; 2 Wharton, Ev. § 1332; *Brinley v. Forsythe*, 69 Mo. 184; *Newell, Ejectment*, 290, 367, 366, 367.

Not only will the law presume the existence of a deed, but it will also presume that every requisite which the law requires to a valid deed was taken.

2 Wharton, Ev. § 1332; *Newell, Ejectment*, p. 290; *Strange v. King*, 84 Ala. 212, 4 So. 600; *Smith ex dem. Teller v. Lorillard*, 10 Johns. 355; 1 Greenl. Ev. chap. 6, pt. 3, § 572.

Messrs. Frederick W. Holden and William L. Bennett, for appellees:

The defendants were not obliged to prove that they had a title; they could succeed by the weakness of the plaintiffs' title.

1 Swift, Dig. 518, 519; *Tracy v. Norwich & W. R. Co.* 39 Conn. 394.

Title by deed must be established by proof of a conveyance, legally executed, of the land in question by some person in possession of the land to Julia Cahill.

Davis v. Kingsley, 13 Conn. 285.

The plaintiffs entirely failed to produce such proof. They claimed that there was a deed to the plaintiff, but that it had been lost. They did not claim that such deed was from any person in particular, or that it came from a person in possession of the land; nor did they prove its execution, or its contents. They did not prove that Julia was named in it as grantee.

Kelsey v. Hammer, 18 Conn. 317; *Stebbins v. Duncan*, 108 U. S. 32, 27 L. ed. 641, 2 Sup. Ct. Rep. 313.

Prentice, J., delivered the opinion of the court:

Richard and Julia Cahill were husband and wife,—married prior to 1877. The plaintiffs are their children, and claim in the latter's right and as her heirs at law. Julia died in 1885. In 1887 Richard married for his second wife the defendant Mary Cahill. Richard died in 1901, leaving surviving him his last-named wife, and leaving also, a will, which was duly probated. The defendant McMahon is the administrator of his estate, *cum testamento annexo*. The will gave his widow, Mary, the life use of his estate, and the defendant McMahon the remainder in trust for certain persons and purposes. The defendants thus claim through Richard, under the will. The record title to the property in question was never in either Richard or Julia, but stood in other persons; the last conveyance being to Wallace & Sons, a corporation, which received it in 1873. No deed to either of said couple was shown in evidence, nor was proof of a copy or contents of any such deed produced. The conduct of the case assumed—although the fact is not expressly found in that form—that in some manner, between them, they were in possession of the land and exercised dominion over it during the last twelve years, at least, of their married life. The plaintiffs claimed that the wife was so possessed in her own right, independently and apart from her husband; the defendants, that the husband was. The plaintiffs claimed to be entitled to recover possession in this action (1) upon a title shown in their mother, and therefore in themselves; and, failing in that, (2) upon their possessory rights in succession to their mother dying possessed.

With respect to the last claim, the court very properly ruled, in accordance with the defendants' contention, that the plaintiffs could not recover without first showing a legal title. The court adopted as its ruling the language of Judge Swift in his Digest, 60 L. R. A.

vol. 1, p. 507, to the effect that the plaintiffs must recover, if at all, by the strength of their own title, and not by the weakness of the defendants', and that it behooved them, not merely to show a better title than the defendants', but a legal title. The plaintiffs concede the correctness, in general, of this principle invoked by the court, but ingeniously contend that it is not a complete statement of the law. Their argument is based upon the existence in the old English common law of certain possessory real actions, and especially the writ of assize, under which an heir or devisee whose ancestor or deviser had died seised of an inheritance was put into possession thereof as against a stranger who had intervened before the heir or deviser had entered, and himself made entry and obtained possession of the freehold. 3 Bl. Com. 184. It is completed by the *dictum* from Swift's Digest to the effect that our action of ejectment comprehends and answers the purpose of all the old common-law real actions, and the further *dictum* that, like writs of entry and assize, it will lie for possessory rights. 1 Swift, Dig. 507. The trouble with this argument is that these *dicta* from Judge Swift do not comport well with his later statements upon the subject of which the passage already referred to is an example, and are in direct antagonism to the repeated utterances of this court. *Talcott v. Goodwin*, 3 Day, 264; *Tracy v. Norwich & W. R. Co.* 39 Conn. 382; *Bristol Mfg. Co. v. Barnes*, 54 Conn. 53, 5 Atl. 593. In the second of the cases cited we said: "We, however, ought to say that we regard it as elementary law in Connecticut that in this action of disseisin or ejectment the plaintiff must recover, if he recover at all, by the strength of his own title. Ample remedies are provided, by actions of trespass and by proceedings for forcible entry and detainer, for the disturbance of quiet possession, and we see no good reason for any change or mitigation of the familiar rule in respect to proof of title in ejectment." The court did not err in ruling as it did.

The plaintiffs claimed to have satisfied the rule adopted by the court, and to have shown a legal title. They sought to prove by direct evidence the existence of a deed which had become lost. The court found that they did not succeed in this regard. For this finding, assuming that the issue was to be determined upon direct proof alone, the evidence furnished ample justification. At the eleventh hour, but in time, perhaps, they claimed to have established a title by adverse possession. The court found otherwise, as it was clearly bound to do upon the evidence. The plaintiffs, evidently foreseeing these results, did not stop here in their claims. They made, first, the broad claim that having shown possession in their mother at her death, and for a period of years prior thereto, the court should, in the absence of countervailing testimony, have presumed and found that she had title. This general claim, which has been urged upon us the most vigorously of all the plain-

tiffs' many claims, was made in the court below and here in several forms, to wit, that Mrs. Cahill's possession was sufficient evidence of title; that therefrom a lawful grant should be presumed; that her possession and repeated acts of ownership were to be presumed to be lawful, and pursuant to a legal title; that such possession would create a presumption that she was the legal owner; that not only the existence of a deed, but all the essentials of a valid one, would be presumed; that this evidence established a prima facie title, which was good and sufficient until overthrown, etc. This claim, in whatever form propounded, was not well made. The subject of presumptions of a grant from possession had an exhaustive discussion in *Sumner v. Child*, 2 Conn. 607. It was there decided that a grant of a corporeal hereditament would never be presumed from possession, however long continued; the whole subject, so far as corporeal hereditaments were concerned, being regulated by the statute limiting the right of entry. The court was far from saying, as we shall have occasion to see later, that a presumption arising from possession and acts of ownership could never be of help in establishing a title. What it did say was that such a presumption could not of itself have the operative effect of creating or establishing a title; that a title could not be presumed therefrom which would have the force and effect of a title proven. So it is that a bare presumption of a title thus made cannot satisfy the requirements of a rule which prescribes that a plaintiff in ejectment must recover by the strength of his own legal title shown, and not by the weakness of his adversary's. Were it otherwise, we should have a rule which was no rule. For what would it profit to say that an ejectment plaintiff may not recover upon proof of a bare possessory right, but must show a legal title, if in the same breath we say that a legal title may be inferred from mere possession? The true office of a presumption from possession and acts of ownership, and its use in proof of title, is clearly indicated in this case of *Sumner v. Child*, 2 Conn. 607. The possession and acts of ownership may, with other circumstances, be proven to perfect the evidence of title. The possession and acts are admitted as secondary corroborative evidence of an actual conveyance, or of some accompanying requisite, of which the original and best evidence is lost. The admission of this evidence assumes the theory of an actual conveyance, as well as the existence of other evidence of a different character, rendering it probable that such a conveyance was made. It is received as one piece of evidence, which, with other testimony, tends to prove that a conveyance in fact was made, and to enable the trier to find, from the whole evidence, such conveyance in fact. The evidence in question is not received for the simple purpose of creating a presumption which should of itself have operative effect. The presumption to be derived from the evidence is one for evidential effect; that is, it is to be weighed and considered in con-

nection with other testimony, and the presumptions and inferences therefrom, in its bearing upon the ultimate question of fact to be determined, to wit, the question of a conveyance in fact. This distinction which the case makes is an important one, and important in its bearing upon the case at bar. The plaintiffs, as we have seen, endeavored to establish by direct proof the existence of a deed to Mrs. Cahill. In their claims to the court, they not only asked that this fact be found upon such proof, but also that the presumption to be derived from her possession and repeated acts of ownership be weighed in connection with the other facts established, and, upon the strength of the conjoined proof, the fact of her ownership, and that such ownership rested upon a valid deed to her, be found. The request thus made in most explicit terms was fairly within the rule laid down in *Sumner v. Child*, 2 Conn. 607, and so far, therefore, their contention was well made.

The court, however, found as a fact that from August, 1873, until the death of Julia, Richard was in possession of the land, and, of course, by inference, that Julia was not. This finding of fact, if it stands, accomplishes a complete demolition of the plaintiffs' contention. If Julia was not in possession, no presumption from possession could arise in her favor. The finding must stand, unless it was made without evidence, as it clearly was not, or some error of law or some incorrect ruling upon the admission or rejection of testimony may have influenced it. It is urged upon us that the finding was the result of a legal misconception as to the relation of a husband, married before 1877, to the reality of his wife. A portion of the record is pointed out as indicating a probability, at least, that the finding was made upon the theory of law that possession of a wife's lands necessarily inured to the husband. This claim the finding effectually negatives.

There remains to be considered a ruling upon the admission of testimony to which the plaintiffs attach much importance in this connection. Plaintiffs' counsel sought to prove that Richard had never done anything upon or about the land in dispute; in other words, that he had never exercised acts of ownership. Evidence to this effect was excluded. We see no escape from the conclusion that here was harmful error. The plaintiffs sought to prove that Mrs. Cahill was possessed of the property of and for herself, and altogether apart from her husband, and that her husband, by refraining from all manner of acts appropriate to ownership—whether in his own right or in the right of his wife—indicated the true relation to the property of the parties, between whom, it is to be borne in mind, the question was. Such a situation as claimed might exist, and the plaintiffs, if they could prove it, were entitled to the benefit of it, to enforce and emphasize their contention as to the presumptive existence of the deed sought to be established. Whatever situation the acts of the parties tended to disclose, the plaintiffs

were entitled to the benefit of it upon the question of possession, which the court directly determined, and thus indirectly upon the question of title. The plaintiffs sought to show that Mrs. Cahill had always dealt with the land as peculiarly her own property, and that her husband had never acted as one having any rights therein. The evidence excluded was clearly not immaterial, as ruled. The court has found in favor of the possession of the husband. As a part of the evidence bearing upon the question was ruled out, the court erred, and to the plaintiff's manifest injury.

We are further impressed, in a study of the finding, with the conviction that the court misconceived the real nature of the particular claim we have been discussing. That is, perhaps, not altogether strange, since so many claims in so many forms were made, and the true basis of claim perhaps little emphasized. The court seems to have confused the claim arising from possession and acts of ownership with the principles of adverse possession. It is quite evident that the fact of possession was regarded as important only in connection with a fifteen-years' continuance and an adverse character. The plaintiffs' claim had no relation to a conclusive presumption such as fifteen-years' adverse possession creates. It related to a rebuttable presumption, only, and one which was of an evidential character, merely. *Sumner v. Child*, 2 Conn. 607. It seems quite clear that in this way, also, the plaintiffs did not obtain the full benefit of their rightful claims of law.

There is error, and a new trial is granted.

The other Judges concur, except **Hamersley, J.**, who dissents.

Hamersley, J., dissenting (Filed April 17, 1903):

The plaintiffs were bound to prove that Julia Cahill owned and possessed the *locus* at the time of her death. This was essential to establish that legal title in the plaintiffs, without which they cannot recover. Property may be acquired through any kind of lawful conveyance from its owner. This is the principal, and for the great mass of property the only, mode under our law of acquiring ownership. The fact of conveyance may be established by any appropriate evidence, and involves proof of the person who made the transfer, his ownership of the property, and the validity of the transfer as made. Where the conveyance is by writing, and especially where the law requires it to be by writing, it must be proved by the production of the original writing. When the writing has been lost, its existence and contents may be proved by relevant, secondary evidence. As ownership draws after it possession, and possession, especially of personal property, is often a badge of ownership, possession may become a relevant fact in proving the existence and contents of such writing. It may be that all evidence of a conveyance, primary or secondary, is wanting, and the possessor holds

property without a conveyance from anyone. For some cases of this kind the law provides other modes of acquiring property, *vis.*, possession and user which is not by virtue of another's right from time immemorial, or such possession for a fixed period unbroken and unchallenged. The latter mode of acquisition is confined mainly to land; the former mainly to intangible rights in property, generally described as easements. Property in these rights may be acquired by prescription as well as by grant. The property is deemed to originate in a grant. By its very nature it is created as property through the assent, voluntary or compelled, of the owner of the tangible thing it burdens. Ownership of the easement is acquired through a valid grant, whether recent or ancient; but such ownership may be acquired through possession from time immemorial as truly and as fully as by a valid grant. This mode of acquisition may rest in part on the effect of occupancy, which, as to movables, is the foundation of separate property rights; but some support is to be found in the elementary principle of jurisprudence which forbids the litigation of claims unsupported by facts within the memory of man. The length of this period has fluctuated, but is now for the most part an arbitrary term. Acquisitive prescription is illustrated when one prescribes in a *que* estate, but for the most part it is not used in the English law in its direct form. Its substance is secured through a legal fiction. Instead of asserting an ownership acquired by immemorial usage or possession, the owner is permitted to assert an ownership acquired by some indefinite and nonexistent grant, and the facts which establish his acquirement of ownership by possession are treated as conclusive proof of some grant which is not proved, and in most cases cannot be proved, because it never existed. Such a legal fiction does not alter the substance of things. In every such case the ownership is in reality acquired through possession, and is not acquired through a grant. Possession as a mode of acquiring property establishes ownership, when as an evidential fact it is wholly incompetent to prove an ownership acquired by grant. It happens in some cases that evidence is introduced tending to prove the existence of an actual particular grant as well as evidence tending to support the acquisition of ownership through possession. Such possibility has naturally led to some confusion between the force of possession as a mode of acquiring ownership and the evidential value of possession merely as a fact which may or may not become relevant or material in proving an actual and particular grant. The distinction, however, is real and important. A sues B for trespass in crossing his land. B attempts to establish two defenses — one, ownership of a right of way, acquired through user from time immemorial (now provable by adverse possession for fifteen years, or its equivalent, an indefinite and fictitious grant conclusively presumed from a possession from time immemorial); and the other, ownership of a right of way

acquired through a grant from A to B, made ten years before the bringing of suit. User or possession of a right of way for fourteen years is proved. Some evidence is produced tending to prove a grant of the way claimed, etc., made by A to B ten years before, and the loss of the deed. The court charges the jury, as bearing on the first defense, that, if B has proved the requisite possession of a right of way for fifteen years, his ownership is established, but, if he has proved such possession for fourteen years only, his ownership is not established; and, as bearing on the second defense, that, if the evidence admitted as relevant to the fact of a deed made ten years before by A to B granting the right of way satisfies the jury that such a grant was made, B has established his ownership by actual grant, although the deed has been lost, and that the fact that B actually used the way at the time of the alleged grant and afterwards might be considered, so far as that fact might be relevant to the actual making and terms of the alleged grant. Such a charge might be substantially correct, but it would be incorrect if the court should further charge that, if the jury cannot find a possession for more than fourteen years, and are not satisfied that A made a grant ten years before, by the evidence relevant to that fact, they may consider the evidence of possession for fourteen years and the evidence relevant to the unproved grant together, and from the whole evidence thus considered may presume an actual grant.

The error centers in the inaccurate use of the word "presume." Possession may confer title as truly as grant confers title. Each is a mode of acquiring ownership. But the potency of possession as a means of acquiring title, when insufficient for that purpose, cannot be used to effect the relevancy of one or more acts of ownership by the alleged grantee of a specified grant to the fact of the execution, contents, and validity of that grant. In discussing the ownership of intangible property or incorporeal hereditaments, it is often necessary to use the words "grant," "presumption," "possession," with differing meanings, indicated only by the context, and there is much excuse for the occasional confusion of things, related but really independent; but there is far less excuse for any confusion of this nature in discussing the ownership of land. Here the distinction between the acquisition of ownership through possession and its acquisition through a conveyance from a former owner to the present possessor is more clearly marked. Under the early English law, land, unlike property in intangible rights, was not the subject of prescription in any form. *Twiss v. Baldwin*, 9 Conn. 304; 2 Bl. Com. 264. Substantially the only mode by which ownership could be transferred from one owner to another was some form of conveyance. Bare possession, the apparent right of possession, and even the right of possession might be acquired without terminating ownership of land once acquired and not conveyed. This ownership

might be asserted and established through the writ of right, and then the lost possession be recovered. The limitation of the writ of right to a definite period of sixty years (Stat. 32 Hen. VIII.) to a limited extent, and the adaptation of the action of ejectment to the trial of title with the limitation of the exercise of a right of entry to a period of twenty years (Stat. 21 Jac. I) to a greater extent, rendered the practical acquisition of ownership by possession possible in many cases. After the passage of the statute of James I. cases might arise where the writ of right would be available to the true owner; but since the enactment of Stat. 3 & 4, Wm. IV., for limitations of actions relating to real property, possession for twenty years as a mode of acquiring ownership of land has been more clearly recognized, and has sometimes been termed an acquisition of ownership through legislative conveyance.

In this state, however, possession as a mode of acquiring ownership of land has been recognized from earliest days; the only other method being some form of conveyance. The first settlers claimed to have acquired absolute ownership of lands within our limits mostly by purchase from the native Indians and partly by conquest, and their ownership in fact rested on these claims until the charter of 1662, which granted and confirmed to the charter government all land within its jurisdiction, to be holden of the King in free and common socage. Subsequently lands belonging to particular persons were held according to this tenure, but the land tenures of England were in no other way ever recognized as a force within our limits. The claims of ownership and purchase by conquest were never abandoned, and in 1793 our legislature declared that by the establishment of our independence the citizens of this state became vested with an allodial title to their lands, and therefore it declared "that every proprietor in fee simple of lands has an absolute and direct dominion and property in the same." Rev. 1796, p. 253. In 1639, substantially coincident with the establishment of civil government, it was enacted that all land allotted to any particular person should be recorded. Such record, as well as the record of any subsequent sale, was compulsory, and sale without record was of no value. A certified copy of the record served the purpose of a deed. 1 Col. Rec. p. 37. In 1660 it was enacted that all future conveyances should be made by deed duly recorded, and the requisites to the validity of such deed were prescribed. 1 Col. Rec. p. 358. In 1667 it was enacted that any person then standing possessed of land and so continuing uninterrupted for the space of one year should be the owner thereof as fully as if allotted to him, with the same right to enter it for record. 2 Col. Rec. p. 67. In 1684 it was enacted that any person who has had a right of entry or action in respect to land detained from him since 1667 until the 10th of the month following the passage of the

act, and neglected to enforce such right, shall thereafter be utterly excluded and disabled from such suit or entry. It was further enacted that no person having an existing right of action or entry for land detained could exercise the same unless within three years from the 10th of the following month, and that no subsequently accruing right of action or entry for land detained could be enforced unless within fifteen years from the accruing thereof. 3 Col. Rec. 146, 147. The substance of this last provision has since remained unchanged, and is found in section 1109 of the General Statutes of 1902. In 1727 it was provided that no valid conveyance of land could be made by anyone ousted of possession thereof except to the present possessor. 7 Col. Rec. 105. The operation of these laws, most of which are still retained substantially in the form of their original enactment, was to establish by legislative authority possession for fifteen years as a distinct means and mode of acquiring ownership of land. One reason for this operation may be found in the wide differences between the English law of real estate and our own.

In *Bush v. Bradley*, 4 Day, 306, Judge Reeve says: "We have always considered ownership as giving a right to possession of real property, as much so as ownership of personal property. Ownership in the one case draws after it the possession as much as in the other case, and whenever a right of possession is lost all title and ownership are lost. So the statute of limitations respecting lands has always been construed. The statute, in the words of it, does not take from the original proprietor his title; it only tolls his right of entry; and yet this statute has been always considered as barring all claim of title, whilst the same words in the English statute have been considered, not as having any effect on the title, but only on the right of entry, and the lands may be recovered by a form of proceeding proper for such a case. The English law distinguishes betwixt a right of possession and a right of property, but our law does not. Wherever there is a right to real property, there is, of course, a right of possession, and the statute, which takes away the right of possession, takes away the right of property; and this is the reason that this statute has received a construction altogether different from the construction given to the English statute." The controlling reason is found in the fact that the legislation mentioned, extending from 1639 to 1684, must be regarded as one piece of work, whereby our system of acquiring ownership of land was developed and settled. Conveyance followed by record according to the forms prescribed for securing perpetual certainty is the normal mode of acquiring ownership. When these forms are neglected, or the owner abandons his land, occupancy or possession continued for fifteen years is a distinct mode of conferring a new ownership on the person in occupation at the end of the term. *Eels v. Day*, 4 Conn. 95; *Sherwood v. Barlow*, 19 Conn. 471-477; *Price v. 60 L. R. A.*

Lyon, 14 Conn. 279-290; *Wright v. Wright*, 21 Conn. 329-345.

It follows (1) that in establishing a legal title to land acquired through adverse possession, evidence is directed to the nature and extent of the occupancy, to the existence of any statutory disabilities, and to the unbroken continuance of the occupancy for fifteen years. Mere possession is in no sense evidence of a conveyance, real or fictitious; on the contrary, its efficacy depends on the assumption that the title by conveyance is in someone else. Possession of the requisite kind, for the requisite period, is the thing to be established by evidence, and, when established by evidence, this thing, viz., this fifteen years of adverse possession, directly extinguishes the former ownership, and directly invests the person in occupation at the termination of the statutory period, not with the title of the former owner, but with a new ownership acquired through this distinct mode. (2) In establishing a legal title acquired through conveyance, possession, occupancy, acts of ownership may or may not, according to the circumstances of each case, be relevant to some fact tending to prove the conveyance through which ownership is claimed. In no other way is there any substantial, evidential relation between the mere fact of an actual occupation of land and the fact of a deed validly conveying that land to the occupant. This is unquestionable, unless it be true that, when a person claiming to be owner of land, but unable to produce evidence of conveyance, is in possession for less than fifteen years, the natural inference is that he has received a deed of that land; but the natural inference in such case is precisely the opposite. In view of our law regulating the making and record of deeds, the probability that a man in possession of land without evidence of conveyance has not received a conveyance is strong.

Mere possession, therefore, cannot be relevant to the fact of a conveyance by deed, although it may become relevant to some one of the facts sought to be established in proving the deed, and its relevancy and weight for that purpose must be determined by the ordinary rules of evidence, and cannot be confused with the theory of an arbitrary presumption used in discussing prescription for incorporeal hereditaments. There is nothing in our decisions to justify such a confusion, although some suggestion of an excuse for it may be found in the individual opinions of Chief Justice Swift and Judge Gould, reported in *Sumner v. Child*, 2 Conn. 607, the case cited in the opinion of the majority of the court. The case is a peculiar one. From what appears to have been the substantially conceded facts, the case is this: William Dudley acquired ownership of the land in question. Upon his death his son, Joseph, entered into possession as heir, and remained in possession for twenty-eight years, when his title passed to the defendant through the levy of an execution. The same year administration was granted on the estate of William Dudley, and in due course of proceeding the land

was sold to pay William's debts. It was purchased by the plaintiff, who shortly after brought the action of ejectment. Here was no question of conveyance or adverse possession. Joseph acquired ownership by descent subject to the paramount authority of the law to appropriate the land to the payment of debts in administering his father's estate. If the grant of administration and the proceedings under it were valid, the plaintiff had a legal title; if they were not valid, the defendant had a good title. The title depended solely on the validity of the administration proceedings. As the decrees of the probate court had not been appealed from, the defendant could not attack their validity in the ejectment suit. He therefore relied upon the claim that the long delay in taking out administration should have the same effect as a release from the creditors of William, and that the fiction of an imaginary grant, proved by immemorial usage or possession, was applicable to this case, and the court in substance charged the jury that they might presume a title in the defendant from length of possession alone. A majority of the judges of this court held that such instruction was erroneous. No opinion of the court was given. Three of the judges expressed their views. The chief justice, who tried the cause below, warmly defended his charge. Judge Smith argued that the charge was erroneous, because possession had nothing to do with the title, as that must depend wholly on the validity of the administration proceedings. Judge Gould directly attacked the general proposition of Judge Swift, arguing that the jury could not presume a conveyance of land from length of possession alone, and for this reason the charge was erroneous. He also expressed his own views as to the possible relevancy of mere occupation in proving the actual conveyance of land. It is this part of his argument which the opinion of the majority restates with an implication of too broad approval. We cannot be sure what number of the judges, in granting a new trial, acted on the views of Judge Smith or Judge Gould. The case is certainly not an authority upon any question except the proposition advanced by Judge Swift. Its interest lies in the academic duel between Judges Swift and Gould, as the individual utterance of either is entitled to the greatest deference. It is idle for present purposes to discuss their differences. Each, to a certain extent, was looking at a different side of the shield, and neither kept clearly in mind the application of his general statements to the real facts of the case in hand. The confusing nature of the discussion is indicated by the last retort of Swift, uttered in his "Digest," where, referring to Gould's opinion and the distinctions drawn by him, he says with his occasional unguarded vigor: "This is a new doctrine. It was never before promulgated. No such distinction can be found in any book. It is opposed to the decision of every case that has been determined, and the *dicta* of every judge upon the subject." 1 Swift, Dig. 167. The general trend of Judge 60 L. R. A.

Gould's opinion supports the views I have expressed, but there is uncertainty in the language used in discussing the occupation of land merely as evidence. If that language can fairly be treated as stating that, when a legal title to land through a deed of conveyance is to be proved, the mere fact of possession or occupation of that land by the claimed grantee has any probative force except as it may be relevant to some fact in the case in accordance with the general rules for determining the relevancy of one fact to another, then the statement seems to me clearly inconsistent with sound principle, and unsupported by authority.

Applying to the facts of the present case the ordinary rules of evidence, it seems clear that the rejected evidence was immaterial, and its rejection furnishes no ground for a new trial. The facts are these: The record title to the land in question is in Wallace & Sons, through a deed to them dated August 20, 1873, from the grantee of an admitted owner. Julia and Richard Cahill, one or both, were in possession from 1873 to the death of Julia, in 1885. From his wife's death Richard was in possession, using the land as his own, and mortgaging it as his own, until his death, in 1901. The defendants are in possession as devisees of Richard. The plaintiffs claim as heirs of Julia Cahill. Richard, at the time of his death, had acquired a complete title through adverse possession since his wife's death, unless his possession was through the right of another. The plaintiffs claim that Julia at her death was owner of the land, and Richard until his death, continued in possession as tenant by the curtesy. Their whole case rests upon maintaining this claim, for unless tenant by the curtesy, the title in Richard at his death is certain. Their claim that, Julia being in possession at the time of her death, and for a long time before, the court should presume, in the absence of countervailing testimony, a legal title in her, was properly overruled, and may be laid out of the case. They attempted to prove ownership in Julia through adverse possession, but, as there was no possession by either Julia or Richard for more than twelve years at the time of Julia's death, the court, for this reason, was compelled to find she had no ownership through adverse possession. Any rulings on evidence as applicable to her title through adverse possession are, therefore, immaterial. There remained the claim of title in Julia through a deed of conveyance, and the plaintiffs' case then rested solely on the fact of conveyance.

The fact in issue is further narrowed through the plaintiffs' introduction of evidence proving the possession by Julia at certain times between 1873 and 1885 of a document which they claim was a deed of conveyance of the land in question to Julia, and this document represented the only conveyance claimed. Unless this document is proved to have contained a valid conveyance to Julia, there is no foundation in the case for the claim of her legal title. The document was not produced, and its contents, to

be proved by secondary evidence, constituted the ultimate fact which must determine the relevancy and materiality of the evidence rejected. Upon the trial Julia's son, one of the plaintiffs, was asked whether his father had ever done anything on or about the land during his mother's life. The question was excluded as immaterial. The ruling would seem unquestionably correct. It is claimed it was relevant to the fact of possession by Julia, but testimony of every fact tending to prove Julia's possession was admitted. Mere negative testimony that someone else did nothing about the place is too remotely related to the fact of her possession to be admissible.

It is claimed that the absence of acts of ownership by Julia's husband might characterize the nature of her possession as adverse to him. Possibly such negative conduct by the husband might be relevant if the question were whether an ownership by adverse possession inured to the wife separately, or to the husband. But, as such question was excluded from the case by want of possession of any kind for the requisite period, relevancy on this ground is wholly immaterial. Whether the actual occupation by Julia was adverse to her husband or not cannot affect its relevancy to the contents of the document which was operative as a conveyance to her, or not at all.

It is suggested that the court has found that the husband was in possession, and, by inference, that the wife was not, and might not have made this finding if an answer to the question had been permitted. I think a negation of Julia's actual occupancy is not a proper inference from this finding, and that it is controlled by a theory as to the legal effect of acts of ownership by the wife, and not at all by any actual acts of ownership by the husband which were not claimed by the defendants to have been proved. But I prefer to assume that the court did find that Julia was not in possession, and that such finding might possibly have been influenced by the negative testimony excluded; for this brings me to a consideration that renders all speculation as to the possible materiality of that testimony to the fact of Julia's possession unnecessary. The fact of exclusive possession by Julia was wholly immaterial in view of the facts proved, and claimed to be proved, in respect to the document in her possession. It appears from the finding of the court,

the statement of the facts on which the plaintiffs' claims of law were based, incorporated in the finding, and the plaintiffs' proposed draft for a finding, that all the subordinate facts proved or claimed to have been proved by the testimony in respect to the deed of conveyance were these: Julia on two or three occasions held in her hand a document which she said was a deed of her land. On one occasion she handed some papers to Mr. Webster to keep for her. He kept them some years, and subsequently returned them. Among these papers was a document which Mr. Webster testified was a deed to Julia. Julia was in actual possession of the land from 1873 to 1885, claiming to be owner. These bald facts are all, and are clearly insufficient to prove a conveyance from the owner of the land to Julia Cahill. It is enough that there is absolutely nothing to prove that any particular person, or any unnamed person, being owner of the land, made any conveyance of any kind to Julia Cahill. Actual possession of the land by her is immaterial, and wholly incompetent to the proof of this fact; and without this fact, as well as others that are not proved, the acquirement of ownership by Julia through a valid deed of conveyance has not been proved, and therefore the plaintiffs have not established a legal title for themselves. It follows that upon all the facts in the case, together with the fact which it is claimed the excluded testimony would prove, the judgment of the trial court is the only one that can lawfully be rendered. Under these circumstances the exclusion of the testimony, even if theoretically erroneous, furnishes no ground for a new trial.

I dissent from the opinion of the majority because I fear it is liable to raise an unauthorized and unnecessary doubt as to the clear distinctions under our law in respect to the acquirement of ownership in land through conveyance and its acquirement through adverse possession, and which control the relevancy and materiality of mere possession in proving a legal title through either mode of acquisition. I dissent from the result because it seems to me clear that it grants a new trial for the exclusion of testimony, which, if admitted, could not lawfully have induced a different judgment.

I think there is no error in the judgment of the superior court.

GEORGIA SUPREME COURT.

BRUNSWICK & WESTERN RAILROAD
COMPANY, *Plff. in Err.*,
v.

John PONDER.

(.....Ga.....)

*1. A railroad company is bound to use

*Headnotes by SIMMONS, Ch. J.

extraordinary diligence to protect a passenger, while in transit, from violence or injury by third persons; but, where the passenger is arrested by officers of the law, the company is under no duty to inquire into the legality of the arrest.

2. Where such arrest by officers of the law is illegal, but the railroad company has no notice of that fact, the company is not liable to the passenger for a failure to inter-

NOTE.—As to carrier's liability for wrongful arrest of passenger, see, in this series, *Mulligan* 60 L. R. A.

v. New York & R. B. R. Co. (N. Y.) 14 L. R. A. 791, and *note*; *Gillingham v. Ohio River R. Co.*

fere with the officers and prevent the arrest, or for stopping the train to allow the officers to remove their prisoner therefrom.

3. In such a case the company is under no duty to see that the officers use only such force as is necessary to make the arrest.

(February 7, 1903.)

ERROR to the City Court of Waycross to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's failure to protect plaintiff while a passenger on its train. *Reversed.*

The facts are stated in the opinion.

Mr. W. E. Kay, for plaintiff in error:

The carrier is an insurer as to freights, but its responsibility, and consequent liability, in the carriage of passengers is much smaller.

5 Am. & Eng. Enc. Law, 2d ed. p. 480; Hutchinson, Carr. 495, 497.

In order to protect the carrier when freight is seized by process of law, it is only necessary that the proceeding should be apparently valid.

Jaggard, Torts, 1065; Hutchinson, Carr. §§ 210 (a), 296.

If the warrant was legal it was not bad faith to the consignor for the agent to furnish all proper facilities to the sheriff to perform his legal duty.

Savannah, G. & N. A. R. Co. v. Wilcox, 48 Ga. 439.

A railroad company is not liable for, and has no connection with, the amount of unnecessary force that may be used in making an arrest.

Jardine v. Cornell, 50 N. J. L. 485, 14 Atl. 590.

Mcssrs. S. W. Hitch and J. C. McDonald also for plaintiff in error.

Mr. John T. Myers for defendant in error.

Simmons, Ch. J., delivered the opinion of the court:

Some time in June, 1901, Ponder boarded a passenger train of the Brunswick & Western Railroad Company at Fairfax, Georgia. He paid his fare to Waycross. When the train stopped at Waresboro, a station intermediate between Fairfax and Waycross, three men boarded the train, assaulted Ponder, and removed him from the train. After settling for a small sum his claims against the individuals who assaulted him, Ponder brought suit against the railroad company for its failure to protect him. The jury returned a verdict for the plaintiff for \$500. The company moved for a new trial, the judge overruled the motion, and the company excepted. The evidence shows that when the train stopped at Waresboro the conductor stepped off to assist the passengers who were getting on or off. While he was so engaged, three men boarded the train

to arrest Ponder; entering the train at a point other than that at which the conductor was standing. One of these men was marshal of the town of Waresboro, another was the deputy marshal, and the third was specially deputized by the marshal to assist in making the arrest. They had no warrant, and seem to have arrested Ponder for having failed to pay one of them a debt. They ordered him to get off the train with them, and, upon his refusal, began to strike and beat him. At this juncture the conductor came in, and discovered, for the first time, that the officers were on the train, making an arrest. He took hold of one of them, and remonstrated with them all; suggesting that they go on to Waycross, the train having already started. This they refused to do, ordering the conductor to stop the train. The conductor, when he came in, had heard Ponder tell the officers that he had paid them all he owed them; but the conductor made no investigation as to the charge against Ponder, and did not try to ascertain whether the officers had a warrant. He knew that the officers were such, and they had on former occasions arrested persons on his train, and taken them off. Upon their demand, he had the train stopped before it had left the corporate limits of the town. The officers and Ponder then left the train. The motion for new trial complains that the verdict is contrary to the evidence and without evidence to support it, and that the court erred in certain charges and refusals to charge. Our idea of the law of the case, as given below, covers these assignments of error, and we will not deal with them separately.

1. A railroad company is bound to use extraordinary care and diligence to protect its passengers, while in transit, from violence or injury by third persons. If a third person boards the train and assaults a passenger, it is the duty of the railroad company to use extraordinary care to protect the passenger; and in this state the conductor of a train carrying passengers is invested with all the powers of a police officer. Pen. Code, § 902. At the same time, a conductor would not be justified in interfering with the lawful arrest of one who happened to be a passenger on his train. This much is clear. The present case, however, falls within an intermediate class. The arrest of Ponder was not a lawful one, but of this fact the officers of the railroad company had no notice. The arrest was made by officers of the law, acting under color of their office, and we think the company was under no duty to inquire into the legality of the arrest. The arrest was apparently regular, and, in the absence of any knowledge or notice to the contrary, the officers and agents of the company could assume that it was lawful. The conductor knew that the men making the arrest were officers, and he had previously had passengers on his train ar-

(W. Va.) 14 L. R. A. 798; *Palmer v. Manhattan R. Co.* (N. Y.) 16 L. R. A. 136; *Central R. Co. v. Brewer* (Md.) 27 L. R. A. 63; *Atchison, T. & S. F. R. Co. v. Henry* (Kan.) 29 L. R. A. 60 L. R. A.

465; *Elchengreen v. Louisville & N. R. Co.* (Tenn.) 31 L. R. A. 702; and *Little Rock Traction & Electric Co. v. Walker* (Ark.) 40 L. R. A. 473.

rested by them and removed from the train. While the officers were attempting to arrest Ponder, the latter told them, in the hearing of the conductor, that he had paid them all he owed them. This was not of itself sufficient to put the conductor on notice that the arrest was for a debt. So far as he knew, it was a claim by Ponder that he had restored all of the money which he had acquired by the commission of some crime with which he was charged, or that he had attempted illegally to settle some criminal prosecution. The arresting officers had no warrant, but in this state an officer may arrest, without warrant, an offender who is attempting to escape. Further than this, the conductor did not know of the absence of a warrant, and Ponder did not raise that question, or represent to the conductor that the arrest was unlawful or unauthorized.

2. The conductor made a decided effort to quiet the disturbance on the train and to stop the assaults on Ponder. One of the plaintiff's witnesses testified that the conductor did all that he could have done. However this may be, we think the failure of the conductor to interfere with the officers and prevent the arrest did not give Ponder any cause of action against the company. It is essential to the maintenance of the law that its processes should be promptly executed, and its officers allowed to proceed without interference, except in cases where such interference is clearly justified. It would never do to allow a railroad conductor to interfere with officers of the law, and prevent arrest by them, merely because he did not know whether or not they were acting within their power and authority. If the conductor had knowledge that the arrest was unlawful, then it would be his duty to use extraordinary diligence to prevent it and protect the passenger, but even in that case the company would not be an insurer against such arrest. If the conductor had notice that the arrest was wrongful, it would be his duty to make inquiry into the matter. But where the arrest is by officers of the law, and is apparently regular, and there is nothing to put the company on notice that the arrest is illegal, the company cannot be held liable for a failure to interfere with the officers and prevent the arrest. It was argued that the conductor had also actively aided in the arrest by stopping his train to enable the officers to remove their prisoner. This is answered by what has been said above. The conductor was ordered to stop the train, and, as he had a right to presume that the arrest was legal, his obeying the 60 L. R. A.

command of the officers was no breach of duty to the passenger. An officer may stop a train to make an arrest of a person thereon. *St. Johnsbury & L. C. R. Co. v. Hunt*, 60 Vt. 588, 1 L. R. A. 189, 15 Atl. 186. And certainly an officer may, after having made the arrest, stop the train to remove his prisoner. It would have been an interference with the officers to have carried them on out of their town while they were endeavoring to make an arrest within it. In this particular case it further appears that, at the time the train stopped upon the command of the officers, Ponder had ceased resisting, and agreed to get off.

3. One other question remains: Was the railroad company liable for allowing the arresting officers to use more force than was necessary to make the arrest? Ponder appears to have been considerably beaten and bruised, and the evidence would warrant a finding that more force was used to make the arrest than was necessary, and that this was evident to the conductor, or to anyone else who was present. It was argued that, even if the company was under no duty to prevent the arrest, it was still liable for not seeing to it that no unnecessary force was used. In the first place, the conductor seems to have done what he could to prevent this, and but little force was used after he arrived upon the scene; the violent assaults having occurred before he discovered what was going on, or had time to take part. Nor is there any evidence of negligence on the part of the company's agents in not sooner discovering that the officers were on the train, endeavoring to arrest Ponder. Then, too, if our conclusion be correct, that the conductor could assume that the arrest was a lawful one, and was under no duty to prevent it, we think the company cannot be held liable for the excessive force used. Ponder became the prisoner of the officers as soon as they laid hold on him, and before he was removed from the train. He was taken out from under the protection of the conductor, as against the officers of the law. He was then in the custody of the law, and, whether or not the conductor or anyone else was authorized to prevent the use of unnecessary force in making the arrest, the railroad company was in this regard no longer under any duty to him as a passenger. See, in this connection, *Jardine v. Cornell*, 50 N. J. L. 485, 14 Atl. 590.

Judgment reversed.

All the Justices concur, except **Lumpkin**, P. J., absent on account of sickness.

IDAHO SUPREME COURT.

STATE of Idaho, *Respt.*,

v.

William IRWIN, *Appt.*

(.....Idaho.....)

- *1. Where an assistant prosecutor asks the son of the accused, on cross-examination, if he had not stated to A that he suspected his father of having committed a similar offense with other girls, one a member of his family, and that such conduct on the part of the accused caused the death of witness's mother, and that, if at such conversation witness did not cry, and say, "I can't go against my father, even if he is guilty;" and repeatedly asks substantially the same question,—such conduct of the prosecutor is reversible error.
2. Such questions are improper cross-examination, and should not be allowed under the guise of impeaching the witness.
3. It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury; and, above all things, he should guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced. He should never seek by any artifice to warp the minds of the jurors by inference and insinuations.

(February 4, 1903.)

A PPEAL by defendant from a judgment of the District Court for Washington County convicting him of rape. *Reversed.*

The facts are stated in the opinion.

Mr. Frank Harris, for appellant:

When the negative is descriptive of the offense it must be alleged in the indictment. Bishop, *Crim. Proc.* 3d ed. §§ 633, 636, 637; *United States v. Cook*, 17 Wall. 168, 21 L. ed. 538.

The conduct of counsel for the prosecution warrants a reversal.

People v. Bowers, 79 Cal. 415, 21 Pac. 752; *People v. Mullings*, 83 Cal. 138, 23 Pac. 229; *People v. Wells*, 100 Cal. 459, 34 Pac. 1078.

Mr. A. A. Fraser also for appellant.

Mr. John A. Bagley, *Attorney General*, for respondent:

If there was any misconduct on the part of the prosecuting attorney or his assistant in this case it does not sufficiently appear that any prejudicial error was occasioned thereby to the defendant, or that he was thereby deprived of having a fair trial.

8 Enc. Pl. & Pr. pp. 109, 116–118; *Siberry v. State*, 133 Ind. 677, 33 N. E. 681; 21 Enc. Pl. & Pr. p. 975; *Ferguson v. Hirsch*, 54 Ind. 337; *Combs v. State*, 75 Ind. 215; *People v. Lee Sere Bo*, 72 Cal. 623, 14 Pac. 310;

*Headnotes by AILSHIE, J.

NOTE.—As to reversal of conviction because of unfair or irrelevant arguments or statements of fact by prosecuting attorney, see also, in this series, *People v. Fielding* (N. Y.) 46 L. R. A. 641, and note, and *Ivey v. State* (Ga.) 54 L. R. A. 950.
60 L. R. A.

People v. Goldenson, 76 Cal. 328, 19 Pac. 161; 2 Enc. Pl. & Pr. p. 73, note 4; *Tuller v. Ginsburg*, 99 Mich. 137, 57 N. W. 1099.

Ailshie, J., delivered the opinion of the court:

The defendant was convicted of the crime of rape, alleged to have been committed on one Dora Irwin, a female child, who at the time of the alleged offense was of the age of fourteen years and eleven months, and he was thereupon sentenced to serve a term of ten years in the state penitentiary.

The offense is alleged to have been committed at Meadows, in the county of Washington, on the 4th day of July, 1902. Defendant appeals from the judgment, and from an order denying his motion for a new trial, and in this court the two principal questions, as presented for our consideration, are: "(1) That the court erred in refusing to instruct the jury that it was necessary for the prosecution to prove that at the time of the alleged offense the prosecutrix, Dora Irwin, was not the wife of the defendant; and that the court erred in refusing to grant a new trial upon the ground that the evidence did not show that said Dora Irwin was not at the time of the alleged offense the wife of defendant. (2) Misconduct on the part of the assistant prosecutor in the repeated asking of certain questions on cross-examination of the witness Daniel Irwin imputing to the defendant other like crimes, and to the rulings of the court in permitting such questions to be answered."

Counsel for defendant contend that, under the provisions of § 6765 of the Revised Statutes, as amended, it is necessary for the information to allege that the female upon whom the offense is charged to have been committed was not at the time thereof the wife of the defendant, and that the court should have instructed the jury that it is necessary for the state to prove such fact the same as any other fact in the case. We are not called upon in this case to pass upon that question, for the reason that the information charges that the offense was committed upon "one Dora Irwin, a female, not the wife of him, the said William Irwin," and the court instructed the jury that such fact must be proved, and we think it was proved. In instruction No. 8 we find the following language: "To warrant a conviction of the defendant, therefore, of the crime charged in the information, to wit, rape, the state must prove beyond a reasonable doubt: . . . (2) That at said time the said Dora Irwin was a female child under the age of eighteen years, and not the wife of the defendant." We have carefully examined the record in this case, and think the evidence as given by the defendant himself sufficiently establishes the fact that the said Dora Irwin was not the wife of defendant. We find in the record the defendant referring to the prosecutrix as

"Miss Dora" and "my granddaughter" and "the girl," and we find her, on the other hand, referring to the defendant as "my uncle Bill."

The second contention of the defendant, however, is a much graver question, and one on which we have examined many authorities before arriving at the conclusion which we are compelled to announce in this case. The defendant called his son, Daniel Irwin, as a witness, and examined him, and thereupon he was cross-examined by the assistant prosecutor, and, among other things, we find that in the course of such cross-examination the following questions were put, and answers, objections, and rulings by the court were made:

Q. Did you not, in the course of that conversation with Mary Phillips, say also, in substance and effect, that you suspected your father of having done the same thing with other girls, mentioning one of your family?

A. No, sir.

Q. You swear to that?

A. Yes, sir.

Q. Did you not on that occasion cry bitterly?

A. I might have shed a few tears; but very few, I think.

Q. Did you not, in the course of that conversation with Mary Phillips, say also, in substance and effect, that your father's actions with the other girl — with the member of the family referred to — had caused your mother's death?

Mr. Irwin: We object to that as immaterial, incompetent, and irrelevant, and not proper cross-examination of the witness. (Objection sustained.)

Q. Did you see Miss Phillips since you have been here in Weiser?

A. Yes, sir.

Mr. Irwin: At this time we wish to take an exception to the special counsel for the prosecution in propounding questions to the witness, as being an invasion of the rights of the defendant, and for the purpose of attempting to prejudice the rights of the defendant in this action, being a matter not relevant, and pertaining to no matter under discussion before the court.

The Court: The court sustains objections to such questions as the court deems improper.

Mr. Irwin: I am not making any objections as regards the court. I am taking an exception particularly to the conduct of counsel in that particular matter in embodying in his questions the same elements to which the court has sustained objections in the preceding question.

Q. I will ask you if you saw Miss Phillips in this town on the evening of March 12th of this present year?

A. I don't know. I believe I did. I have seen her several times since I have been in town. I am not positive of the date.

Q. I will ask you whether or not, on the evening of March 12, 1902, in room 19 of the Weiser Hotel, in this county and state, 60 L. R. A.

you said to Mary Phillips, in the course of a conversation had between you and Mary Phillips in that place and on that occasion, the conversation being directed to the question of your father's guilt or innocence upon this charge, in substance and effect as follows: "I can't go against my father, even if he is guilty." Did you so state?

Mr. Irwin: We object to that question as immaterial, irrelevant, and incompetent (Objection overruled, to which ruling of the court counsel for defendant excepts.)

Q. Did you so state in substance and effect?

(No answer.)

Q. Again I ask you whether you stated in substance and effect — I will repeat: "I cannot go against my father, even if he is guilty?"

A. No, sir; I did not.

Q. Nothing to that effect?

A. No, sir.

Q. Did you cry there on that occasion in talking to her?

A. No, sir.

Q. You didn't cry on that occasion in talking to her?

A. No, sir. She was there for the information she didn't get.

Q. You was playing detective again, was you?

A. No, sir; I was not. She was.

Q. How do you know she was?

A. I could tell from the lay of things from start to finish. She invited me to the room. I went there.

Q. Did she say on that occasion that she thought your father was guilty?

Mr. Irwin: We object to that as incompetent, irrelevant, and immaterial, and as hearsay.

(Objection sustained.)

Q. Then you swear positively that you had no such conversation, in substance and effect, as that; that is, the conversation that you have denied?

A. Yes, sir; I do.

It is contended by counsel for defendant that the questions here asked repeatedly of defendant's son tended to prejudice the substantial rights of defendant before the jury, and to throw into the jury box the insinuation that the defendant had, prior to the commission of the act alleged, committed similar offenses, and that his conduct in that respect had caused the death of the witness's mother, defendant's wife, and that the witness himself believed in the guilt of the defendant, and that he had stated as much, and that he had cried and wept in his conversations with others over the conduct of his father.

We are cited to a great many authorities discussing the conduct of prosecutors and rulings of the courts upon questions very similar to the one at bar. In the case of *People v. Wells*, 100 Cal. 459, 34 Pac. 1078, McFarland, J., speaking for the court in discussing the conduct of the prosecutor in asking the defendant on cross-examination

if she had not committed a like offense in another state, says: "It would be an impeachment of the legal learning of the counsel for the people to intimate that he did not know the question to be improper and wholly unjustifiable. Its only purpose, therefore, was to get before the jury a statement in the guise of a question that would prejudice them against appellant. If counsel had no reason to believe the truth of the matter insinuated by the question, then the artifice was most flagrant; but if he had any reason to believe in its truth, still he knew that it was a matter which the jury had no right to consider. The prosecuting attorney may well be assumed to be a man of fair standing before the jury, and they many well have thought that he would not have asked the question unless he could have proved what it intimated if he had been allowed to do so. . . . Where the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict." In *People v. Bowers*, 79 Cal. 415, 21 Pac. 752, the defendant was prosecuted upon the charge of murder. The supreme court of California, in discussing the conduct of the prosecutor in stating matters in the presence of the jury which were not borne out by the record, said: "Still more objectionable was the conduct of the prosecuting attorney. It is true, the court properly interfered, rebuking the attorney, and instructing the jury to pay no attention to the statements. But the statements were well calculated to influence the jury in a case of this character, and it is impossible for us to say that no injury resulted to the defendant therefrom." In *People v. Mullings*, 83 Cal. 138, 23 Pac. 229, the prosecuting attorney asked the defendant, while on the witness stand, the following questions: "What did you say to . . . your wife when you went home that night? Did you not tell your wife that you had killed a man?" The defendant objected to these questions, and the objection was overruled. The supreme court of California, in discussing this action of the prosecutor and ruling of the court, says: "Counsel for respondent contends that the questions asking defendant about conversations with his wife did not injure him, because his answers to them were mostly in the negative. But what answers were expected? After defendant testified that he did not kill John Moore, can any sane man think that the district attorney supposed for a moment that defendant would answer affirmatively a long list of questions framed upon the presumption that he did kill him? Why, then, did he ask them? And, if the questions and answers did not help to strengthen the case against defendant, why did not the prosecution consent to have them stricken out? It is quite evident that the questions, and not the answers, were what the prosecu-

tion thought important. The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proved, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense." The case of *Leahy v. State*, 31 Neb. 586, 48 N. W. 390, was a rape case, and in many particulars similar to the one at bar. There the prosecutor, upon cross-examination of the accused, asked him "if on the day succeeding that on which it was alleged he committed the crime he did not go to the residence of one B, and there, finding Miss B, daughter of B, alone, did not attempt to drag her to the lounge," etc., and then said to the court in the presence of the jury, "We intend to follow this matter up, and show that he went right over to B's, and there tried to kiss and hug Miss B, and drag her to the lounge." The supreme court of Nebraska, in commenting upon this conduct of the prosecutor, says: "It is the duty of the officer prosecuting to conduct the trial of a criminal case according to the established rules. He acts in a semi-judicial capacity, and is supposed to act alone from principle, and without bias or prejudice. The state has guaranteed to everyone a fair trial, and such trial cannot be had if the prosecution can resort to tricks to secure a conviction. If such practice was sanctioned, it would result in many cases in the conviction of innocent persons. The plaintiff in error was on trial for the crime charged in the information. So far as appears, he had not been charged with any other offense, and certainly was not on trial for the second. The statements of the attorney were improper, and in the highest degree prejudicial, and for those causes the judgment is reversed, and the cause remanded for a new trial." In *Smith v. People*, 8 Colo. 457, 8 Pac. 920, the defendant was charged with the crime of receiving stolen property. The prosecutor, in the course of his argument, stated "that he had further expected to prove, as stated in his opening, that the defendant had murdered Molly Gorman." The supreme court of Colorado, in discussing this action of the prosecutor, said: "The action of the prosecuting officer, as above set forth in the record, constitutes gross misconduct on his part, and a total disregard of the legal rights of the prisoner. It manifests a disposition to ignore the plainest principles of law in relation to the trial of criminal offenses, and exhibits contempt for the authority and dignity of the court of which he was then an officer. Such statements, coming from the acting district attorney at the time and in the manner made, must have been highly prejudicial to the cause of the defendant. They were not only made by an officer of the court, but they were made in the closing or last speech to the jury, when there was no opportunity for defendant's counsel

to criticize or answer them. No such facts had been received in evidence, and they were not only wholly outside the evidence, but totally irrelevant to the subject-matter of the trial. The officer could have had but one motive in view in the course pursued by him, viz., to prejudice the jury against the prisoner by charging her with the commission of graver crimes than the offense for which she was being tried." In *Holder v. State*, 58 Ark. 473, 25 S. W. 279, the defendant was prosecuted on the charge of murder, and in the course of his cross-examination the prosecutor asked him, among other things: "Is it not a fact that you had committed rape in Texas, and left there for that reason?" Battle, J., speaking for the court, concerning this question, says: "The action of the attorney for the state was highly reprehensible. A prosecuting attorney is a public officer, 'acting in a quasi judicial capacity.' It is his duty to use all fair, honorable, reasonable, and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury, which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case, and the conclusions legitimately deducible from the law applicable to the same. To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man. The forms of law should never be prostituted to such a purpose." The Missouri court of appeals, in the case of *State v. Trott*, 36 Mo. App. 29,—a gambling case,—in discussing the conduct of the prosecutor in cross-examining the accused, and asking him if he had not played cards for money before, said: "The question thus put to the witness by the state's attorney was not only not pertinent to the witness's direct examination or to the issues, but it was inadmissible as evidence against him on any theory, and it thrust into the minds of the jurors an irrelevant matter, which was highly prejudicial to the accused." In the case of the *People v. Cahoon*, 88 Mich. 456, 50 N. W. 384, the court, in commenting upon the action of the prosecutor in making remarks in the presence of the jury as to the purpose of the evidence he was offering, said: "Zeal in a prosecuting attorney is entitled to the highest commendation, but that zeal must be exercised within proper limits. . . . In criminal cases the prosecuting attorney is a public officer, acting in a quasi judicial capacity. Juries very properly regard him as unprejudiced, impartial, and nonpartisan; and insinuations thrown out by him regarding the credibility of witnesses for the defense are calculated to prejudice the defendant." To the same effect, see *Gale v. People*, 26 Mich. 156; 60 L. R. A.

People v. Devine, 95 Cal. 231, 30 Pac. 378; *People v. Lee Chuck*, 78 Cal. 327, 20 Pac. 719; *People v. Ah Len*, 92 Cal. 282, 28 Pac. 286.

It will be observed from the foregoing authorities that the courts do not look with favor upon the action of prosecutors in going beyond any possible state of facts which can be material as to the guilt or innocence of the defendant in a particular case for which he is upon trial. Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. It seems that they frequently exert their skill and ingenuity to see how far they can trespass upon the verge of error, and generally in so doing they transgress upon the rights of the accused. It is the duty of the prosecutor to see that a defendant has a fair trial, and that nothing but competent evidence is submitted to the jury, and above all things he should guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced. When he has submitted all the facts in the case to the jury he should be content, but he should never seek by any artifice to warp the minds of the jurors by inferences and insinuations. In the case at bar it is apparent at once that the questions of the special prosecutor were calculated to prejudice the jury, and lead them to believe that the defendant, who was then on trial, was a bad and dangerous man in a community, and that he had been guilty of a similar offense prior to the one alleged, and that his conduct with other young girls had brought about the death of his own wife; and this was sought to be made more forcible by asking the defendant's son if he had not made such statement himself,—facts which were wholly foreign to the case upon trial. It could not be material in any view of the case. It was not proper cross-examination, and upon no view or theory of the case was it admissible. In this case the objection to one of the questions was sustained, but counsel continued to ask practically the same question. The defendant's attorney objected to the conduct of the counsel, and finally the court overruled the objection of defendant's counsel to a very similar question, as will be seen from the portion of the record quoted. From this ruling of the court the jury had a right to believe that the evidence was competent for them to consider.

Another thing which appears in this case, and makes the error more prejudicial to the rights of defendant, is the fact that the evidence was of the most conflicting and unsatisfactory character; so much so that we cannot doubt that the conduct of counsel and the incompetent evidence admitted did actually prejudice defendant.

It is urged by the attorney general that

an exception to the action of the assistant prosecutor and the rulings of the court was not properly saved. We are unable to agree with this contention. The record above quoted shows that defendant's counsel twice objected to the questions, and once took exception to the action of counsel for the state in persisting in substantially repeating the question. Attorneys should be careful in making their objections and saving their exceptions, but we think they have sufficiently done so in this case.

After the defendant had rested his case, the state examined the witness Mary Phillips in rebuttal, and asked her if she had had such a conversation with the witness

Daniel Irwin as had been set forth in the question asked of Irwin, and she answered in the affirmative. The defendant assigns the admission of this evidence as error. The record, however, does not show any objection made to the question, but it is well enough here to observe that the evidence was clearly inadmissible as against the defendant, and the fact that it was given under the guise of impeachment of the witness Daniel Irwin did not make it competent.

The judgment of the District Court is reversed, and cause remanded.

Sullivan, Ch. J., and Stockslager, J., concur.

IOWA SUPREME COURT.

B. F. LONG

v.

Nannie Belle WILSON *et al.*, Appts.

(.....Iowa.....)

A judgment in a suit between the owner of property abutting on a highway and the municipality to establish the boundary of the highway is not conclusive on the owner of the property located on the opposite side of the street, who is not made a party to the suit, and whose access to and from his property will be interfered with if the boundaries so established prevail.

(January 28, 1903.)

A PPEAL by defendants from a judgment of the District Court for Dallas County in favor of plaintiff in an action to prevent the obstruction of a highway. *Affirmed.*

Statement by Ladd, J.:

The petition alleged that plaintiff acquired lots 5, 6, and 7 in block 3, abutting Fifth street, in Tyler's addition to Perry, in 1892, and shortly thereafter occupied them as a homestead for himself and family, and has continued to do so since; that said street is 70 feet wide, and the only one through which plaintiff has convenient access to said property. It also averred facts which, if true, indicate that said street, through dedication, had become a public street of the city before defendants acquired block 4 of said addition, in November, 1900, and that they have since encroached on said street by erecting a dwelling house, building a fence, and planting shade trees up to within 13 feet of the east line of plaintiff's lots, and threaten by other obstructions to prevent the use of all the said street, save said strip 13 feet wide along the east side of plaintiff's lots, and thereby interfere with his access to his property, and the comfort

and enjoyment of it as a home, and greatly diminish its value. Plaintiff prayed that these obstructions be abated, and defendants enjoined from encroaching on said street. In the third division of the answer the defendants aver that they acquired said block 4 (describing it) of the Security Investment Company of Baltimore November 27, 1900; that prior to that time, December 19, 1899, said company commenced an action against the city of Perry to establish the boundaries of said block, and to quiet title against said city; that said city appeared and answered; that decree was entered, as prayed, confirming the boundaries of said block as claimed by defendants. Copies of the pleadings and decree in that case were set out as part of the answer. To this division the plaintiff interposed a general demurrer, and also that the adjudication was not binding on plaintiff, as he was not a party to the action. The demurrer was sustained, and defendants appeal.

Messrs. Giddings & Winegar, for appellants:

Plaintiff in this case being a citizen and property owner of the city of Perry at the time of the commencement and trial of the case of *Security Investment Co. v. Perry*, upon the trial of which case the issue was made and determined, as between said parties, as to whether or not the particular piece of property now in dispute constituted a portion of the public street, and that determination being adverse to the city, it is binding upon the city and upon all the residents and property owners thereof.

The fee title to all public streets and alleys is in the city. The purchaser of town and city property acquires no ownership or interest in the streets adjoining such property other than that which is given to the whole public.

Milburn v. Cedar Rapids, 12 Iowa, 246.

NOTE.—As to right of person injured by abandonment or vacation of highway to recover damages, see, in this series, *notes to Selden v. Jacksonville (Fla.)* 14 L. R. A. 370, and *People ex rel. Hart v. Marin County (Cal.)* 26 L. R. A. 60 L. R. A.

659; also *Chicago v. Burcky (Ill.)* 29 L. R. A. 569; *Dantzer v. Indianapolis Union R. Co. (Ind.)* 34 L. R. A. 769; *Re Melon Street (Pa.)* 38 L. R. A. 275; and *Cram v. Laconia (N. H.)* 57 L. R. A. 282.

The city may vacate a street without notice to the property owners.

Dempsey v. Burlington, 66 Iowa, 687, 24 N. W. 508.

It was, therefore, the proper party in the former litigation, and its officers, in defending said suit, represented, not only the city, but all citizens and property owners thereof.

2 Black, Judgm. § 584; *Gaskill v. Dudley*, 6 Met. 546, 39 Am. Dec. 750; *Chase v. Merrimack Bank*, 19 Pick. 564, 31 Am. Dec. 163; *McLoud v. Selby*, 10 Conn. 390, 27 Am. Dec. 689; *Faust v. Baumgartner*, 113 Ind. 139, 15 N. E. 337; *Zearing v. Raber*, 74 Ill. 413; *Maywood Co. v. Maywood*, 118 Ill. 61, 6 N. E. 866; *Pt. Dearborn Lodge No. 214, I. O. O. F. v. Klein*, 115 Ill. 177, 56 Am. Rep. 133, 3 N. E. 272; Greenl. Ev. 613.

The questions of title and the right of possession, and of dedication and acceptance, appear to have been passed upon and determined in favor of appellant's.

The judgment is conclusive upon any rights which the appellee might have, because his rights are dependent upon those of the village.

Elson v. Comstock, 150 Ill. 303, 37 N. E. 207; *Detroit v. Ellis*, 103 Mich. 612, 27 L. R. A. 211, 61 N. W. 886; *Sauls v. Freeman*, 24 Fla. 209, 4 So. 525; *Lyman v. Paris*, 53 Iowa, 498, 5 N. W. 621; *Cannon v. Nelson*, 83 Iowa, 242, 48 N. W. 1033; *Hilliard v. Griffin*, 72 Iowa, 331, 33 N. W. 156; *Dicken v. Morgan*, 59 Iowa, 157, 13 N. W. 57.

Messrs. H. A. Hoyt and White & Clarke, for appellee:

The abutting property owner has rights in the street distinct from the rights of the general public.

Cook v. Burlington, 30 Iowa, 94, 6 Am. Rep. 649; *Milburn v. Cedar Rapids*, 12 Iowa, 246; *Warren v. Lyons City*, 22 Iowa, 351; *Pettingill v. Devin*, 35 Iowa, 344; *Stanley v. Davenport*, 54 Iowa, 463, 37 Am. Rep. 216, 2 N. W. 1064, 6 N. W. 706; *Lathrop v. Central Iowa R. Co.* 69 Iowa, 105, 28 N. W. 465; *Cadle v. Muscatine Western R. Co.* 44 Iowa, 11; *Leffler v. Burlington*, 18 Iowa, 361; *Fisher v. Beard*, 40 Iowa, 625; *Jenks v. Lansing Lumber Co.* 97 Iowa, 347, 66 N. W. 231.

Ladd, J., delivered the opinion of the court:

For the purpose of this case, the averments of the petition and third division of the answer must be treated as true. If so, then defendants are encroaching upon and obstructing the only street by which plaintiff has convenient access to his homestead abutting thereon. The defendants justify this by a decree in an action wherein their grantor was plaintiff and the city of Perry, within whose limits the property is located, was defendant, awarding said grantor all of said street, save a strip 13 feet wide along the east side of plaintiff's lots, as a part of block 4 to the east, and belonging to them. Plaintiff was not a party to that action. Is he bound by the adjudication? As contended by appellant, the decree is binding upon all citizens of the city of Perry having 60 L. R. A.

no interest in the street, other than as individual members of the general public. The legally constituted authorities of the city stand for and instead of its citizens, and may be said to represent them in such litigation. *Clark v. Wolf*, 29 Iowa, 197; *Lyman v. Paris*, 53 Iowa, 498, 5 N. W. 621; *Cannon v. Nelson*, 83 Iowa, 242, 48 N. W. 1033; *Dicken v. Morgan*, 59 Iowa, 157, 13 N. W. 57. This is not questioned. What appellee contends is that, as owner of the property abutting on the alleged street, he has a right to, and interest in, the street, distinct and different from that of the general public. This doctrine has been expressly recognized in this state. *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649; *Warren v. Lyons City*, 22 Iowa, 351. The authorities are practically agreed to the same effect. *Elliott, Roads & Streets*, § 877. It may not be of importance to the general public whether a particular street is vacated or not. It is important to the individual owner of abutting property that he shall be able to get to and from his residence or business, and that the public shall have the means of getting there for social or business purposes. In such a case access to thorough-fares connecting his property with other parts of the town or city has a value peculiar to him, apart from that shared in by citizens generally, and his right to the street as a means of enjoying the free and convenient use of his property has a value quite as certainly as the property itself. If this special right is of value,—and it is of value if it increases the worth of his abutting premises,—then it is property, regardless of the extent of such value. Surely no argument is required to demonstrate that the deprivation of the use of property is to that extent the destruction of its value. Under the allegations of the petition, then, shutting off the approach to plaintiff's homestead was the taking of his property, and of this there has been no adjudication. *Haynes v. Thomas*, 7 Ind. 38; *Lackland v. North Missouri R. Co.* 31 Mo. 180; *Bradbury v. Walton*, 94 Ky. 167, 21 S. W. 869; *Heller v. Atchison, T. & S. F. R. Co.* 28 Kan. 625; *Heinrich v. St. Louis*, 125 Mo. 424, 28 S. W. 626; *Bannon v. Rohmeiser*, 90 Ky. 48, 13 S. W. 444; *Abendroth v. Manhattan R. Co.* 122 N. Y. 1, 11 L. R. A. 634, 25 N. E. 490; *Cincinnati & S. G. Ave. Street R. Co. v. Cumminsville*, 14 Ohio St. 523; *Anderson v. Turbeville*, 6 Coldw. 150. As said in *Heinrich v. St. Louis*, 125 Mo. 424, 28 S. W. 626; "There is no doubt but a property owner has an easement in a street upon which his property abuts which is special to him, and should be protected." While the owner of a lot on a public street has the same right to the use of a street that rests in the public, he at the same time has other rights which are special and peculiar to him, and the right of ingress and egress is one of them. This right of access is appurtenant to his lot, and is private property. To destroy that right is to damage his property, and, when this is done for the public good,

the public must make just compensation therefor."

We are not questioning the power of the legislature, through the municipality, to vacate streets. That has been fully recognized by this court. *McLachlan v. Gray*, 105 Iowa, 250, 74 N. W. 773, and cases cited. Conceding such power, it does not follow that it may be exercised without compensating abutting owners for the damages occasioned thereby. *Paul v. Carver*, 24 Pa. 207, 64 Am. Dec. 649, and *McGee's Appeal*, 114 Pa. 470, 8 Atl. 237, are often cited as announcing that compensation cannot be exacted in event of the vacation of a street. Although the opinions broadly state this, it is to be observed that they were causes in which the municipalities were sought to be enjoined from exercising the power to vacate, and did not necessarily involve the right of the abutter to recover damages. The power to vacate as we think, does not necessarily depend on the absence of the right to recover damages for the taking of private property. Damages might be awarded in a subsequent action. But these cases are to be further distinguished, in that the public had but an easement, and the vacation amounted to no more than a surrender of this to the owner of the fee. They seem in this respect to be in harmony with our own decisions relating to the vacation of a country highway. In deciding this question, the court, in *Brady v. Shinkle*, 40 Iowa, 576, said: "That a landowner may sustain damage, according to the common acceptance of the word, on account of a vacation of a highway, as stated in the question, cannot be doubted. It is equally true that inconvenience and damage may result to him by closing a road which is miles away from his land. A farmer may suffer serious loss and inconvenience by the vacation of a highway over which he is accustomed to travel and haul the productions of his farm to market, though his land abuts upon no part of it. All who use the road suffer in the same way. While one may be more largely injured than others, he yet sustains damages of the same character and nature which all who use the road—the public generally—suffer. While the road exists, he has a right to the easement. But this right is not different from that enjoyed by the public generally. His right, then, is such as is enjoyed by the public. His damages are those shared by the public, and no other." See also *Grove v. Allen*, 92 Iowa, 519, 61 N. W. 175; *McKinney v. Baker*, 100 Iowa, 302, 69 N. W. 683. This is the prevailing rule. *Levee Dist. No. 9 v. Farmer*, 101 Cal. 178, 23 L. R. A. 388, 35 Pac. 569; *State ex rel. Johnson v. Deer Lodge County*, 19 Mont. 582, 49 Pac. 147. See *Contra*, *Pearsall v. Eaton County*, 74 Mich. 558, 4 L. R. A. 193, 42 N. W. 77.

In the vacation of an ordinary highway, outside of a city or town, all that is done is to yield control of the easement in the land, and the right of exclusive possession passes to the owner, to be occupied as a private way, or otherwise, as he pleases. Its dis-

continuance does not of necessity cut off access to his property. The public merely ceases to keep up and repair the strip of land as a highway. The situation, although analogous in some respects, is different with a town or city street. The abutting lot owner cannot complain if the street be left in precisely the same condition as a country road. The municipality owes him no legal duty of improving it. Upon its vacation, however, the fee, remaining in the city or town, may be devoted to whatever purposes it may choose, and hence access be entirely cut off. It may be diverted absolutely from the purposes for which dedicated, and this brings us to the main distinction between a country highway and a street. The former is established by law for the public: the owner usually being paid value for a mere easement in his land, though there may be gratuitous dedication. Title to the streets of a city or town is acquired by grant, with the implied right of ingress and egress in the abutting lot owner; the grantor or the party making the dedication to the city or town saying to him: "This right of ingress and egress you shall have." *Bradbury v. Walton*, 94 Ky. 163, 21 S. W. 869. By accepting the street, the obligation to keep it open and afford the dedicator or his grantees, near or remote, access to abutting lots, is clearly implied; and though, under the plenary powers of the legislature over all streets and highways, it may be vacated, the damages occasioned thereby cannot be said to be those shared with the public generally, as in the case of a country road, but are in large part peculiar to himself. *Anderson v. Turbeville*, 6 Coldw. 150; *Selden v. Jacksonville*, 28 Fla. 558, 14 L. R. A. 370, 10 So. 457; *Moose v. Carson*, 104 N. C. 431, 7 L. R. A. 548, 10 S. E. 689; *Rensselaer v. Leopold*, 106 Ind. 29, 5 N. E. 761, and cases previously cited; *People ex rel. Hart v. Marin County*, 26 L. R. A. 659, and note in which decisions are collected (103 Cal. 223, 37 Pac. 203).

Damages incident to the occupation of the street by a railroad are denied, in the absence of statute, because the inconvenience occasioned thereby is shared in by the citizens generally. Nor do courts look favorably on claims based on the mere inconvenience arising from the closing of streets, when another approach remains. *Kings County F. Ins. Co. v. Stevens*, 101 N. Y. 411, 5 N. E. 353; *Fearing v. Irwin*, 55 N. Y. 486; *Dantzer v. Indianapolis Union R. Co.* 141 Ind. 604, 34 L. R. A. 769, 39 N. E. 223. And no consideration will be given the claims of owners of land not abutting thereon. *Smith v. Boston*, 7 Cush. 254; *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795, 10 N. E. 395; *Heiler v. Atchison, T. & S. F. R. Co.* 28 Kan. 625.

The point involved was touched in *Barr v. Oskaloosa*, 45 Iowa, 275. The ruling there affirmed sustained a demurrer to a petition that, while alleging the vacation of the street, also asserted that access to the dwelling house was greatly obstructed, not cut off. It was held that the city had the

power to vacate, and that damages could not be recovered for the partial use thereof by the railroad; but in the course of the opinion, after referring to the statute, the court said: "This section clearly confers upon the city the power exercised in this case, and for an exercise of this legal right the city cannot be made to respond in damages." But the case has not been treated in subsequent decisions as disposing of the question. Thus, in *Stubenrauch v. Neyensch*, 54 Iowa, 567, 7 N. W. 1, it was mentioned and treated as open, but a decision of it expressly disclaimed; *Barr v. Oskaloosa* being cited. In *Williams v. Carey*, 73 Iowa, 194, 34 N. W. 813, the court said that the use of the street in *Barr's Case* had not been diverted, but was "still devoted to a public use, different, possibly, from the one intended by the proprietor who laid out the town." The writer of the opinion had spoken for the court in *Cook v. Burlington*, 30 Iowa, 94, 6 Am. Rep. 649, and quoted with approval language from an Ohio case which so clearly expresses our conclusion that it will bear

repetition: "The lot owners have a peculiar interest in the street, which neither the local nor general public can pretend to claim; a private right in the nature of an incorporeal hereditament legally attached to the contiguous grounds and the erections thereon; an incidental title to certain facilities and franchises assured to them by contract and by law, and without which their property would be comparatively of little value. This easement appendant to the lots, unlike any right of one lot owner in the lot of another, is as much property as the lot itself."

Having determined all necessary to a decision of this case, the question of liability for damages ought to be deferred until directly involved. It follows that, as plaintiff had an interest in the street apart and distinct from that enjoyed by citizens generally, the adjudication against the city of Perry was not binding on him, and the demurrer was rightly sustained. *Hine v. Keokuk & D. M. R. Co.* 42 Iowa, 636.

Affirmed.

KENTUCKY COURT OF APPEALS.

City of CAMPBELLSVILLE, Appt.,
v.

Jacob ODEWALT.

(.....Ky.....)

1. An ordinance subjecting one in possession of premises on which liquor is sold, disposed of, obtained, or furnished in violation or evasion of law, to fine, whether the act is with his knowledge or consent or not, violates a constitutional provision that absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in the republic.
2. The burden of proving that the act was not with his knowledge or consent does not rest upon one on whose premises liquor is illegally sold, where the evidence of the prosecution shows merely that the liquor was procured in defendant's building from a person unknown.

(Hobson, O'Rear, and Settle, JJ., dissent.)

(February 20, 1903.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Taylor County in favor of defendant in a proceeding to enforce a penalty for violation of a city ordinance. *Affirmed.*

The facts are stated in the opinion.

Messrs. H. W. Rives and H. C. Wood for appellant.

Paynter, J., delivered the opinion of the court:

The appellee was arrested under a war-

rant which charged that "on the 22d day of September, 1900, in the county aforesaid, the said Jacob Odewalt was there and then in possession of premises on which liquor was sold to one Thomas G. Newton, contrary to the form of the statute in such cases made and provided." It was based upon an ordinance which reads as follows: "Be it enacted by the board of council for the city of Campbellsville, Ky.: That any person in possession of the premises in the city of Campbellsville, Ky., on which liquor is sold, disposed of, obtained, or furnished in violation or evasion of law, by any trick or method whatever, on conviction shall be fined not less than twenty dollars (\$20.00) nor more than one hundred dollars (\$100.00) for each offense, and each time such liquor is sold, disposed of, or furnished in violation or evasion of law is a separate offense." The ordinance does not denounce a penalty for selling liquor in violation of law. The warrant was obtained upon the affidavit of Thos. G. Newton, the party to whom it is alleged the liquor was unlawfully sold. It does not charge the appellee with selling liquor, but the charge is that "said Jacob Odewalt was then and there in possession of the premises on which the liquor was sold." The evidence offered is to the effect that Newton, in a back room of the appellee's store, bought from an unknown party some whisky and beer. There was no evidence showing that the party from whom Newton bought it had any connection whatever with the appellee in a business way or otherwise, or that the appel-

NOTE.—As to power of municipal corporation to regulate sales of intoxicating liquors generally, see notes to *Champer v. Greencastle* (Ind.) 24 L. R. A. 768, and *State v. Karstendiek* (Ia.) 39 L. R. A. 520; also, in this series, *Fortner v. Duncan* (Ky.) 11 L. R. A. 188; *Ex parte* 60 L. R. A.

Hayes (Cal.) 20 L. R. A. 701; *Ex parte Sikes* (Ala.) 24 L. R. A. 774; *Swift v. People ex rel. Ferris Wheel Co.* (Ill.) 33 L. R. A. 470; *Bennett v. Pulaski* (Tenn.) 47 L. R. A. 278; *Chicago v. Netcher* (Ill.) 48 L. R. A. 261; and *De Blanc v. New Iberia* (La.) 56 L. R. A. 285.

lee even knew him, or that he had ever been in the store previous to or since that time. The court below gave a peremptory instruction to the jury to find for the appellee, which was accordingly done. The case is not briefed by counsel for appellee, but in the brief for appellant it is stated that the court sustained the motion for peremptory instruction upon the ground that the ordinance in question was unconstitutional. This is a most unusual ordinance. It makes the party in possession of the premises responsible for an act that he never had an intention to commit; for an act that he did not do himself; for an act that might have been done by another, not in his presence, but without his knowledge or consent. No presumption of innocence can be indulged; no defense can be made to the prosecution; although he may not have had an intention to commit the offense, although he never was guilty of an act in violation of law, and although he had no knowledge that others were engaged in the violation of law upon his premises. Under this ordinance parties could enter upon the yard of a citizen at midnight, when he was asleep, sell liquor in violation of law, and in consequence of which a fine could be imposed upon the party in possession of the premises. A practical illustration of what might be done under the ordinance is furnished by this case. Newton testified that he bought it from a party unknown to him. He then swore out a warrant for the appellee. Appellee cannot contradict Newton, because he fails to give the name of the alleged seller. If the ordinance is valid, appellee must suffer the imposition of the fine with practically a denial of the right to defend himself against the charge. If a legislature or common council of a municipality can enact such a law as this, and it is valid, they could enact a law which would compel an occupant of premises to pay all kinds of fines and submit to all kinds of imprisonment for all kinds of offenses which might be committed upon his premises without his knowledge or consent. While a zeal to punish persons who sell liquor in violation of law is commendable, yet it must be confined to the enactment and enforcement of laws which do not arbitrarily deprive citizens of their liberty and property. Section 2 of the Bill of Rights reads as follows: "Absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority." We cannot conceive of a greater attempt at the exercise of arbitrary power than in the enactment of the ordinance in question. Under that ordinance a citizen's liberty and property can be taken, although he has done no act in violation of law, or even had an intention to do so. The exercise of the same arbitrary power might deprive a citizen of his life, because, if this ordinance is valid, a law might be enacted of the same character that would deprive one of his life, although he was not present, and although he did not commit a wrongful act, or have any knowledge that one was about to be

committed. The ordinance in question is quite different from one which would impose a fine upon one in possession of premises for suffering or permitting liquor to be sold thereon. To interpolate words to describe that offense would be, in effect, adopting a new ordinance. The offense under such an ordinance would not be for being in possession of premises upon which the wrongful act was committed, but for the act of suffering or permitting the wrongful act of another to take place on his premises. Such an ordinance would denounce a penalty for an act which the ordinance declares to be wrong, while the ordinance in question in effect makes one guilty of the wrongful act of another. Our opinion is that the ordinance in question is unconstitutional.

It is suggested that the peremptory instruction should not have gone, as the proof tended to show that appellee was in possession when the selling took place, and therefore the burden shifted to him to show that he had no knowledge of it. The ordinance was not enacted as a rule of evidence, and to determine its effect, but to define an offense. If it were proper to interpret the ordinance in question as we would one that complied with the constitutional requirements, then the peremptory instruction should have gone, because the evidence detailing the circumstances under which it was sold would rebut the charge that he suffered and permitted it to be sold. Bishop on Statutory Crimes, § 132, reads as follows: "A statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurs with his act, because the common law does not. Hence what is done from overwhelming necessity is construed as not violating a statute, however contrary to its general terms. And one who, while careful and circumspect, is led into a mistake of facts, and, doing what would be in no way reprehensible were they what he supposes them to be, commits what, under the real facts, is a violation of a criminal statute, is guilty of no crime, because such is the rule of the common law, and in construction it restricts the statute. Yet in some instances of this sort he incurs a civil liability." It is suggested that to follow the doctrine of this section would lead us to hold the ordinance valid. It is difficult to see what this has to do with the case under consideration. The first part of it is to the effect that at common law it was essential to show the intent of the alleged offender, and that statutes do not generally make a criminal offense, unless the offender's intent concurs with his act. To enforce the ordinance in question it is necessary to interpolate words describing an act for which a party may be prosecuted, as well as an intention to commit it. In the next clause of the section it is stated that, where an act is the result of "overwhelming necessity," it is construed as not violating a statute, however contrary to its general terms. This is not a case for the application of such a principle, because it is not contended that any act was done in

this case as the result of "overwhelming necessity." Again, the section says: "And one who, while careful and circumspect, is led into a mistake of facts, and, doing what would be in no way reprehensible were they what he supposes them to be, commits what, under the real facts, is a violation of a criminal statute, is guilty of no crime." We are wholly unable to see the remotest application that this principle has to the case under consideration. There is no evidence here that the appellee was led to do an act as the result of a mistake of facts.

It is suggested that certain rules of interpretation, if followed, would lead to the holding of the ordinance in question as valid. One of these rules is that every statute ought to be expounded, not according to the letter, but according to the meaning; and another is that every interpretation which leads to an absurdity ought to be rejected; and, again, that a law ought to be interpreted in such manner as that it may have effect, and not be vain and illusive. There is no occasion for the application of the first rule of interpretation mentioned, because we have interpreted the statute according to its letter and spirit, and condemn it because in its spirit and letter it is violative of the Constitution. This is no occasion for the application of the second rule, because the interpretation we have given the ordinance does not lead to an absurdity. If it is enforced according to the word and spirit, it would be neither vain nor illusive, but it would be so drastic and effective as to deprive the citizen of his liberty and property. Again, it has been suggested that the reason of an enactment must enter into its interpretation, and that a case within the letter, but not within the spirit, of a statute, is not embraced by it. This is not a case for the application of that rule, because the party was in possession of the premises when the sale took place, and, if it is an offense, it is not only within the letter, but within the spirit, of the ordinance. Section 460, Ky. Stat., provides that "all words and phrases shall be construed and understood according to the common and approved usage of language." There is no question as to the words and spirit of the ordinance. No word is used of doubtful import, and no phrase is employed of uncertain meaning.

The logic of those who oppose the views herein expressed is to have the court enact an ordinance that would not be subject to a constitutional objection, give it a retroactive effect, and declare the appellee has violated it. The business of the court is to interpret, not enact, laws.

The judgment is affirmed.

Hobson, J., dissenting:

The by-law before us in this case is taken from § 2572, Ky. Stat., which is in these words: "The person in possession of the premises on which liquor is sold, disposed of, obtained, or furnished in violation or evasion of law, by any trick or method whatever on conviction shall be fined not less 60 L. R. A.

than twenty nor more than one hundred dollars for each offense; and each time such liquor is sold, disposed of, or furnished in violation or evasion of law shall be deemed a separate offense under this act against the person in possession of the premises on which said liquor is obtained, furnished, or disposed of." The by-law, merely following the statute, is not void, unless the statute is also invalid; for it cannot, of course, be maintained that the town authorities could not make a by-law similar to the statute, to secure its better enforcement. It is said that the language used is broad enough to make the owner of the premises guilty criminally if a tramp walking by should step off the highway and sell whisky on his land, and other similar illustrations are given. But the statute requires no such rigorous construction. It will be observed that the statute uses the words, "in violation or evasion of law;" also the words, "under this act." The act was approved February 24, 1894, and is entitled "An Act to Punish the Violation and Evasion of the Laws of This Commonwealth in Relation to the Regulation of the Sale of Spirituous, Vinous, or Malt Liquors." See Acts 1894, p. 33. Every section of the act strikes at tricks, subterfuges, or devices for the evasion of the laws against liquor selling. The legislature knew that in local option communities blind tigers were frequently run by irresponsible persons, here to-day and gone to-morrow; while the owner of the property could be more easily found; and the purpose was to prevent the evasion of the law. The statute was aimed at those who evaded the law, and not at those whose premises might be used for a moment by some tramp without their knowledge. This construction not only harmonizes the section quoted with the general intent of the act as shown by its title and other provisions, but is in accord with the principles of common law. In Bishop on Statutory Crimes, § 132, it is said: "A statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurred with his act, because the common law does not. Hence, what is done from overwhelming necessity is construed as not violating a statute, however contrary to its general terms. And one who, while careful and circumspect, is led into a mistake of facts, and, doing what would be in no way reprehensible were they what he supposes them to be, commits what, under the real facts, is a violation of a criminal statute, is guilty of no crime, because such is the rule of the common law, and in construction it restricts the statute. Yet in some instances of this sort he incurs a civil liability." In *Bailey v. Com.* 11 Bush, 691, this court said: "Words in a statute were always to be understood according to the approved use of language. But there are other rules of construction of equal dignity and importance, which must not be overlooked, and which, although not incorporated in our statutes, are as binding upon the courts as if embodied in it. One

of these rules is that 'every statute ought to be expounded, not according to the letter, but according to the meaning;' and another, that 'every interpretation that leads to an absurdity ought to be rejected;' and still another, that a law ought to be interpreted in such manner as that it may have effect, and not be found vain and illusive." Following this principle, it has been held that the reason of an enactment must enter into its interpretation, and that a case within the letter, but not within the spirit, of a statute, is not embraced by it. *Brown v. Thompson*, 14 Bush, 538, 29 Am. Rep. 416. And to sustain a statute, and give it effect, the court read the statute as though the word "width" was the word "depth." *Bird v. Kenton County*, 95 Ky. 195, 24 S. W. 118. The case before us does not require us to go further than the common-law rule quoted above from Bishop on Statutory Crimes. The legislature had in mind evasions of the liquor laws, and was aiming to punish those who evaded them. Where the liquor is sold on the premises of another, without his knowledge or consent, or under circumstances beyond his control, or not reasonably to be anticipated by him, he is not to be punished. This gives the statute a fair effect. It remedies the evils the legislature had in mind, and it is the duty of the court, if it can do so, to enforce the legislative will, and not render the statute vain and illusive. By § 1130, Ky. Stat., a person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the first conviction, and, if convicted a third time, during his life. Yet under this statute it was held that the increased penalties only applied to offenses committed after the former conviction. *Brown v. Com.* 100 Ky. 127, 37 S. W. 496. In holding this the court had only to guide it the legislative intent, without any expressions in the statute indicating it. The case here is much stronger, for the phraseology of the statute, as well as its title, shows that the legislature was aiming at only evasions of the law. It has been held a violation of the statute to carry a pistol concealed in a valise; but if a person, walking with a friend, carried his valise for him, not knowing there was a pistol in it, he would clearly not come within the purpose of the statute against carrying concealed deadly weapons. Similar illustrations may be given as to nearly all the statutes declaring certain specific acts misdemeanors. To say that the principle stated by Bishop applies to acts done by the defendant, but not to a case like this, is to ig-

nore the principle on which the rule rests; which is that there is at common law no criminality where the defendant acts innocently, and there is no fault on his part, actual or constructive.

The evidence in this case proved the facts set out in the statute, and therefore made out a prima facie case against the defendant. It was one of those cases within the letter, but not within the spirit, of the statute, as above indicated. The burden of proof was on the defendant to show it, and the court should not, therefore, have instructed the jury peremptorily to find for the defendant. In Bishop on Statutory Crimes, § 1022, it is said: "Where the statute is silent as to the defendant's intent or knowledge, the indictment need not allege, or the government's evidence show, that he knew the facts. His being misled concerning it is matter for him to set up in defense and prove." A number of authorities from other states are cited in support of this principle, and there are many familiar illustrations of it. A mistake of the person or ignorance of a subsisting marriage will, under some circumstances, be a defense to an indictment for adultery; but such things need not be anticipated by the state, and must be shown by the defendant. The same is true of the crime of incest, where the defendant may show ignorance of the relationship in defense. There being no proof here rebutting the prima facie case made out by the state, the court should, in my judgment, have submitted it to the jury. The question is not, therefore, presented how far the legislature, in the exercise of the police power, may, by small and reasonable penalties, provide for those things which tend to the repression of violations of law, as, in its discretion, the exigencies of the case require. See *Purnell v. Mann*, 105 Ky. 87, 48 S. W. 407, 49 S. W. 346, 50 S. W. 264. Of course, it is conceded that excessive fines and cruel punishment cannot be inflicted. Const. § 17. I therefore dissent from the judgment of the court.

O'Rear, J., concurs in this dissent. Settle, J., concurs in so much of it as construes the statute to cover only evasions of the law, but is of the opinion that the burden of proof in such cases as this is upon the commonwealth to show that the sale of spirituous liquor was made with the knowledge or acquiescence of the defendant; and, that fact not having been shown on the trial, the lower court did not err in granting the peremptory instruction in his favor.

LOUISIANA SUPREME COURT.

Edmond KIRD

v.

NEW ORLEANS & NORTHWESTERN
RAILWAY COMPANY, Appt.

(.....La.....)

*To have its freight platform constructed so near to its track that the elbow of a passenger may come in contact with freight on the platform as the passenger is seated inside of a passing car, with his elbow resting for comfort on the sill of one of the windows of the car, and protruding but slightly, is gross negligence on the part of a railway company, rendering it responsible in damages to a passenger injured under the above circumstances.

(June 21, 1902.)

A PPEAL by defendant from a judgment of the Judicial District Court for the Parish of Morehouse in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. Jonathan N. Luce for appellant.

Mr. E. T. Lamkin, for appellee:

It is gross carelessness and negligence to construct a platform so near a railroad track that cotton piled properly upon it becomes an obstruction to passing trains.

Kird v. New Orleans & N. W. R. Co. 105 La. 226, 29 So. 729.

There can be no contributory negligence where there is no knowledge of the danger, nor sufficient reason to apprehend it to put a reasonable and careful person on his guard.

7 Am. & Eng. Enc. Law, 2d ed. p. 391; *Langan v. St. Louis, I. M. & S. R. Co.* 72 Mo. 392; *Thomp. Carr. of Pass.* p. 446; *Summers v. Crescent City R. Co.* 34 La. Ann. 139, 44 Am. Rep. 419.

Negligence is not contributory where it was not the proximate cause of the accident.

7 Am. & Eng. Enc. Law, 2d ed. p. 382.

Negligence on the part of the plaintiff does not relieve the defendant of liability in an action for damages for injuries, where it is shown that the defendant could have avoided the accident by the exercise of proper care and caution.

Louisville & N. R. Co. v. Collins, 2 Duv. 114, 87 Am. Dec. 486; *McGuire v. Vicksburg, S. & P. R. Co.* 46 La. Ann. 1543, 16 So. 457; *Rice v. Crescent City R. Co.* 51 La. Ann. 114, 24 So. 791.

It is not unusual for passengers to ride with the arm resting in the car window, and

railway companies are bound to have knowledge of it, and should exercise proper care and caution to avoid such accidents, particularly where an unusual and dangerous obstruction is plainly visible.

Summers v. Crescent City R. Co. 34 La. Ann. 139, 44 Am. Rep. 419.

Mr. W. F. Millsaps also for appellee.

Provosty, J., delivered the opinion of the court:

The plaintiff's wife boarded the defendant's train at Oakridge station on her way to Monroe. She took a seat next to a window, another woman of her own race occupying the other half of the seat at her left. The car moved on, and had gone about 150 feet, when plaintiff's wife's right arm was broken in two places, above and below the elbow, by coming in contact with a bale of cotton that stood on the freight platform of the defendant company, alongside of which the train was passing. Plaintiff sues in damages for the injury, and the defendant company answers that the accident was brought about by the negligence of the plaintiff's wife in putting her arm out of the car window.

The plaintiff's wife says that she and her seat companion were eating pinder candy, of which the supply was in a paper bag in her lap; that she was holding a piece of candy in her left hand, while her right was on her lap, her elbow resting on the window sill, when the window was darkened by the bale of cotton, and her arm was broken by being crushed against the jamb of the window; and that the broken arm dropped in her lap.

She is a talkative witness, given to details, and her testimony has about it an air of ingenuousness; but she says that she did not put her arm out of the window and wave good-by to her friend as the car was leaving the station, and that her arm at the moment of the accident was wholly inside of the car, no part of it projecting outside, whereas all the other witnesses who saw the accident testify that she did wave and that her arm was projecting.

Two of these witnesses testify that her arm was still extended out of the window in the act of waving at the moment of the accident; but the weight of the testimony is that she had ceased waving, and had drawn in her arm, and was merely resting it on the window sill.

The defendant's witness Brodnax, who had had his head out of one of the windows of the front car and had drawn it in just in time to avoid the cotton, testifies, as follows: "After she ceased waving, she placed her arm on the window sill, with the elbow sticking 6 or 7 inches out of the window. . . . A portion of the hand was out of the car window, I think, as best I remember."

The defendant's witness Drew, who was at the station looking at the train as it moved

*Headnote by PROVOSTY, J.

NOTE.—As to passenger's negligence in exposure of person at car window, see also, in this series, *Richmond & D. R. Co. v. Scott* (Va.) 16 L. R. A. 91, and *note*, and *Clark v. Louisville & N. R. Co.* (Ky.) 36 L. R. A. 123. 60 L. R. A.

off, and watching the arm, and within 150 feet of it, testifies as follows:

Q. Is it not a fact, Mr. Drew, that Melissa Kird's elbow, at the time the injury was inflicted upon her, extended over the car window, or out of the car window, only a very short distance or space?

A. That's what I stated.

Q. Is it not a fact that the elbow did not project or extend over the window sill 2 inches?

A. I can't say that exactly. I say it extended over the window sill no further than the width of the arm. It was almost directly straight. Her arm was straight with the car when I saw it.

Q. Her arm was almost straight with the window sill upon which it was resting?

A. Yes, sir.

Q. With the hand extending inward, or the inside of the car?

A. I could not tell whether the hand was inside the car or hanging directly down. I couldn't see the arm at all, but just the elbow. Either the hand was bent inside the car, or down. I couldn't tell which.

Drew was in the better position for observation, and his attention was concentrated on the arm at the moment of the collision; hence we adopt his statement that the elbow was extending outside no further than the thickness of the arm.

Our conclusion from this testimony, taken in connection with that of plaintiff's wife, is that when the accident happened plaintiff's wife had ceased waving to her friends and had turned her attention to her candy, and that her arm had been drawn in and was resting on the window sill merely for comfort. So much for the proof of the alleged contributory negligence.

The bale of cotton, on the other hand, was so close to the passing car that, if it had been set there on purpose to catch any protruding elbow, or hand, or head, it could hardly have been stationed closer. If we go by the testimony of the mechanic, who, after the accident, was employed by the defendant's agent to saw off a part of the platform, and who says that he was instructed to cut off 2 feet, and that he did so after exact measurement, the space between platform and passing train was $1\frac{1}{2}$ inches at the north end of the platform, $3\frac{1}{2}$ inches at the south end, and $4\frac{1}{2}$ inches at the middle; and the bale of cotton may well have grazed the passing car, especially if the same witnesses, Brodnax and Drew, are not mistaken in their statements that it projected beyond the edge of the platform, or if some allowance is made for the vacillation of the train. If we base ourselves on the inference that the planks of the curtailed platform were originally of the same length as those of the east platform, and that therefore the curtailment was of $15\frac{1}{2}$, instead of 24, inches, then the space between platform and passing train was from 9 to 10 inches, and between passing train and bale of cotton that same distance, less the projection of 60 L. R. A.

the bale of cotton, which projection was not less than 1 inch, and, according to the witness Brodnax, 4 inches. As the train pulled out the second time, it having backed to the station to put off the wounded woman, the two witnesses, Brodnax and Drew, observed closely to see how near it would pass to the bale of cotton. Drew was occupying his same position at the station, and Brodnax was on the train. According to the latter it passed very close, less than 6 inches; according to the former, it missed the bale of cotton by about 4 inches. Whether the collision had pushed the bale of cotton in, or had drawn it further out, is not known. Certain it is that this platform and this bale of cotton were close enough for their presence there to constitute on the part of the defendant company gross and culpable and inexcusable negligence.

And now the question occurs whether the defendant company is absolved from the consequences of this negligence by the alleged contributory negligence of the plaintiff's wife in letting her elbow project beyond the window sill.

Doubtless passengers should keep their persons within the car; there is abundant room for them to do so, and there is no necessity for them to stick their elbows outside; but the fact of the matter is that railway companies so construct their cars that the window sill at the passenger's side offers an inviting support to the arm, and in warm weather, when the sash is up, allures the arm to stretch along its airy surface, and notoriously passengers do yield to this temptation, and almost habitually do rest their elbow on the window sill, even at the risk of some part of it protruding beyond the line of the car. We do not think that an elbow protruding slightly under these circumstances *ipso facto* forfeits the protection of the law and becomes free game to the negligence of the railway company. We think that a passenger has a right to rely upon there being a clearance space for the train of at least the thickness of an arm, and that the question whether the exposure of the arm to that extent shall constitute contributory negligence must be left to be decided according to the circumstances of each particular case.

In the instant case, we are satisfied that the plaintiff's wife was unaware of the danger,—nay, perhaps, unconscious of the fact that her elbow was protruding; so that her fault, if any, was slight, and only such as any passenger might in a moment of forgetfulness lapse into, and, even if her act had been deliberate, she had a right to rely upon there being a clearance space for the train of at least the thickness of an arm, whereas the platform was thus dangerously near without necessity or reason, or even excuse, and the defendant has confessed that much by having it cut. The dangerous closeness was the result of the unmitigated negligence of the defendant,—was a constant threat and menace to the safety of the passengers. It maimed the plaintiff's wife, and on the same occasion came near proving a

death trap to the witness Brodnax, and no telling how many like casualties it may have made imminent in the past. To absolve the defendant from responsibility under these circumstances would be to carry too far, we apprehend, the law of contributory negligence. In a recent case, where the negligence of the railway company was not near so direct or grave as in the instant case, this court held that the alleged contributory negligence of the passenger in permitting his elbow to protrude did not preclude recovery. *Clerc v. Morgan's L. & T. R. & S. S. Co.* 107 La. 370, 31 So. 886.

As to the amount of the damages,—\$1,500,—we have considered carefully the reasons adduced on one side for an increase, and on the other side for a reduction, and have come to the conclusion that, while the amount, perhaps, is somewhat scant, yet that, everything considered, justice has been done.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be affirmed, at the cost of the appellant.

Petition for rehearing denied February 2, 1903.

MARYLAND COURT OF APPEALS.

Amanda OPPENHEIMER et al., Appts.,
v.

Jacob LEVI.

(96 Md. 296.)

1. Possession is not necessary to enable a reversioner to maintain a suit in equity to remove the cloud from his title, where the term lessee, after having covenanted to pay the taxes, neglects to do so, and acquires title to the property at a tax sale.
2. Equity has jurisdiction of a suit by a reversioner to remove, as a cloud on his title, a tax deed acquired by a lessee for years, who has covenanted to pay the taxes, under the power to relieve from fraud and enforce trusts.

(January 16, 1903.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Baltimore County in favor of defendant in an action brought to set aside a tax deed. *Reversed.*

The facts are stated in the opinion.

Mr. John Watson, Jr., for appellants:

The defendant, Levi, had possession when the tax sale was made, which was while he was still paying rent to the complainant Oppenheimer, and so held the premises for her and as her tenant. This is equivalent to actual possession by the landlord for the purposes of this case.

Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57; *Root v. Mead*, 58 Mo. App. 477.

Every violation by a trustee of a duty which equity lays upon him, whether wilful, or fraudulent, or done through negligence, or arising through mere oversight or forgetfulness, is a breach of trust.

Duckett v. National Mechanics' Bank, 86 Md. 403, 39 L. R. A. 84, 38 Atl. 983; *Stewart v. Meyer*, 54 Md. 467; *Baumgardner v. Fowler*, 82 Md. 631, 34 Atl. 537.

A judgment creditor, or a mortgagee, not in possession, may invoke the aid of a court of equity to remove a cloud upon a title.

NOTE.—As to right of tenant to acquire title at tax sale, see also, in this series, note to *Smith v. Newman* (Kan.) 53 L. R. A. 939.

As to necessity of plaintiff's possession in suit to quiet title or remove cloud from title, 60 L. R. A.

Polk v. Reynolds, 31 Md. 106; *Schofield v. Ute Coal & Coke Co.* 34 C. C. A. 334, 92 Fed. 269; *Ormsby v. Ottman*, 29 C. C. A. 295, 56 U. S. App. 510, 85 Fed. 492.

The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances.

Kilbourn v. Sunderland, 130 U. S. 514, 32 L. ed. 1009, 9 Sup. Ct. Rep. 594; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557.

The jurisdiction attaches where the invalidity of the tax deed does not appear upon its face.

Ritchie v. Sayers, 100 Fed. 520.

It is one of the characteristic features of the relief afforded by courts of equity that the effort always is to put the complainant in exactly the position he would have occupied had it not been for the wrongful act of the defendant.

Bispham, Eq. § 361.

Ejectment would not afford an adequate and complete remedy.

La Coss v. Wadsworth, 56 Mich. 429, 23 N. W. 75; *Mutual Endowment Assessment Asso. v. Essender*, 59 Md. 468; *Donelson v. Polk*, 64 Md. 506, 2 Atl. 824.

Md. Code, Pub. Gen. Laws, §§ 26-30, art. 16, give the absolute right to appellants to proceed in equity. It is not necessary to show possession in the plaintiff.

Gormley v. Clark, 134 U. S. 346, 347, 33 L. ed. 913, 10 Sup. Ct. Rep. 554; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *Ormsby v. Ottman*, 29 C. C. A. 295, 56 U. S. App. 510, 85 Fed. 492; *Cloyd v. Trotter*, 118 Ill. 391, 9 N. E. 507; *Ward v. Farwell*, 97 Ill. 593.

Messrs. Grason & Bacon for appellee.

Pearce, J., delivered the opinion of the court:

Samuel Ellinger and wife, in 1869, leased

see also *Grand Rapids & I. R. Co. v. Sparrow* (C. C. W. D. Mich.) 1 L. R. A. 480; *Wagner v. Law* (Wash.) 15 L. R. A. 784, and cases in note to *West v. People's Bank* (Mass.) 8 L. R. A. 727.

the lot of land now in controversy, situated in Baltimore county, to Lena Sachs, for ninety-nine years, reserving to the said Ellinger and his heirs a yearly rent of \$50, payable, one half February 1st, and the other half August 1st; and the lessee covenanted for herself, her personal representatives and assigns, to pay this rent and the taxes upon the lot. The leasehold estate therein, by deed of assignment made December 31, 1884, became vested in the appellee Jacob Levi, and his wife, Babet Levi, who, on February 16, 1887, assigned the same to Wm. H. Dryden. In 1890, the taxes for a previous year being in arrear, the fee in the premises was sold by the collector of Baltimore county to Jacob Levi, the appellee, to whom it was conveyed by said collector on January 23, 1891. This deed, however, was not placed upon record until June 13, 1896. Samuel Ellinger died July 6, 1891, and shortly thereafter his heirs conveyed to the appellant, Amanda Oppenheimer, the reversion in, and the ground rent issuing out of, said lot. On May 8, 1896, Levi united with Dryden in conveying to Henry Toner and wife a lot of ground designated as the lot described in the Ellinger lease, but which, through error, was made to embrace a lot but 50 feet square, instead of 50 feet by 150 feet, and this was conveyed subject to the annual rent reserved in the original lease from Samuel Ellinger and wife to Lena Sachs. On December 21, 1900, Toner, whose wife in the meantime had died, conveyed the lot to Jacob Levi, the appellee, subject to the payment of said annual rent. Levi paid the annual rent from the time he acquired the leasehold estate, December 31, 1884, down to the time of the conveyance by himself and Dryden to Toner, May 8, 1896, and Toner paid the same from May 8, 1896, to December 21, 1900, when he assigned to Levi, who has refused to pay the subsequently accruing rent, claiming the fee by virtue of said tax sale and the subsequent assignment to him. Thereupon Amanda Oppenheimer and her husband, on January 15, 1901, filed a bill alleging all the facts above recited, and averring that the tax sale mentioned and the various subsequent conveyances constituted a cloud upon her title to the reversion and rent, for the removal of which she was entitled to relief in equity. The bill also alleges that at the time of this tax sale this lot was assessed to Jacob Levi, and had been so assessed for several years, and that the tax sale was void for several reasons, not necessary to enumerate here. The bill further charges that, notwithstanding the assignment from Levi to Dryden in February, 1887, Levi remained, and continued to be, the real owner of the leasehold, and that he paid the ground rent continuously from 1884 to 1896 to Samuel Ellinger and those claiming under him; that the lot was assessed up to the time of the tax sale to Levi, and that notice that the taxes were overdue, and that sale would be made if they were not paid, was served upon him, who was the real owner of the leasehold, and as such bound to pay said taxes; and then 60 L. R. A.

specifically charges "that by his fraudulent acts and concealments he encouraged, promoted, and procured the said sale with the intention of acquiring the fee-simple interest in said lot for the trivial sum of \$46, for which the same was sold; . . . and that the payment by him of the purchase money at such tax sale was but the payment of the taxes and expenses, which he was under obligation to pay." The prayer of the bill is: (1) That the tax sale may be declared void; (2) that the deed from the collector may be declared void, and be vacated and annulled; (3) that a decree may be passed declaring the appellant to be seised in fee of the reversion in said lot, and, to be entitled to collect the rent reserved in the original lease from Ellinger. The appellee demurred to the bill, and assigned the following grounds: (1) That the bill stated no sufficient case to entitle the plaintiff to relief; (2) that the court had no jurisdiction to hear and determine the matter; (3) that the plaintiff's remedy, if any, was in a court of law; (4) that there was a full, complete, and adequate remedy at law; (5) that the plaintiff had neither the legal title to, nor the possession of, the property.

At the hearing the court sustained the demurrer, and dismissed the bill, holding in the opinion filed that, as there was no allegation of possession by the plaintiff at the time the bill was filed, the case was governed by the case of *Tector v. Shipley*, 77 Md. 474, 26 Atl. 1019, 28 Atl. 1060, and those which preceded it, in all of which it is held that there must be such averment of possession, followed by proof, to warrant a decree for plaintiff. There can be no doubt that such is the general rule of equity, and that as such it is firmly established in this state by numerous decisions. In *Heiden v. Hellen*, 80 Md. 621, 31 Atl. 506, where a bill filed to remove a cloud upon the title failed to allege possession by the plaintiff, the bill was dismissed on demurrer; the court saying: "If the possession is in another, his remedy is by an action of ejectment. . . . Whatever may be the decisions elsewhere, no case in this state has gone so far as to maintain a bill in equity under the facts and circumstances of this case." And the rule was reaffirmed in *Keys v. Forrest*, 90 Md. 132, 45 Atl. 22, the latest case upon the subject in this court. But, while this is the general rule, there are some recognized exceptions to its application. In *Crook v. Brown*, 11 Md. 172, applying the general rule to the facts of that case, Judge Tuck said: "We know of no head of equity jurisprudence under which this [amendment to the bill] can be maintained. It would be substantially to give to a chancery suit the effect of an action of ejectment. . . . There are some circumstances under which courts of equity will remove a party in possession, and put in another, but these cases are of peculiar character." So, in *Livingston v. Hall*, 73 Md. 395, 21 Atl. 49, Judge Alvey said: "To maintain a suit of this character, it is, as a general rule, necessary that the plaintiff should be in the possession

of the property." And in *Steuart v. Meyer*, 54 Md. 467,—a case arising under a tax sale of property subject to ground rent,—relief was granted notwithstanding the plaintiffs were not in possession; Judge Alvey saying: "They are interested only in the annual ground rents and in the estate of the reversion. They are not entitled to the possession, and could not, therefore, sue in ejectment for the recovery of the property. Under the circumstances of this case, without resort to a proceeding like the present, the parties would be without adequate remedy for relief against the effect of the prima facie title in the purchaser." In *Textor v. Shipley*, 77 Md. 473, 26 Atl. 1019, 28 Atl. 1060, it was argued that the decision in *Steuart v. Meyer* was in conflict with all the other cases in this court on that subject, and overruled the previous cases, but the opinion filed by Judge Robinson on the reargument in *Textor v. Shipley*, in which Judge Alvey concurred, explained what were the circumstances alluded to by him in *Steuart v. Meyer*, and showed that in that case, when the bill was filed, the property in controversy was in the possession of receivers appointed by the court, and that the plaintiff could not resort to the ordinary remedy by ejectment against Meyer as a disseisor, for the reason that he was not in possession of the property, and that, in maintaining the jurisdiction of equity under the peculiar circumstances of that case, it was not meant to question the general rule laid down in the earlier cases, "that those only who have a clear legal and equitable title to land, connected with the possession, have any right to claim the interference of a court of equity to give them peace, or dissipate a cloud on title." There are decisions elsewhere from courts of repute that actual possession by a tenant is equivalent to actual possession by the landlord for the purpose of such a bill; but these are not consistent with the decision in *Steuart v. Meyer*, as explained in *Textor v. Shipley*, and need not be referred to. There are, however, well-established legal principles applicable to the facts of this case, which, in our opinion, take it out of the general rule, and bring it within the exceptions in which equity has jurisdiction. These principles cannot be better stated than in the language of Judge Cooley, extracted from his *Law on Taxation* [2d ed. p. 500]: "Some persons, from their relation to the land or to the tax, are precluded from becoming purchasers, on grounds which are apparent when their relation to the tax and to the property is shown. The title to be given on a tax sale is a title based on the default of the person who owes to the public the duty to pay the tax, and the sale is made by way of enforcing that duty. But one person may owe the duty to the public, and another may owe it to the owner of the land, by reason of contract, or other relations. Such a case may exist where the land is occupied by a tenant, who, by his lease, has obligated himself to pay taxes. Where this is the relation of the parties to the land, it would cause a shock to the

moral sense if the law were to permit this tenant to neglect his duty, and then take advantage thereof to cut off his lessor's title by buying in the land at a tax sale. . . . There is a general principle applicable to such cases, which may be stated thus: That a purchase made by one whose duty it was to pay the taxes shall operate as payment only; shall acquire no right, as against a third party, by a neglect of the duty which he owed to such party. This principle is universal, and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance." A long list of cases illustrating the application of the principle thus stated under a great variety of circumstances is given in a footnote to the text, and a valuable note on the same subject will be found upon page 939 of 53 L. R. A., appended to the case of *Smith v. Newman*, 62 Kan. 318, 62 Pac. 1011, in which it is said that the cases are all agreed that a tenant cannot acquire a valid title, as against the landlord, by virtue of a tax sale during the tenancy for taxes which the tenant had agreed to pay. Among these may be cited the following: "At most the tenant could only become seised under the tax deed in trust for his landlord if living; if dead, then for his heirs or their assigns." *Burgett v. Tahaffer*, 118 Ill. 516, 9 N. E. 334. "Payment of taxes by a tenant at a tax sale will be considered as a redemption of the land for his landlord, and he will remain his tenant as before." *Williamson v. Russell*, 18 W. Va. 625. "In such case the tenant can acquire no valid title as against such owner, but would hold any title thus acquired in trust for such owner." *Bertram v. Cook*, 32 Mich. 519. "A tax purchase, made while such relation exists, is made in wrong; and the law, in circumvention of dishonesty, will conclusively presume that it was made in the performance of duty, and not in repudiation of it." *Connecticut Mut. L. Ins. Co. v. Dulte*, 45 Mich. 120, 7 N. W. 707. "A title so acquired would remain void in the hands of a bona fide purchaser without notice." *Blake v. Howe*, 1 Aik. (Vt.) 306, 15 Am. Dec. 681. "Where a lessee covenanted to pay all taxes and assessments on the demised premises during the term, he was bound to pay a special assessment for planking and curbing the sidewalk in front of the premises; and where he disputed this liability, and permitted the lot to be sold to pay this assessment, and after the expiration of the term became the assignee of the purchaser, and took the tax deed, the lessor was held entitled to a judgment that the lessee quitclaim the premises to him, and that he be restrained from conveying or encumbering them." *Shepardson v. Elnore*, 19 Wis. 424. Some of these cases were actions of ejectment; others, and notably the last cited, were bills to remove cloud upon title. To the same effect are the cases of *Stout v. Merrill*, 35 Iowa, 47; *Haskell v. Putnam*, 42 Me. 244; *Willard v. Ames*, 130 Ind. 351, 30 N. E. 210; *Reily v. Lancaster*, 39 Cal. 354;

Coze v. Gibson, 27 Pa. 160, 67 Am. Dec. 454; *Rothwell v. Devees*, 2 Black, 613, 17 L. ed. 309; *Lamborn v. Dickinson County*, 97 U. S. 181, 24 L. ed. 926.

It is true that, in an action of ejectment, this plaintiff would be entitled to recover upon proof of the facts she alleges in her bill, but it does not follow that equity has not jurisdiction to grant the relief prayed; and we think an examination of the authorities will show that it is our duty to sustain this bill, and not to send the plaintiff to a court of law. In *Hamilton v. Cummings*, 1 Johns. Ch. 523, a bill was filed praying the delivery up and cancelation of certain bonds executed by the plaintiff's testator, which it was charged were given to indemnify defendant as bail in certain suits, but which were to be surrendered and canceled if defendant was not damaged or put to costs. The bill alleged that the suits were all settled, and that defendant had been put to no costs or damage. In considering the objection made to the jurisdiction of equity in that case, Chancellor Kent said: "I am inclined to think that the weight of authority and the reason of the thing are equally in favor of the jurisdiction of the court, whether the instrument is or is not void at law, and whether it be void from matter appearing on its face, or from proof taken in the cause."

But while I assert the authority of the court to sustain such bills, I am not to be understood as encouraging applications, where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate; and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult or uncertain at law, or from some other special circumstances peculiar to the case, and rendering a resort here highly proper, and clear of all suspicion of any design to promote expense and litigation." In *Van Horne v. Fonda*, 5 Johns. Ch. 406, two devisees were in possession of lands under an imperfect title devised to them by their common ancestor, and it was held that one of these could not buy up an adverse title to disseise or expel his cotenant, but that such purchase would inure to their common benefit, subject to an equal contribution to the expense; and the same high authority said, "It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able, without the consent of the other, to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion. It would be repugnant to a sense of refined and accurate justice." Accordingly, the chancellor sustained a bill for an account filed by the devisee sought to be ousted under the adverse title bought by his

codevisee. That case was relied on as conclusive by Chancellor Cooper in *Harrison v. Winston*, 2 Tenn. Ch. 544, in which it was held that a beneficiary under a trust assignment for the benefit of creditors, who is a party to the suit for the execution of the trust, consenting thereto, and accepting its benefits, cannot acquire a title to any of the property, under a tax sale free from the trust; and that one who joins with him in the purchase with knowledge of his fiduciary relations will stand in no better position; and that the complainant was entitled to a decree perpetually enjoining an action of ejectment brought by the purchaser of the tax title, and declaring that the tax title inured to the benefit of the trust.

Applying the principles thus declared to the case before us, we cannot say, as was said in *Crook v. Brown*, 11 Md. 172, "we know of no head of equity jurisdiction under which this can be maintained." We perceive at once that upon the allegations of the bill there was fraud in the acquisition by defendant of the tax title, and that, as a result of this fraud, the title is held by the defendant in trust for the plaintiff; and we know that fraud and trusts are independent heads of equity jurisdiction. In *King v. Carpenter*, 37 Mich. 366, it was held that, "where a party has an equitable cause of action against another, coming within any recognized rule of equity jurisdiction, such right can be enforced in equity, whether the complainant is in possession or not." In *Sheppard v. Nixon*, 43 N. J. Eq. 633, 13 Atl. 617, the court said: "The exception to the rule [that the plaintiff must be in possession] is where the case presents some special ground for equitable interposition, such as fraud, accident, or mistake, requiring the setting aside or reformation of deeds or instruments of conveyance. If these elements be wanting, a bill to establish the complainant's title is an ejectment bill, pure and simple." To the same effect is *Essex County Nat Bank v. Harrison*, 57 N. J. Eq. 91, 40 Atl. 211. And in *Security Sav. Co. v. Mackenzie*, 33 Or. 209, 52 Pac. 1046, it was held that the question of possession of real estate, as required by a statute of the state, in a suit for an interest therein, was immaterial, when the relief sought is such that an equity court has jurisdiction independent of the statute. This view of the law is sustained in 17th Enc. of Pleading & Practice, p. 309, where it is said: "Where there is any other distinct head of equity jurisdiction sufficient to support the action, possession by the plaintiff is not required, but equity will retain the cause, and grant relief by quieting the title or removing clouds." In the present case fraud in the acquisition of the tax title is distinctly charged; such fraud as would raise a trust in favor of the plaintiff. The defendant has demurred, and the effect of his demurrer is to admit all matters of fact well pleaded, and we think the fraud is well pleaded. Again, in 17th Enc. of Pleading & Practice,

311, it is said that "it would seem that ejectment is an inadequate remedy in all cases where, although the plaintiff might recover possession, a void instrument or muniment of title would be left outstanding and uncanceled;" and it was so held in *Redmond v. Packenham*, 66 Ill. 434. Here, if the plaintiff were to recover in ejectment, the tax title would remain outstanding, and would, after such recovery, still constitute an apparent cloud upon the title whenever the property might be upon the market. Consequently, we think the demurrer should have been overruled and the bill retained.

Nothing that we have said, however, is to be understood as overruling or impairing the authority of any of the previous cases in this court, none of which presented the question now before us. In *Keys v. Forrest*, 90

Md. 132, 45 Atl. 22, the case was not presented on demurrer, but was heard upon bill, answer, and testimony. The bill alleged, and the answer denied, fraud in the acquisition of the tax title; and it will be seen on reference to the record that the lower court considered the allegation of fraud and found it was not sustained, and this court concurred in that finding. Had the possession by the plaintiff been essential in that case, it would have been idle to determine the question of fraud. There is therefore no conflict or inconsistency between this case and any of the earlier cases in this court. For the reasons given, the decree of the circuit court will be reversed.

Decree reversed, with costs to the appellant above and below, and cause remanded for further proceedings.

MINNESOTA SUPREME COURT.

Thomas CURRAN, *Respt.*,

v.

Peter OLSON *et al.*, *Appts.*

(.....Minn.....)

- *1. The plaintiff was injured in the saloon of the defendants by a third party pouring alcohol on his foot while he was asleep, and then setting it on fire. This is an action to recover damages for injuries caused thereby. *Held*, that the defendants were bound to use reasonable care to protect the plaintiff, as their guest, from injury at the hands of vicious and lawless persons whom they permitted to be in their saloon.
2. The evidence sustains the verdict, to the effect that the defendants were guilty of negligence in the premises, and that the plaintiff was not.

(January 16, 1903.)

APPPEAL by defendants from an order of the District Court for Polk County denying a new trial after verdict in plaintiff's favor in an action brought to recover damages for personal injuries for which defendants were alleged to be responsible. *Affirmed*.

The facts are stated in the opinion.

Messrs. J. A. Sorley and F. C. Massee, for appellants:

If the bartender gave the alcohol to the cook knowing that he was going to pour it on respondent's foot and set it afire, then it was a wanton act on the part of the bartender, and his principal would not be liable.

Philadelphia, W. & B. R. Co. v. Brannen (Pa.) 2 Atl. 429; *Wood v. Detroit City*

*Headnotes by START, Ch. J.

NOTE.—As to liability of person selling liquor at public place for injuries done to a guest by one to whom liquors are sold, see, in this series, *Belding v. Johnson* (Ga.) 11 L. R. A. 53, and *Mastad v. Swedish Brethren* (Minn.) 53 L. R. A. 803.
60 L. R. A.

Street R. Co. 52 Mich. 402, 50 Am. Rep. 259, 18 N. W. 124; *Curtis v. Dinneen*, 4 Dak. 245, 30 N. W. 148; *Golden v. Neubrand*, 52 Iowa, 59, 35 Am. Rep. 257, 2 N. W. 537.

Respondent was guilty of such contributory negligence as will defeat a recovery.

Wood v. Detroit City Street R. Co. 52 Mich. 402, 50 Am. Rep. 259, 18 N. W. 124; *Bridge v. Grand Junction R. Co.* 3 Mees. & W. 244; *Pluckwell v. Wilson*, 5 Car. & P. 375; *Rathbun v. Payne*, 19 Wend. 399; *Barnes v. Cole*, 21 Wend. 188; *Brown v. Maxwell*, 6 Hill, 592, 41 Am. Dec. 771; *Washburn v. Tracy*, 2 D. Chip. (Vt.) 128, 15 Am. Dec. 661; *Waterbury v. Chicago, M. & St. P. R. Co.* 104 Iowa, 32, 73 N. W. 341; *Emery v. Chicago, M. & St. P. R. Co.* 77 Minn. 465, 80 N. W. 627; *Bradley v. Grand Trunk R. Co.* 107 Mich. 243, 65 N. W. 102; *Scheiber v. Chicago, St. P. M. & O. R. Co.* 61 Minn. 499, 63 N. W. 1034; *Wharton*, Neg. § 130; 4 Am. & Eng. Enc. Law, p. 17; *Johnson v. Hudson River R. Co.* 20 N. Y. 71, 75 Am. Dec. 375; *Strong v. Sacramento & P. R. Co.* 61 Cal. 328; *Kennard v. Burton*, 25 Me. 39, 43 Am. Dec. 249; *Terre Haute & I. R. Co. v. Graham*, 95 Ind. 291, 48 Am. Rep. 719; *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 543.

Mr. H. A. Bronson, for respondent:

Hotel or inn keepers are bound to protect their guests, both in person and property, from acts and misconduct of wrongdoers permitted to remain upon the premises.

Mastad v. Swedish Brethren, 83 Minn. 40, 53 L. R. A. 803, 85 N. W. 913; *Bishop*, Noncontract Law, 1173; *Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779; *Corrigan v. Elsinger*, 81 Minn. 42, 83 N. W. 492.

Granting that the bartender had no knowledge of the commission of this particular act, yet, the appellants would be liable for the reason that they permitted such a man as this cook to be about the premises, well knowing that he had perpetrated, and might again perpetrate, such a brutal act.

Mastad v. Swedish Brethren, 83 Minn. 40, 53 L. R. A. 803, 85 N. W. 913; *Rommel v. Schambacher*, 120 Pa. 579, 11 Atl. 779; *Corrigan v. Elsing*, 81 Minn. 42, 83 N. W. 492.

Respondent was lawfully and rightfully upon the premises of the appellants at the time of the accident.

Thomp. Neg. p. 1173.

Even assuming that the respondent had placed himself in a place of danger, and had failed to use reasonable care in anticipating this injury, contributory negligence cannot be imputed to him in not anticipating that the appellants would act negligently as they did, and in not providing against the consequences of such anticipated negligence.

Thomp. Neg. p. 1173; Whittaker's Smith, Neg. p. 387; Cooley, Torts, p. 674; 7 Am. & Eng. Enc. Law, 2d ed. p. 392; *Estelle v. Lake Crystal*, 27 Minn. 243, 6 N. W. 775.

Start, Ch. J., delivered the opinion of the court:

Action to recover damages for personal injuries sustained by the plaintiff while in the saloon of the defendants, by reason of their alleged negligence in failing to protect him from an assault by a vicious and lawless person whom they permitted to be in and about their saloon. The answer was a denial. Verdict for the plaintiff in the sum of \$100, and the defendants appealed from an order denying their alternative motion for judgment or a new trial.

The question presented by the record is whether the verdict is sustained by the evidence. The defendants claim that it is not, because the evidence fails to show any negligence or wrong on their part, but that it does conclusively show that the plaintiff was guilty of contributory negligence. The evidence tends to show that the plaintiff for some days prior to his injury had been a guest and a patron of the defendant's saloon at East Grand Forks; that, having spent all of his money therein, he went, on the night of February 10, 1902, into the saloon to sleep, and at about 1:30 A. M. he fell asleep in his chair; that a cook in a restaurant in the rear of the saloon, belonging to a third party, came into the saloon, got alcohol from the bartender in charge of the room, poured it upon the left foot of the plaintiff, and set it on fire, whereby he was seriously injured; and, further, that the bartender knew, or might have known by the exercise of the slightest care, what the alcohol was to be used for, and could have prevented the injury to the plaintiff. Neither of the defendants was present at the time. The defendants were bound to use reasonable care to protect their guests and patrons from injury at the hands of vicious or lawless persons whom they knowingly permitted to be in and about their saloon. If they delegated this duty to their barkeeper, they are responsible for his negligence in the premises. *Mastad v. Swedish Brethren*, 83 Minn. 40, 53 L. R. A. 803, 85 N. W. 913. The evidence is ample to sustain a finding by the jury that the defendants were guilty of neg-

ligence which was the proximate cause of the plaintiff's injury.

The claim that the plaintiff was guilty of contributory negligence is based upon the facts that before the plaintiff was injured, and during the same night, the cook on two separate occasions came into the saloon, and, finding a guest asleep, he got alcohol, poured it upon the feet of the sleeper, and then set fire to it; that the plaintiff witnessed the orgies, and laughed and joked with the other guests over the discomfiture of the sleepers, and said nothing to the bartender about it; that he stayed awake as long as he could, so that alcohol could not be put on his feet and fired, but he at last fell asleep. The great weight of the evidence is to the effect that the bartender not only knew of these two cases of brutality, but furnished the alcohol which the cook used. The evidence does not establish the contributory negligence of the plaintiff as a matter of law. The verdict is sustained by the evidence.

Order affirmed.

Helen S. HOLMES, Appt.,

v.

Alexander CATHCART et al., Respts.

(.....Minn.....)

*An agent who is authorized by his principal to sell or exchange the property of the latter upon specified prices and terms is in duty bound, upon learning that a more advantageous sale or exchange can be made, the facts concerning which are unknown to the principal, to communicate the same to him before making the sale as expressly authorized, and his failure to do so amounts to a fraud in law

(January 9, 1903.)

APPEAL by plaintiff from an order of the District Court for Ramsey County directing a verdict in favor of defendants in an action brought to recover damages for loss alleged to have been sustained by plaintiff in an exchange of property through the failure of her agent to disclose facts material to her interests. *Reversed*.

The facts are stated in the opinion.

Mr. William G. White, for appellant:

Defendant Cathcart was guilty of positive fraud upon the plaintiff, and he induced her to consent to the proposed exchange of her property by a deliberate misrepresentation of the facts.

While acting in a fiduciary capacity as agent for the plaintiff, Cathcart accepted a

*Headnote by BROWN, J.

NOTE.—For other illustrations of the rule that an agent must not profit at his principal's expense in the matter of his agency, see also, in this series, *Tyler v. Sanborn* (Ill.) 4 L. R. A. 218, and *note*; *McNutt v. Dix* (Mich.) 10 L. R. A. 660; *Jansen v. Williams* (Neb.) 20 L. R. A. 207; *Boswell v. Cunningham* (Fla.) 21 L. R. A. 54; and *Kimball v. Ranney* (Mich.) 46 L. R. A. 403.

commission of \$500 from the Pioneer Apartment House Company. This acceptance of a commission by him was a fraud upon the plaintiff in the same manner and to the same extent as if Cathcart had been himself the actual purchaser of her property. For this fraud he is liable in damages to the plaintiff.

Mechem, Agency, § 953; *Lyon v. Mitchell*, 36 N. Y. 235, 93 Am. Dec. 502; *Walker v. Osgood*, 98 Mass. 348, 93 Am. Dec. 168; *Murray v. Beard*, 102 N. Y. 505, 7 N. E. 553; *Story, Agency*, § 31; *Farnsworth v. Hemmer*, 1 Allen, 494, 79 Am. Dec. 756.

Even if the evidence in this action does not disclose positive and actual fraud on the part of Cathcart, it conclusively appears that he concealed from the plaintiff important and material facts which it was his legal duty to impart to her. This concealment on his part, and this omission to advise the plaintiff of important and material facts affecting her interest, was a fraud upon her which makes the defendant Cathcart liable in damages in this action.

Mechem, Agency, § 538; 1 Am. & Eng. Enc. Law, p. 1069; *Arrott v. Brown*, 6 Whart. 9; *Brown v. Arrott*, 6 Watts & S. 416; *Devall v. Burbridge*, 4 Watts & S. 305; *Harvey v. Turner*, 4 Rawle, 223; *Hegenmyer v. Marks*, 37 Minn. 6, 32 N. W. 785; *Tilleny v. Wolverton*, 46 Minn. 256, 48 N. W. 908; *Cannell v. Smith*, 142 Pa. 25, 12 L. R. A. 396, 21 Atl. 793.

Wherever an agent violates his obligation to his principal by exceeding his authority by misconduct, or by omission, and any damages result to his principal, he is responsible for such injurious consequences, and bound to make indemnity.

2 Sedgw. Damages, § 811; *Laverty v. Snethen*, 68 N. Y. 522, 23 Am. Rep. 184; *Wilts v. Morrell*, 66 Barb. 511; *Hamilton v. Cunningham*, 2 Brock. 366, Fed. Cas. No. 5,978; 1 Livermore, Agency, p. 398.

Mr. John F. Fitzpatrick, for respondents:

Appellant was distinctly informed of the third party in the transaction, as soon as the third party came into it, and before its consummation. If she wished more detailed information she should have asked for it.

Miller v. Miller, 47 Minn. 546, 50 N. W. 612.

Brown, J., delivered the opinion of the court:

The facts in this case are substantially as follows: Plaintiff, who resides at Buffalo, New York, was the owner of twelve houses in the city of St. Paul, all of which were clear and free of encumbrance. The houses were somewhat out of repair, and, to render them habitable, certain expenses were necessary to be incurred; and, to avoid that expense, plaintiff was anxious to exchange the houses for other property. Defendant Cathcart was her agent, and acted for her in the care and management of the houses, collecting rents, making needed re-

pairs, placing insurance on the property, and, in a way, her general representative at St. Paul. He undertook to make an exchange of the property, and at one time had under consideration a proposition which he thought might result beneficially to plaintiff; and he induced her to come on, with her husband, from her home in Buffalo for the purpose of an examination and inspection of the property proposed in exchange. The exchange did not take place, but later on Cathcart secured from one Horeish a proposition to exchange a brick block owned by him in the city of St. Paul, which was encumbered by a mortgage of \$15,000, for plaintiff's twelve houses; but there were back taxes against the block and overdue interest on the mortgage to the amount of \$1,600, which plaintiff would be required to pay to effect a trade. Pending the consideration of the proposition by plaintiff,—the evidence does not show that it had been rejected,—Cathcart procured from Horeish a further contract by which the latter agreed to accept two of plaintiff's houses, free and clear of encumbrance, and the sum of \$200, for his property, subject to the mortgage and the payment of the back taxes and interest. At about this time—the precise date does not clearly appear—he entered into some sort of an agreement with the Pioneer Apartment House Company, by which that concern agreed to advance all money necessary to pay the back taxes and interest against the Horeish property, over and above the sum of \$1,000, in consideration of which it was to receive ten of the houses. Cathcart then informed plaintiff that he could effect an exchange of her twelve houses for the Horeish block, subject to the encumbrance, interest, and taxes (plaintiff to pay \$1,000, instead of \$1,600, according to the previous proposition); and he subsequently informed her that the balance of the \$1,600 necessary to pay the back taxes and interest in full would be advanced by a third party, who was to receive some of the houses. She was not informed that Horeish was willing to exchange the brick block for two of her houses and the sum of \$200, subject to the mortgage and the taxes and interest. She understood all along that all of her houses were to be transferred and exchanged for that property, and she was not informed at any time that the apartment house company was to receive ten of her houses for the amount of money it was to advance. She finally accepted this proposition, deeded the houses to the Pioneer Apartment House Company, and paid the \$1,000 toward the back taxes and interest. The balance necessary to pay the same in full was paid by the apartment house company. The precise amount paid by it is not shown by the record, but it was probably in the neighborhood of \$1,200 or \$1,400, including a commission to Cathcart of the sum of \$500. A verdict was directed for defendants at the trial in the court below when plaintiff rested. Defendants were not re-

quired to offer any evidence, and the facts in defense of the action, or upon which they would rely if required to defend, do not appear. This action was brought against both defendants,—Cathcart, the agent, and the apartment house company,—on the theory that those parties were in collusion, and that plaintiff was entitled to recover against both for any damage she had suffered for the failure of her agent to disclose to her all the material facts in reference to the exchange of the properties. The evidence is insufficient, perhaps, to show a collusive agreement between the defendants, though it is somewhat strange, or at least not wholly clear, that the apartment house company should receive ten of plaintiff's houses for the nominal consideration of about \$1,200, when they were worth at least the sum of \$4,000. But at the trial below defendants joined in a motion to direct a verdict, which motion was granted; and, if the court erred in granting the motion as to either, a reversal must apply to both, and the case will be left as though no trial had ever been had, and must be tried again as to both defendants.

The theory on which the learned court below dismissed the action was that the plaintiff had not been injured by any act on the part of defendants, and she could not recover; that, as she was willing to part with all her houses in exchange for the brick block, it was immaterial to whom they were in fact deeded,—whether to Horeish or to the apartment house company; that she lost nothing by the transaction, and has no cause of action. We think the court was in error. It is not controlling whether plaintiff was willing, or not, to make the exchange on the terms proposed to her. The action involves the duty of an agent when acting for his principal, and whether he performed that duty in accordance with the law. The principal may authorize his agent to sell or exchange his property, but it does not necessarily follow that the agent, by carrying out the specific instructions given him, fully performs his duty, and is relieved from liability. He is bound to the exercise of the most perfect good faith, and to keep his principal informed of facts coming to his knowledge affecting his rights and interests. If, after receiving instructions to sell property on certain specified terms, the agent learns that other and more advantageous terms can be obtained, it is his plain duty, and he is under every legal and moral obligation, to communicate the facts to the principal, that he may act advisedly in the premises. As stated by Chief Justice Gilfillan in *Hegenmyer v. Marks*, 37 Minn. 6, 32 N. W. 785: "Upon this contract of agency [we] . . . are of opinion . . . that when . . . [the agent] learned a fact affecting the value of the property, and of which fact he knew . . . [the principal] was ignorant when she fixed the price, and if . . . [the agent] had reason to believe that, had she 60 L. R. A.

known the fact, she would have fixed a higher price, . . . then good faith towards his principal required of him, and it was his legal duty, to disclose the fact to her before he proceeded to sell, so that she might, if so disposed, fix the selling price in accordance with the actual condition of things. This being so, his selling upon the basis of the price first fixed, without disclosing to her the fact he had learned, was, of course, a fraud on her." That case is in accord with the unanimous voice of the authorities. *Mechem, Agency*, § 531; 1 *Am. & Eng. Enc. Law*, 1069; *Arrott v. Brown*, 6 Whart. 9; *Devall v. Burbridge*, 4 Watts & S. 305; *Harvey v. Turner*, 4 Rawle, 223; *Tilleny v. Wolverton*, 46 Minn. 256, 48 N. W. 908. Plaintiff was not informed at any time prior to the closing up of the transaction that she could obtain the brick block for two of her houses and the payment of about \$1,600 in money, and the question arises whether defendant Cathcart should have communicated that fact to her. If, as now claimed by plaintiff, that bargain was a better one for her,—more beneficial in its results,—it was the clear duty of Cathcart to communicate the facts to her; and if, by his failure to do so, plaintiff was damaged, she is entitled to recover whatever loss she actually suffered. Whether defendant did fail in his duty in this respect is, of course, a question of fact, which we do not attempt to pass upon; but we do hold that the evidence offered by plaintiff on the trial was such as to require a finding on the question by the trial court, or the submission of the same to a jury. The measure of her relief would be the actual damage suffered in consequence of defendant's failure of duty. The case must therefore be reversed.

It was also claimed by plaintiff that she was entitled to the commission received by defendant Cathcart, her agent, and that the court erred in holding otherwise. It appears, without dispute, that Cathcart did receive from the apartment house company a commission of \$500 for his services in effecting the exchange of properties. We do not concur with plaintiff's counsel, however, that plaintiff is entitled to any portion of it. The evidence disclosed by the record fairly shows that plaintiff contemplated that defendant should receive some sort of a commission, and this is clearly shown by the correspondence between the parties. As a condition to the acceptance of the final offer to exchange the properties, she distinctly stated that it must include all commissions to be received or claimed by Cathcart. It therefore appears from the record that Cathcart was entitled to negotiate for and accept and receive a commission for his services in the premises, and this with the knowledge and consent of plaintiff. And, having done so with her express consent, he is entitled to retain the same.

Order reversed and new trial granted.

NEBRASKA SUPREME COURT.

CITIZENS' STATE BANK of Newman
Grove, Nebraska, Plff. in Err.,
v.

Lars I. NORE.

(.....Neb.....)

- *1. In this state a statute will not be construed so as to make a negotiable instrument void in the hands of a bona fide purchaser, unless the act specifically so declares.
2. A note given for medical services by an unlicensed practitioner may be recovered by a bona fide purchaser, notwithstanding the provisions of article 1, chap. 55, of the Compiled Statutes, prohibiting the practice of medicine without a license.

(January 8, 1903.)

ERROR to the District Court for Boone County to review a judgment in favor of defendant in an action brought to enforce payment of a promissory note. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. Needham & Doten, for plaintiff in error:

Mere illegality of consideration, unless the note is declared void by statute, does not affect recovery thereon by a bona fide holder for value.

Smith v. Columbus State Bank, 9 Neb. 31, 1 N. W. 893; *Wortendyke v. Meehan*, 9 Neb. 221, 2 N. W. 339; *Darst v. Backus*, 18 Neb. 231, 24 N. W. 681; *Coakley v. Christie*, 20 Neb. 509, 31 N. W. 73.

Even in states where the statute expressly makes a note void where the consideration is illegal, a bona fide holder for value can recover where the note has nothing on it indicative of the illegality of the consideration.

Sondheim v. Gilbert, 117 Ind. 71, 5 L. R. A. 432, 18 N. E. 687; *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 387; *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713.

Even if the court should assume that fraud at the inception of the note has been proved, as the fraud alleged to have been practised upon the defendant was not in relation to the note he executed, such fraud would not prevent recovery on the part of the plaintiff as a bona fide holder for value.

Dinsmore v. Stimbert, 12 Neb. 433, 11 N. W. 872.

Before the defendant can interpose the defense of failure of consideration, it must first attack plaintiff's bona fides, which it failed to do in any particular.

Western Cottage Organ Co. v. Boyle, 10

*Headnotes by LOBINGIER, C.

NOTE.—As to effect of failure to procure license for business on validity of contract, see also, in this series, *Buckley v. Humason* (Minn.) 16 L. R. A. 423, and note; *Fairly v. Wappoo Mills* (S. C.) 29 L. R. A. 215; *Vermont Loan & Trust Co. v. Hoffman* (Idaho) 37 L. R. A. 509; *Randall v. Tuell* (Me.) 38 L. R. A. 143; *Smith v. Robertson* (Ky.) 45 L. R. A. 510; and *Denning v. Yount* (Kan.) 50 L. R. A. 103.

Neb. 409, 6 N. W. 473; *Coakley v. Christie*, 20 Neb. 509, 31 N. W. 73; *Crosby v. Ritchey*, 47 Neb. 924, 66 N. W. 1005; *Violet v. Rose*, 39 Neb. 660, 58 N. W. 216.

Mr. H. C. Vail, for defendant in error:

The note and the contract constitute one and the same transaction. The agreement to pay for medical services, as evidenced by the note, was just as much part of the contract as though made in any other form, and must all be taken as one transaction.

Kittle v. De Lamater, 3 Neb. 325; *Larson v. First Nat. Bank*, 62 Neb. 303, 87 N. W. 18.

Notes made in violation of the provisions of chap. 55, Comp. Stat. 1901, regulating the practice of medicine, etc., in this state are absolutely void. When a statute expressly, or by necessary implication, declares an instrument void, it gathers no vitality by its circulation, in respect to the parties executing it, even though it be held by a bona fide holder, without notice.

Dan. Neg. Inst. §§ 197, 807; *Larson v. First Nat. Bank*, 62 Neb. 303, 87 N. W. 18; *Snoddy v. American Nat. Bank*, 88 Tenn. 573, 7 L. R. A. 705, 13 S. W. 127.

Lobingier, C., filed the following opinion:

This is an action on a promissory note payable six months after date, given by the defendant in error to one F. N. Brett, for medical services rendered to the former's wife. At the time of the execution of the note, and as a part of the same transaction, Brett executed and delivered to defendant in error the following instrument:

American Medical and Surgical Institute.
For the Treatment of All Chronic, Private and Nervous Diseases, both
Medical and Surgical.

Albion, Nebr., Sept. 7, 1898.

Received of L. Nore twenty-two dollars, for which I hereby agree to treat L. Nore's wife for three months, until cured; to furnish medicine and apparatus deemed necessary by me to bring about the best possible results; and to return note at end of specified time if no cure is effected; and to give an extension of time if needed. (\$22.00.)

F. N. Brett.

On the day after its receipt, Brett went to the banking house of plaintiff in error at Newman Grove, and negotiated a sale of the note, through the cashier, at a discount of 10 per cent. Brett was a stranger in the town, and the cashier had seen him only once before, but there is no evidence that the cashier or any of plaintiff in error's officers or agents had any knowledge or notice of the purpose for which the note was given. The note not being paid at maturity, plaintiff in error brought this action thereon; and defendant in error answered, alleging that Brett was not a licensed physician, that the execution of the note had been

induced by fraud, and that the consideration had failed. On the trial the county clerk testified that his office contained no record, as provided by article 1, chap. 55, of the Compiled Statutes, of any certificate authorizing Brett to practise medicine, and no evidence was offered indicating that such certificate had ever been issued. After the introduction of evidence, plaintiff moved for a peremptory instruction, which was refused. The jury returned a verdict for the defendant, upon which judgment was rendered, and plaintiff brings the case here by petition in error.

Defendant in error relies principally on *Larson v. First Nat. Bank*, 62 Neb. 303, 87 N. W. 18. In that case the statute under which a bona fide purchaser was denied recovery on a note provided that any conveyance of lands allotted to the Indians, "or any contract made touching the same, . . . shall be absolutely null and void." In the case at bar the statute contains no express declaration of this kind. The legislation which defendant in error invokes to support his position may be summarized as follows: Article 1, chap. 55, of the Compiled Statutes makes it the duty of all persons desiring to practise "medicine, surgery, or obstetrics" in this state to obtain a certificate from the state board of health, and to file the same with the clerk of the county in which they desire to practise. Section 15 provides: "No person shall recover in any court in this state any sum of money whatever for any medical, surgical or obstetrical services unless he shall have complied with the provisions of this act, and is one of the persons authorized by this act to be registered as a physician." Section 7 declares it to be unlawful for any person to practise in any of these lines without first obtaining and registering such certificate; and § 16 makes it a misdemeanor to so practise, and imposes a fine therefor. It will be seen that none of these provisions declares a contract for medical services, by an unlicensed practitioner, to be void. Indeed, while § 15 provides that "no person shall recover," the latter part of the section indicates that this prohibition is limited to the practitioner himself.

It is urged that, by making the unlicensed practice of medicine a crime, the legislature has, by implication, declared void all contracts growing out of such practice; and we are cited to *Snoddy v. American Nat. Bank*, 88 Tenn. 573, 7 L. R. A. 705, 13 S. W. 127. There a contract to deal in futures was held to be included within the statute against gaming, and the court said: "By the great weight of authority, notes given in consideration of a contract against morals, public policy, and public statutes are void in any hands;" and then added: "Perhaps there are no exceptions when, in addition, the transaction is also criminal." But in *Sondheim v. Gilbert*, 117 Ind. 71, 5 L. R. A. 432, 18 N. E. 687, and *Crawford v. Spencer*, 92 Mo. 498, 4 S. W. 713, the gaming statute was held not to apply to such transactions. There are, indeed, authorities elsewhere

which tend to support the contention of defendant in error. More than two centuries ago, Lord Holt said, in the leading case of *Bartlett v. Vinor*, Carthew, 252: "Every contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so." In *Cope v. Rowlands*, 2 Mees. & W. 157, Baron Parke observes: "It is perfectly settled that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication, forbidden by the common or statute law, no court will lend its assistance to give it effect." See also *Columbia Bank & Bridge Co. v. Haldeman*, 7 Watts & S. 233, 42 Am. Dec. 220; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737; *Johnston v. McConnell*, 65 Ga. 129; *Conley v. Sims*, 71 Ga. 161. Were the question *res nova* therefore, in this jurisdiction, we might be inclined to regard defendant in error's argument as entitled to great weight. But the question is not *res nova* here. The precise question was before this court in *Smith v. Columbus State Bank*, 9 Neb. 31, 1 N. W. 893, and decided adversely to that contention. The case last cited was an action on a note whose consideration was the compounding of a crime,—an act forbidden and made a misdemeanor by § 177 of the Criminal Code. It was contended there, as here, "that, when a statute inflicts a penalty for doing an act, such act is unlawful, though not in terms prohibited or declared to be illegal. And any contract, the consideration of which is founded upon the doing of such act, is void." This court, however, adopted the contrary view, and in doing so overruled, on that point, *Kittle v. De Lamater*, 3 Neb. 325; and Cobb, J., in delivering the opinion, said: "In my view of the law, in order to prevent a recovery in the case stated in the above exception, the case must come within some statute expressly declaring notes given for such consideration void." This case was cited and followed in *Wortendyke v. Meehan*, 9 Neb. 221, 2 N. W. 339, and has not since been qualified or overruled. Indeed, we are not asked to overrule it now, nor would we be inclined to do so. After having stood for almost a quarter of a century as the law of this state, we think it far better to adhere to its doctrine than to unsettle the law by adopting a different rule, even though it might be more in accordance with the weight of authority elsewhere.

Much is said concerning the policy of the statute, and the evils which are likely to result from allowing contracts to be enforced which are contrary to its purpose and spirit. We fully recognize the importance of such legislation as the medical act. It embodies a fixed and time-honored policy, of the most vital concern to the state and its people. But it may well be questioned whether the evils consequent upon the free circulation of the notes given for services of unlicensed practitioners could be more serious than the derangement of business resulting from a

rule that would make all such notes void in the hands of innocent purchasers. It must be remembered that instruments like these have no earmarks, and, when once it is understood that a limited and indistinguishable class of them is deprived of the virtues of negotiability, a step is taken toward casting the taint of suspicion upon all. Moreover, the medical act has never, so far as we have been able to ascertain, been construed to have that effect upon negotiable paper. Legislation of this character is not recent, or even modern. As early as 1511, Parliament passed an act requiring practitioners of surgery in London and vicinity to be examined and licensed by the college of surgeons, and imposing a penalty for non-compliance. In *Gremare v. Le Clerc Bois Valon* (1809) 2 Campb. 144, this ancient statute was set up as a defense to an action for surgical services, but it was held insufficient, even as between the parties, and

recovery was allowed. From the standpoint of public policy, as well as that of *stare decisis*, we are of the opinion that the medical act furnished no defense as against plaintiff in error in this action. And, since the other defenses were such as would be valid only between the original parties, we think the court should have directed a verdict as asked; and we recommend that the judgment be reversed, and the cause remanded for further proceedings according to law.

Hastings and Kirkpatrick, CC., concur.

Per Curiam: For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the cause remanded for further proceedings according to law.

NEW HAMPSHIRE SUPREME COURT.

STATE of New Hampshire

v.

Samuel H. JACKSON.

(71 N. H. 552.)

1. Whether or not a statute requiring the attendance of children at school is "wholesome and reasonable" is a legislative, and not a judicial, question, where the legislature has constitutional power to pass all manner of wholesome and reasonable laws as they may judge for the benefit and welfare of the state.
2. The natural right of parental dominion does not render unconstitutional a statute requiring children to be sent to school.
3. A parent cannot be required to procure the consent of the school board to his child's remaining away from school to protect himself from the penalty of the compulsory education law, if it is, apparently, reasonably necessary to the child's life that it be kept out of school.

(December 4, 1902.)

EXCEPTIONS by defendant to rulings of the Superior Court for Carroll County which resulted in his conviction for violating the school law. *Sustained.*

Defendant's daughter was in feeble health, and he took her from school, believing, in good faith, that her attendance at, and confinement in, school would seriously injure her reason and health, upon advice of a physician. He did not obtain the consent of the school board to such acts, although he informed some members of the board of his intention to keep the child from school.

The further facts appear in the opinion.

NOTE.—For another case in this series as to constitutionality of statute requiring attendance of children at school, see also, *State v. Bailey* (Ind.) 59 L. R. A. 435.
60 L. R. A.

Mr. Arthur L. Foote for defendant.

Mr. Sewall W. Abbott, for the State: Section 14, chap. 61, Stat. 1901, is directly in line with the authority exercised by the legislature during the existence of the present Constitution.

In connection with the children of this state, only two things are to be considered; namely, what is for the best good of the child, and the welfare of the state. To these the rights and privileges of parents are secondary.

Mercein v. People, 25 Wend. 64; *State v. Scott*, 30 N. H. 274.

The first duty of a parent towards a child is that of education.

Schouler, Dom. Rel. 5th ed. § 235.

Remick, J., delivered the opinion of the court:

1. The motion to quash the complaint on the ground that the statute upon which it was founded is unconstitutional was properly denied. The statute is as follows: "Every person having the custody and control of a child between the ages of eight and fourteen years, residing in a school district in which a public school is annually taught, shall cause such child to attend the public school all the time such school is in session, unless the child shall be excused by the school board of the district because his physical or mental condition is such as to prevent his attendance for the period required, or because he was instructed in the English language in a private school approved by the school board, for a number of weeks equal to that in which the public school was in session, in the common English branches, or, having acquired those branches, in other more advanced studies. Any person who does not comply with the requirements of this section shall be fined \$10 for the first offence, and \$20 for every subsequent of-

fence." Pub. Stat. chap. 93, § 14; Laws 1901, chap. 61, § 1. That education of the citizen is essential to the stability of the state is a proposition too plain for discussion. As a mere generalization of our own, it would command immediate and universal assent. But it rests upon a firmer foundation. The Constitution declares that "knowledge and learning, generally diffused through a community," are essential to the preservation of a free government. Const. art. 82. Nor does it stop with this abstract statement. It provides that "it shall be the duty of the legislators and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools." Const. art. 82. Showing that something more than a mere sentimental interest was intended by the injunction "to cherish the interests of literature," etc., this court has said: "The clause in the Constitution . . . in regard to the encouragement of literature, in connection with the early legislation on the subject, . . . shows conclusively, if any such evidence were needed, that the framers of the Constitution, as well as their contemporaries in the legislature, regarded the subject of education as one of public concern, to be cherished, regulated, and controlled by the state; and the great multitude and variety of acts passed since show that no different view has ever been entertained, . . . The Constitution enjoins the duty in very general and comprehensive terms on magistrates and legislators as one of paramount public importance." Ladd, J., in *Farnum's Petition*, 51 N. H. 376, 378, 379. It thus being the constitutional duty of the legislature to diffuse knowledge and learning through the community, it must be within the constitutional power of the legislature to enforce school attendance to that end. But the right is not left to implication. "Full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties or without, so as the same be not repugnant or contrary to this Constitution as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof." Const. art. 5. Whether the statute in question is "wholesome and reasonable," within the meaning of the provision of the Constitution last referred to, is a question over which the court has no control. "The ample authority conferred upon the legislature to make, ordain, and establish all manner of wholesome and reasonable orders, laws, and statutes, which it shall judge to be for the good and welfare of the commonwealth, necessarily invests that department of the government with the right of determining conclusively upon the propriety and reasonableness of all provisions which are not in some way repugnant to the Constitution." *Com. v. Williams*, 6 Gray, 1, 3; *Orr v. Quinby*, 54 N. H. 500, 60 I. R. A.

608. "The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power." Cooley, Const. Lim. 201. "We have not to inquire into the policy of the law, or, if the purpose be admitted to be public, whether the supposed public good to be attained was sufficient to justify the legislature. . . . All mere questions of expediency, and all questions respecting the just operation of the law, within the limits prescribed by the Constitution, were settled by the legislature when it was enacted. The court have only to place the statute and the Constitution side by side, and say whether there is such a conflict between the two that they cannot stand together." Ladd, J., in *Perry v. Keene*, 56 N. H. 514, 530.

Being without brief or argument from the defendant, we are not advised upon what ground he asserts the unconstitutionality of the act. Certainly, it is not unconstitutional, merely because, in obedience to the mandate of the Constitution, and for "the preservation of a free government," it interferes in some measure with the natural right of parental dominion. "When men enter into a state of society, they surrender up some of their natural rights to that society, in order to insure the protection of others" (Bill of Rights, art. 3), and subject themselves to innumerable restrictions and regulations for the common good (*State v. United States & C. Exp. Co.* 60 N. H. 219, 253, 254). But the surrender is not absolute. There are "certain natural, essential, and inherent rights" reserved by the Constitution, and of which the citizen cannot be deprived by legislative enactment; rights "paramount to all governmental authority," and which no legislation can invalidate or abridge (*Wooster v. Plymouth*, 62 N. H. 193, 200; *State v. Jackman*, 69 N. H. 318, 42 L. R. A. 438, 41 Atl. 347); rights higher and earlier in origin "than the Constitution or the common law, not superseded by those temporal and finite systems, but sustained and enforced by their declaration and sanction of the highest, primary, eternal, and infinite law of nature." (*Aldrich v. Wright*, 53 N. H. 398, 400, 16 Am. Rep. 339). Thus, "as a fundamental and essential right, the defense of life, liberty, and property is . . . put, by a special guaranty, above the altering and repealing power of the legislature." *Aldrich v. Wright*, 53 N. H. 398, 399, 16 Am. Rep. 339. And so it was held that one might lawfully kill a mink in defense of his geese, notwithstanding the existence of a statute providing that "no person shall in any way destroy . . . any mink, . . . under penalty of \$10 for each animal so destroyed;" that the owner's "natural, common-law, and constitutional right of defense existed in full force and vigor, not repealed, nor in the slightest degree impaired or modified, by the statute;" that "he could exercise that right as fully and freely as if the statute had not been enacted." *Aldrich v. Wright*,

53 N. H. 398, 399, 400, 16 Am. Rep. 339. For the preservation and propagation of fur-bearing animals, in the interest of society at large, the legislature had the undoubted right to prohibit their destruction, within a certain season, for purposes of sport, profit, or the like; but they could not repeal the constitutional right of defense. *Ibid.*

If statutory prohibitions and penalties are thus impotent to take away the inherent right of defense when invoked in behalf of one's geese, surely they must be so when the right is resorted to in defense of one's own life, or that of his child. For the diffusion of knowledge and learning through the community, the legislature have the undoubted right, as against the mere will and pleasure of the parent, to require him to send his child to school; but they cannot repeal the natural, common-law, and constitutional right of the parent "to do whatever apparently is reasonably necessary to be done in defense" of the life of his child. If it was, apparently, reasonably necessary, in defense of his geese, that the owner should then and there destroy the mink, the legislature could not constitutionally require him to first get permission of the game warden. So, if, apparently, reasonably necessary for a parent to keep or withdraw his child from school, in defense of the child's life, without first applying for excuse by the school board, the legislature cannot compel him to first make such application. Of course, in case of complaint against a parent for withdrawing or detaining his child from school without excuse from the school board, the burden would be upon the accused to show that what he did was, apparently, reasonably necessary in defense of the child's life. Failing, he would be amenable to the statute. Succeeding, he would be exempt from its operation. But upon this question of reasonable necessity he would be entitled to the judgment of his peers. A parent cannot be required to imperil the life of his child by delays incident to an application to the school board, before he can lawfully do what is, apparently, reasonably necessary for its protection.

The letter of the statute in question prohibits the parent from keeping or withdrawing his child from school without consent of the school board, even when, apparently, reasonably necessary to do so in order to preserve the child's life. To this extent the statute, taken literally, contravenes the constitutional right of defense to which we have referred. But, "as the legislature could not abolish the right, they were not presumed to have attempted an impossibility, or to have intended to pass a void act; and the statute is held valid by giving it a construction compatible with the Constitution, making it applicable only to those cases to which it can be constitutionally applied." *Aldrich v. Wright*, 53 N. H. 398, 399, 16 Am. Rep. 339. To illustrate: One whose child is stricken by some malady, making detention from school reasonably necessary

in defense of the child's life, breaks no law of this jurisdiction by hastening for doctors and nurses instead of to the board of education. On the other hand, if he keeps his child from school merely to suit his own or his child's pleasure, or for any other reason not within the exceptions provided by the act or guaranteed by the Constitution, he must suffer the penalty. Indeed, as thus limited, the law is a decided invasion of the parental domain; but, being repugnant to no provision of the Constitution, and being for "the benefit and welfare of this state, and for the governing and ordering thereof," the citizen, in fulfillment of the social compact, must yield submission and obedience. *School Board v. Jackson*, L. R. 7 Q. B. Div. 502; *Burdick v. Babcock*, 31 Iowa, 562, 568-571; *Donahoe v. Richards*, 38 Me. 379, 391, 395-397, 61 Am. Dec. 256; *Schouler*, Dom. Rel. 235. The statute requires attendance "all the time . . . school is in session," and, as would appear, makes no provision for excuse excepting on account of the physical and mental condition of the child. Literally construed, the parent incurs its penalty who keeps his child from school a single day for any other cause, however imperative, even though it be to attend the mother's funeral. It is inconceivable that the legislature intended the act to have such sweeping effect. Chapter 93, § 14, Pub. Stat., required the parent to cause his child, if between the ages of eight and sixteen years, to attend school twelve weeks in each year, six of which should be consecutive. Under this statute, we are not aware that it was suggested that mere occasional and temporary absences could not be permitted by the school board for other causes than the physical or mental condition of the child. The statute in question amended that statute by substituting the entire school year for twelve weeks as the compulsory attendance period, and made it apply to children between eight and fourteen instead of between eight and sixteen years of age. In this view, it is reasonable to suppose that the words "all the time such school is in session" in the present statute, like the words "twelve weeks" in the statute which preceded it, were used for the purpose of establishing a compulsory attendance period in a general sense, and had no reference to occasional and temporary absence, not inconsistent with the general design already indicated; but left such absence subject to any reasonable regulations the governing board might see fit to establish. Pub. Stat. chap. 93, § 6. See Laws 1901, chap. 16, § 7.

2. "The defendant offered evidence to show that Alice was in feeble health; that he took her from school believing in good faith that her attendance at and confinement in school would seriously injure her reason and health; that he so informed two members of the school board before he removed her from school, and offered evidence of a physician that her confinement in the school would greatly endanger her life; all of which evidence was excluded, and the de-

defendant excepted." This evidence tended to show that the action of the defendant in withdrawing Alice from school was, apparently, reasonably necessary in defense of her life. It also tended to show an attempt by the defendant to comply with the law. The law is not adapted nor intended for formal action. Upon the evidence as stated, in the absence of objection or request for further action by the school officers, the defendant may have been justified in understanding that the school board did not object, and the jury may find that the child was in fact excused. It may also be found upon the evi-

dence that the child was so unfit for school that the only reasonable result of any investigation by the school board must have been her excuse from attendance. The statute was intended to secure the attendance of children who were able, not to confer arbitrary power upon the school board. To require a parent whose child was confined in bed during the year to apply for and secure an excuse, would be an idle formality. Such was not the purpose or intent of the law. The evidence was competent, and its exclusion was error.

Exception sustained. All concur.

NEW JERSEY COURT OF ERRORS AND APPEALS.

J. Aspinwall HODGE *et al.*
v.

UNITED STATES STEEL CORPORATION
et al., Appts.

(.....N. J.)

- *1. At a meeting of the stockholders of a corporation, owners of shares are under no disability to vote because they are also directors of the corporation. They do not vote in their fiduciary capacity, but, like other stockholders, in the right of the shares held by them.
2. At a duly convened meeting of stockholders they may lawfully enter into, or authorize, a contract between the company and a third party, in which directors are personally interested, if it is done by them with notice of such interest.
3. The general doctrine is well established in this state that facts known, which are sufficient to put a party upon inquiry, are sufficient to charge him with all knowledge he would have acquired by a proper inquiry in the ordinary course of business.
4. The rule that directors cannot lawfully enter into a contract in the benefit of which even one of their number participates without the knowledge and consent of the stockholders is the settled law of this state.
5. Such a contract is voidable at the option of the corporation, but is not void *per se*. When the facts are disclosed to the stockholders, it may be subsequently ratified by them.
6. When the by-laws of a corporation, adopted by the stockholders in pursuance of authority given by the act of incorporation, provide that a majority vote at a stockholders' meeting shall be binding on the corporation, every shareholder will be bound by all acts and proceedings within the scope of the power and authority conferred by the charter, which shall be approved or sanctioned by the vote of a majority of such share-

holders, duly taken and ascertained according to law.

7. The act of incorporation of the United States Steel Corporation requires the corporation to pay to the preferred shareholders a yearly dividend at the rate of 7 per cent per annum, in quarterly payments. By the terms of the act of 1902 said corporation cannot take advantage of its provisions, unless it shall have continuously declared and paid dividends at the rate of 7 per cent on the preferred stock for the period of at least one year next preceding a meeting called to avail itself of the act. The meeting was held May 19, 1902. A dividend of 1½ per cent was declared and paid for the quarter ending July 1, 1901, and a like dividend for each of the quarters ending October 1, 1901, January 1, 1902, and April 1, 1902. Held, that this was a compliance with the act of 1902.

(February 18, 1903.)

APPPEAL by defendants from a decree of the Chancery Court enjoining them from carrying out a scheme for the reduction of capital stock. *Reversed.*

The facts are stated in the opinion.

Messrs. Francis Lynde Stetson, Charles L. Corbin, Richard V. Lindabury, and William D. Guthrie, for appellants:

The statutory period began on April 1, 1901, because that is the date when the dividend period of the steel corporation commenced to run, and the date from which the obligation with respect to the preferred and cumulative features of the stock must be calculated.

As the statute is silent as to the point or event from which the period must be computed, resort must be had to the principles of interpretation.

Nampson v. Peaslee, 20 How. 571, 579, 15 L. ed. 1022, 1027; *Lion Mut. Marine Ins. Asso. v. Tucker*, L. R. 12 Q. B. Div. 176; *State ex rel. Kelly v. Paterson*, 35 N. J. L. 196.

The language of the statutory condition covers "the period of at least one year next preceding the meeting" held on May 19, 1902. During this year the record shows that the steel corporation declared and paid four

*Headnotes by VAN SYCKEL, J.

NOTE.—As to right of equity to interfere with management of corporation by majority stockholders at suit of minority, see also, in this series, *Shaw v. Davis* (Md.) 23 L. R. A. 194.
60 L. R. A.

quarterly instalments of dividends at the required rate, in regular order.

Lang v. Lang, 57 N. J. Eq. 325, 41 Atl. 705; *Schroder v. Ehlers*, 31 N. J. L. 44.

The letter of a statute is to be subordinated to its spirit, so as to carry out the intention.

Black v. Delaware & R. Canal Co. 22 N. J. Eq. 130; *State v. Clark*, 29 N. J. L. 96; *Jersey Co. v. Davison*, 29 N. J. L. 415; *Schroder v. Ehlers*, 31 N. J. L. 44; *Morris Aqueduct v. Jones*, 36 N. J. L. 206; *Orvil Twp. v. Woodcliff*, 64 N. J. L. 286, 45 Atl. 686; *United States v. Kirby*, 7 Wall. 482, 486, 19 L. ed. 278, 280; *Heydenfeldt v. Daney Gold & S. Min. Co.* 93 U. S. 634, 638, 23 L. ed. 995, 996; *Church of Holy Trinity v. United States*, 143 U. S. 457, 460, 36 L. ed. 226, 228, 12 Sup. Ct. Rep. 511; *Lau Ow Bew v. United States*, 144 U. S. 47, 59, 36 L. ed. 340-344, 12 Sup. Ct. Rep. 517; *McKee v. United States*, 164 U. S. 287, 293, 41 L. ed. 437, 439, 17 Sup. Ct. Rep. 92; *People ex rel. Wood v. Lacombe*, 99 N. Y. 43, 1 N. E. 599; *Spencer v. Myers*, 150 N. Y. 269, 34 L. R. A. 175, 44 N. E. 942; *Com. v. Kimball*, 24 Pick. 366; *State, Dodge, Prosecutor, v. Love*, 47 N. J. L. 436, 2 Atl. 810, Affirmed in 49 N. J. L. 235, 9 Atl. 744.

It cannot be maintained that the statute requires five quarterly, three half-yearly, or two yearly, dividends to show one year's continuous solvency or the payment of one year's continuous dividends.

The bankers' contract was entirely separate and distinct, and was not made dependent upon the vote for the reduction or the issue of bonds. Whenever stock is to be increased or decreased, directors, who must necessarily be stockholders, are more or less personally interested; but such indirect interest does not affect their action upon the question of reduction or increase.

Illinois Trust & Sav. Bank v. Pacific R. Co. 117 Cal. 332, 49 Pac. 197.

The practice in regard to notices of special meetings of stockholders is to state the time and place of the meetings, and the general nature of the business to be transacted.

Henderson v. Bank of Australasia, 62 L. T. N. S. 869.

A stockholder who neglects to send for a copy of the contract, or to attend the meeting, cannot be permitted to wait until long after the stockholders' meeting, and then be heard to insist that he has been misled because of his ignorance of what was offered to be communicated to him, and of what he could have seen or ascertained at the meeting.

Lagunas Nitrate Co. v. Lagunas Syndicate [1899] 2 Ch. 392; *Re Lady Forrest Gold Mine* [1901] 1 Ch. 582; *Hallows v. Fernie*, L. R. 3 Ch. 467; *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *Kelley v. Newburyport & A. Horse R. Co.* 141 Mass. 496, 6 N. E. 745; *Gale v. Morris*, 30 N. J. Eq. 285; *Haslett v. Stephany*, 55 N. J. Eq. 68, 36 Atl. 498; *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687; *Raritan Water Power Co. v. Veghte*, 21 N. J. Eq. 463; *May v. Chapman*, 16 Mees. & W. 355. 60 L. R. A.

A majority of the stockholders could ratify the contract so as to bind the minority.

Durfee v. Old Colony & F. River R. Co. 5 Allen, 230; *Benedict v. Columbus Constr. Co.* 49 N. J. Eq. 23, 23 Atl. 485; *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217, 23 Atl. 287; *Edison v. Edison United Phonograph Co.* 52 N. J. Eq. 620, 29 Atl. 195; *Foss v. Harbottle*, 2 Hare, 461; *Burland v. Earle* [1902] A. C. 83; *Leavenworth County v. Chicago, R. I. & P. R. Co.* 134 U. S. 688, 704-708, 33 L. ed. 1064, 1072, 1073, 10 Sup. Ct. Rep. 708; *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402; *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, 52 N. W. 48; *Shaw v. Davis*, 78 Md. 308, 23 L. R. A. 294, 28 Atl. 619; *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.* 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333.

A corporate transaction in which some of the directors have a personal interest is not void, but voidable or valid as the corporation may elect.

Stewart v. Lehigh Valley R. Co. 38 N. J. L. 505; *Gardner v. Butler*, 30 N. J. Eq. 702; *Ryle v. Ryle*, 41 N. J. Eq. 582, 7 Atl. 484; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 414; *Metropolitan Teleph. & Teleg. Co. v. Domestic Teleg. & Teleph. Co.* 44 N. J. Eq. 568, 14 Atl. 907.

Failure to appeal to the stockholders for them to act is fatal to this suit.

Foss v. Harbottle, 2 Hare, 461; *Burland v. Earle* [1902] A. C. 83; *MacDougall v. Gardiner*, L. R. 1 Ch. Div. 13; *Hawes v. Oakland*, 104 U. S. 450, sub nom. *Hawes v. Contra Costa Water Co.* 26 L. ed. 327; *Dunphy v. Traveller Newspaper Asso.* 146 Mass. 495, 16 N. E. 426; *Warren v. Para Rubber Shoe Co.* 166 Mass. 97, 44 N. E. 112; *Urner v. Sollenberger*, 89 Md. 316, 43 Atl. 810; *Flynn v. Brooklyn City R. Co.* 158 N. Y. 493, 53 N. E. 520.

It would be absurd to hold that a stockholder, who necessarily sues only in the name and for the benefit of the corporation, could, in that capacity, maintain a suit to set aside a contract within the corporate powers, after its ratification by a majority of the stockholders of the corporation in the manner expressly permitted by its fundamental law.

Geer v. Amalgamated Copper Co. 61 N. J. Eq. 364, 49 Atl. 159; *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.* 112 Cal. 53, 33 L. R. A. 788, 44 Pac. 333; *Burden v. Burden*, 159 N. Y. 287, 54 N. E. 17; *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201; *Leavenworth County v. Chicago, R. I. & P. R. Co.* 134 U. S. 688, 704-708, 33 L. ed. 1064, 1072, 1073, 10 Sup. Ct. Rep. 708; *Stewart v. St. Louis, Ft. S. & W. R. Co.* 41 Fed. 736; *Burland v. Earle* [1902] A. C. 83; *Northwest Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589; *Shaw v. Davis*, 78 Md. 308, 23 L. R. A. 294, 28 Atl. 619; *Urner v. Sollenberger*, 89 Md. 316, 43 Atl. 810; *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402; *Bjorngaard v. Goodhue County Bank*, 49 Minn.

483, 52 N. W. 48; *Gorder v. Plattsmouth Canning Co.* 36 Neb. 548, 54 N. W. 830; *Ashhurst's Appeal*, 60 Pa. 290; *United States Rolling Stock Co. v. Atlantic & G. W. R. Co.* 34 Ohio St. 450, 32 Am. Rep. 380; *Stratton v. Allen*, 16 N. J. Eq. 229; *Bergen v. Porpoise Fishing Co.* 42 N. J. Eq. 397, 8 Atl. 523; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Whittaker v. Amwell Nat. Bank*, 52 N. J. Eq. 400, 29 Atl. 203; *Savage v. Miller*, 56 N. J. Eq. 432, 36 Atl. 578, 39 Atl. 605; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587-589, 23 L. ed. 328-330; *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 22, 24 L. ed. 917, 919; *Sanford Fork & Tool Co. v. Howe, B. & Co.* 157 U. S. 312, 39 L. ed. 713, 15 Sup. Ct. Rep. 621; *Copsey v. Sacramento Bank*, 133 Cal. 659, 66 Pac. 7, 204; *Mullanphy Sav. Bank v. Schott*, 135 Ill. 655, 26 N. E. 640; *Hill v. Nisbet*, 100 Ind. 341; *Kitchen v. St. Louis, K. C. & N. R. Co.* 69 Mo. 224; *New Memphis Gaslight Co. Cases*, 105 Tenn. 268, 60 S. W. 206; *Atwood v. Shenandoah Valley R. Co.* 85 Va. 966, 9 S. E. 748; *Tyler v. Hamilton*, 62 Fed. 187.

Interested directors and other syndicate participants had a perfect right to vote as stockholders, even if their vote were necessary to constitute a majority approving the banker's contract; which was not the fact in the case at bar.

Pender v. Lushington, L. R. 6 Ch. Div. 70; *Camden & A. R. Co. v. Elkins*, 37 N. J. Eq. 273; *Windmuller v. Standard Distilling & Distributing Co.* 114 Fed. 491, 115 Fed. 748; *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201; *Metropolitan Elev. R. Co. v. Manhattan Elev. R. Co.* 11 Daly, 373, 14 Abb. N. C. 103; *Shaw v. Davis*, 78 Md. 316, 23 L. R. A. 294, 28 Atl. 619; *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402; *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, 52 N. W. 48; *St. Louis v. Alexander*, 23 Mo. 483; *Foss v. Harbottle*, 2 Hare, 461; *Northwest Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589; *Burland v. Earle* [1902] A. C. 83.

Messrs. **Abram I. Elkus, Joseph M. Proskauer, Robert H. McCarter, Alan H. Strong, and Frank Bergen**, for appellants:

The requirements of the act of March 28, 1902, as to declaration and payment of dividends on the company's preferred stock, were not complied with.

Berger v. United States Steel Corp. 63 N. J. Eq. 809, 53 Atl. 73.

The action of the directors at the meeting of April 1st was illegal by reason of the private interest of the directors.

Stewart v. Lehigh Valley R. Co. 38 N. J. L. 505; *Cumberland Coal & I. Co. v. Sherman*, 30 Barb. 553; *Staats v. Bergen*, 17 N. J. Eq. 554; *State, Winans, Prosecutor, v. Crane*, 36 N. J. L. 394; *Gardner v. Butler*, 30 N. J. Eq. 702; *Guild v. Parker*, 43 N. J. L. 430; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Ryle v. Ryle*, 41 N. J. Eq. 582, 7 Atl. 484; *State, Stroud, Prosecutor, v. Consumers' Water Co.* 56 N. J. L. 422, 28 Atl. 578; *State, West Jersey Traction Co., Prosecutor, v. Camden Public Works*, 56 N. J. L. 431, 60 L. R. A.

29 Atl. 163; *Foster v. Cape May*, 60 N. J. L. 78, 36 Atl. 1089.

The contract is unequal and unfair to stockholders.

The bankers' contract provides for an equal opportunity to each preferred stockholder, for a period of thirty days after a date to be specified, to subscribe for bonds in preferred stock to the extent of 40 per cent of his holding; but in saying that such subscription shall not in any instance exceed 40 per cent, the qualification is introduced, "except at the discretion of the bankers." The scheme, by the mere existence of such a power in the bankers, violates the fundamental requirement of equality between stockholders.

Cook, Corp. § 286; *Berger v. United States Steel Corp.* 63 N. J. Eq. 809, 53 Atl. 68.

The action of the stockholders' meeting could not validate the illegal action of the directors on the 1st of April.

Curtin v. Salmon River Hydraulic Gold Min. & Ditch Co. 130 Cal. 345, 62 Pac. 552; *Cook, Corp.* § 709; *Metropolitan Teleph. & Teleg. Co. v. Domestic Teleg. & Teleph. Co.* 44 N. J. Eq. 568, 14 Atl. 907.

The legislature cannot confer jurisdiction upon a person to act in a cause in which he is interested; much less a corporation, by means of a by-law.

Cooley, Const. Lim. pp. 410, 414; 17 Am. & Eng. Enc. Law, 2d ed. p. 733; *State, Winans, Prosecutor, v. Crane*, 36 N. J. L. 394; *Edwards v. Russell*, 21 Wend. 64; *Schroder v. Ehlers*, 31 N. J. L. 44; *Converse v. McArthur*, 17 Barb. 410; *Withers v. Baird*, 7 Watts. 227, 32 Am. Dec. 754; *Chambers v. Hodges*, 23 Tex. 104; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *Oakley v. Aspinwall*, 3 N. Y. 547; 3 Clark & M. Corp. § 642; *Wagner v. Howard Sav. Inst.* 52 N. J. L. 225, 19 Atl. 212; *Durkee v. People*, 155 Ill. 354, 40 N. E. 627.

There could be no ratification by stockholders for want of full disclosure as to the interest of the directors.

Tiessen v. Henderson [1899] 1 Ch. 861; *Newark v. Stout*, 52 N. J. L. 35, 18 Atl. 943; *Dunne v. English*, L. R. 18 Eq. 524; *Costa Rica R. Co. v. Forwood* [1900] 1 Ch. 756; 1 Lewin, Tr. & Trustees, 497, 498; *Cumberland Coal & I. Co. v. Sherman*, 30 Barb. 553; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094; *Gulick v. Grover*, 33 N. J. L. 463, 97 Am. Dec. 728.

A stockholder may restrain the consummation of the scheme.

Guild v. Parker, 43 N. J. L. 430; *Schwarzmaelder v. German Mut. F. Ins. Co.* 59 N. J. Eq. 589, 44 Atl. 769; *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775; *Chester v. Halliard*, 36 N. J. Eq. 313; *Concay v. Halsey*, 44 N. J. L. 462; 2 Clark & M. Corp. § 541, p. 1676; *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505; *Whelpdale v. Cookson*, 1 Ves. Sr. 9; *Staats v. Bergen*, 17 N. J. Eq. 556; *Flint & P. M. R. Co.*

v. *Deucey*, 14 Mich. 477; *Pearson v. Concord R. Corp.* 62 N. H. 537.

A stockholder may vote at a stockholders' meeting upon any matter as may best subserve his own interests; but the action resulting from such vote must not be so detrimental to the corporation itself as to lead to the necessary inference that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interest of the corporation, and of the minority of the stockholders, and that their action is a wanton or fraudulent destruction of the rights of such minority.

Chicago Hansom Cab Co. v. Yerkes, 141 Ill. 320, 30 N. E. 667; *Farmers' Loan & T. Co. v. New York & N. E. Co.* 150 N. Y. 412, 34 L. R. A. 76, 44 N. E. 1043; *Brewer v. Boston Theatre Co.* 104 Mass. 378; *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, 52 N. W. 48; *Menier v. Hooper's Teleg. Works*, L. R. 9 Ch. 353; *Allen v. Gold Reefs of West Africa* [1900] 1 Ch. 657; *North-west Transp. Co. v. Beatty*, L. R. 12 App. Cas. 589.

The absence of Mr. Hodge from the stockholders' meeting should not operate against him.

Tiessen v. Henderson [1899] 1 Ch. 861.

Mr. Edward B. Whitney, also for appellees:

A corporate wrong which the majority stockholders either could not cure, or have not yet cured, which the directors themselves have committed and have an interest in sustaining, and upon which intelligent action cannot be obtained from a stockholders' meeting until too late to be of practical use, is a wrong which any stockholder can sue to enjoin.

2 Pom. Eq. Jur. § 1095; 1 Morawetz, Priv. Corp. §§ 242, 252; 2 Clark & M. Corp. 1675, 1676, 1680-1683; 2 Cook, Corp. §§ 669, 741; *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118, 50 N. J. Eq. 485, 27 Atl. 636; *Brewer v. Boston Theatre Co.* 104 Mass. 378; *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 263, 26 N. E. 145; *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048; *Northern Trust Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460.

Upon the issuance, increase, or reduction of stock, or the granting of any special privilege, all shall be treated alike.

Dousman v. Wisconsin & L. S. Min. & Smelting Co. 40 Wis. 418; 1 Morawetz, Priv. Corp. § 279; 1 Cook, Corp. §§ 286, 289; 2 Clark & M. Corp. 1290; *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854; *Arkansas Valley Agri. Soc. v. Etcholtz*, 45 Kan. 164, 25 Pac. 613; *Way v. American Grease Co.* 60 N. J. Eq. 263, 47 Atl. 44; *Davies v. Monroe Waterworks & Light Co.* 107 La. 145, 31 So. 694; *Augsburg Land & Improv. Co. v. Pepper*, 95 Va. 92, 27 S. E. 807.

The retirement "cannot certainly be at the expense and against the consent of one portion of the stockholders, and for the benefit and advantage of the others."

Currier v. Lebanon Slate Co. 56 N. H. 262; *Niagara Shoe Co. v. Tobey*, 71 Ill. App. 250.

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It is not even alleged in the answer that the dividends had been continuously earned for a period of at least one year preceding May 19, 1902.

A director interested in the syndicate, as eleven out of twenty-four are admitted to have been, cannot be counted as a member of the board. Nor can an interested director take any part in the meeting, or be counted as part of a quorum.

Stewart v. Lehigh Valley R. Co. 38 N. J. L. 505; *State, Stroud, Prosecutor, v. Consumers' Water Co.* 56 N. J. L. 422, 28 Atl. 578; *Metropolitan Elev. R. Co. v. Manhattan Elev. R. Co.* 11 Daly, 377; *Ourlin v. Salmon River Hydraulic Gold Min. & Ditch Co.* 130 Cal. 345, 62 Pac. 552.

Duties which may be delegated in the absence of express statutory authority are such, only, as concern the transaction of the ordinary business of the corporation.

1 Morawetz, Priv. Corp. § 536; Taylor, Corp. § 233; 3 Clark & M. Corp. § 2232; *Green's Brice, Ultra Vires*, 490, 491; *Weidenfeld v. Sugar Run R. Co.* 48 Fed. 615; *Cartmell's Case*, L. R. 9 Ch. 691; *Silver Hook Road v. Greene*, 12 R. I. 164; *Rutland & B. R. Co. v. Thrall*, 35 Vt. 536; *Metropolitan Teleph. & Teleg. Co. v. Domestic Teleg. & Teleph. Co.* 44 N. J. Eq. 568, 14 Atl. 907; *Temple v. Dodge*, 89 Tex. 68, 32 S. W. 514, 33 S. W. 222.

While illegal acts of the directors may be ratified "when they are such as may be done or authorized by the stockholders," the stockholders cannot ratify an "act which, under the charter of the corporation, is within the exclusive authority of the directors."

3 Clark & M. Corp. 2181; 2 Morawetz, Priv. Corp. § 626; *National Trust Co. v. Miller*, 33 N. J. Eq. 155.

A ratification is effective only when the stockholders have received the most full, fair and frank disclosure, both as to the character of the contract which they are asked to ratify, and as to the adverse interest of the directors.

Cumberland Coal & I. Co. v. Sherman, 30 Barb. 553; *Re Agriculturist Cattle Ins. Co.* L. R. 1 Ch. 161; *Hoffman Steam Coal Co. v. Cumberland Coal & I. Co.* 16 Md. 456, 77 Am. Dec. 311; *First Nat. Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646; *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 426; 2 Morawetz, Priv. Corp. 628; *Tiessen v. Henderson* [1899] 1 Ch. 861; *Costa Rica R. Co. v. Forwood* [1901] 1 Ch. 756.

Mr. J. Aspinwall Hodge also for appellees.

Van Syckel, J., delivered the opinion of the court:

The subject-matter of this appeal is an order granted by the court of chancery at the instance of the complainants, restraining the defendants from executing, issuing, delivering, or receiving any bond or mortgage, under certain resolutions of the stockholders of the United States Steel Corporation, passed May 19, 1902, providing for the reduction of \$200,000,000 of its preferred

stock, and the retirement thereof out of bonds or the proceeds of bonds. Three of the complainants in the bill as originally filed voluntarily withdrew from the suit. The remaining complainants are Hodge, Smith, and Curtis. Hodge owns 100 shares, acquired by him before the contract in question was made. Smith owns 200 shares acquired since that time from a holder who assented to the contract. Curtis, so far as appears, owns no stock. The vice chancellor properly held that the case must be considered as based wholly upon the rights of Hodge as a shareholder. The steel corporation was organized under the general corporation act of this state (Revision 1896) on the 25th day of February, 1901, and the certificate of incorporation was filed on that day. On the 1st day of April, 1901, an amended certificate of incorporation was filed, which provided, among other things, for an authorized capital of \$1,100,000,000, of which \$550,000,000 was to be preferred stock, divided into 5,500,000 shares of the par value of \$100 each, and a like number of shares of common stock of the par value of \$100 each. As required by § 18 of the general corporation act, the amended certificate of incorporation stated that "the holders of the preferred stock shall be entitled to receive when and as declared, from the surplus or net profits of the corporation, yearly dividends, at the rate of 7 per centum per annum, and no more, payable quarterly on dates to be fixed by the by-laws." The by-laws of the company provide as follows: Article 5, § 5: "The dates for the declaration of dividends upon the preferred, and upon the common stock, of the company, shall be the days by these by-laws fixed for the regular monthly meetings of the board of directors in the months of April, July, October, and January in each year, on which days the board of directors shall declare what, if any, dividends shall be declared upon the preferred stock and the common stock or either of such stocks. The dividends on the preferred stock shall be payable quarterly on the sixth Wednesday next after the several dates of the declaration thereof."

The board of directors of said corporation, having resolved that it would be advisable to decrease the capital stock of the corporation to the extent of 2,000,000 shares, and to retire them by means of an issue of bonds, called a meeting of the stockholders to be held on the 19th day of May, 1902, in pursuance of and as required by § 27 of the general corporation law and by the act of 1902, for the purpose of voting upon the proposed plan for the purchase and retirement of that amount of preferred stock and the issue of 5 per cent bonds. Prior to the notice of this meeting the directors had entered into a tentative contract with Messrs. J. P. Morgan & Co., bankers, under date of April 1, 1902, by which said bankers agreed with the steel corporation that \$100,000,000 face value of the new bonds would be taken and paid for, of which \$80,000,000 would be paid for by a like amount of preferred stock taken at par, and \$20,000,000 would be paid

in cash. To guarantee the performance of this contract, a syndicate was formed by J. P. Morgan & Co., the members of which actually deposited with that firm \$80,000,000 of preferred stock to be used in the performance of the contract. The effect and purport of this agreement is that the bankers agreed to buy from the steel corporation at least \$100,000,000 of 5 per cent bonds, and to pay therefor \$20,000,000 in cash and \$80,000,000 in preferred stock at par, with an option to purchase the remaining bonds if the stockholders did not do so; and in consideration of this undertaking the bankers were to receive a commission of 4 per cent on \$100,000,000, and contingently a commission of 4 per cent on any additional amount that might be taken at par by the stockholders or the bankers. This contract with the bankers was to be subject to the approval of the stockholders. At the stockholders' meeting on the 19th of May, 1902, duly convened, the resolution to retire the preferred stock and the resolution to adopt the bankers' contract were separate and distinct, and were voted upon and passed as separate and distinct resolutions. The shareholders could have adopted the first and rejected the latter. There was in attendance at the meeting, in person or by proxy, over 73 per cent of the outstanding preferred stock, and over 78 per cent of the outstanding common stock. More than 99.83 per cent of the stockholders at such meeting, present either in person or by proxy, voted in favor of both resolutions and only $\frac{1}{100}$ of 1 per cent voted against them.

The by-laws of the corporation contained the following provision: "The board of directors, in its discretion, may submit any contract or act for approval or ratification at any annual meeting of the stockholders, or at any meeting of the stockholders called for the purpose of considering any such act or contract, and any act or contract that shall be approved or ratified by the vote of the holders of a majority of the capital stock of the company which is represented in person or by proxy at such meeting: Provided, that a lawful quorum of stockholders be there represented in person or by proxy, shall be as valid and as binding upon the corporation and upon all the stockholders, as though it had been approved or ratified by every stockholder of the corporation." This by-law can not amplify the powers of the corporation, or operate to validate any act *ultra vires* of the corporation, but it enabled the stockholders by a majority vote to ratify any contract which the entire body of stockholders or the corporation might lawfully make. Both resolutions therefore received more than the vote required by the 27th section of the corporation act and by the by-law of the company. If all the shareholders had intended to convert their preferred shares into 5 per cent bonds, they would, of course, have voted for the conversion resolution, and have rejected the bankers' contract. In a scheme involving such an enormous amount of capital, and affecting thousands of shareholders, it could not reasonably have been supposed

that all would prefer to accept the 5 per cent bonds, and it was, therefore, the exercise of a prudent foresight that prompted them, in order to assure the successful execution of the plan, to secure the co-operation of bankers who could command millions of capital. When the subject-matter of this litigation was before this court at the June term, 1902, in the case of *Berger v. United States Steel Corp.* 63 N. J. Eq. 809, 53 Atl. 68, it was expressly declared: First. That the act concerning corporations, as revised in 1896, authorizes corporations formed under it to retire shares of its preferred stock purchased with bonds or the proceeds of bonds issued for that purpose, the provisions of §§ 27 and 29 being complied with. Second. The manner in which a duly authorized plan is to be carried through is part of the business of the corporation, and, in the absence of fraud or bad faith, is not the subject of judicial control to any greater extent than other business of the corporation. The court cannot substitute its judgment for that of the directors and majority stockholders, and say that a less expensive plan could be successfully adopted. These questions, therefore, are not open to controversy in this case, in so far as the cost or wisdom of the plan is concerned.

There is an entire absence in the case of anything to show a taint of fraud, or an attempt to conceal from the shareholders any fact which should have influenced their action. That the entire proceeding was conducted with good faith, without concealment, and with fairness to both parties, is evinced by the fact that during all the litigation which has ensued, under the promotion of a share owner who did not attend the meeting, not one of the vast number of shareholders who were present in person or by proxy, comprising men of great business capacity, interested to the extent of millions of dollars in the conversion plan, has questioned its propriety, or expressed a desire, so far as appears, to recede from it. The contract with the bankers was submitted to the stockholders without comment, and, as stated in the resolutions, of which a copy was tendered to the stockholders, "was not finally to become or to be operative until after approval thereof by the stockholders in special meeting assembled."

The first reason to be considered, upon which the complainants rely to maintain their injunction, is that the action of the directors in passing the resolutions for the plan of conversion and approving the bankers' contract was fraudulent and void, because fifteen or more of the twenty-four members of the board of directors were interested in the syndicate which was formed to assist in carrying out the bankers' contract, and to share its profits; and that the plan was never properly and legally ratified by the two-thirds vote of the stockholders required by the corporation act, inasmuch as the votes upon the stock held or controlled by the bankers' firm and members of the syndicate must be counted to make up the necessary two thirds, and without those votes 60 L. R. A.

the requisite number did not approve the reduction of stock. The insistence that the votes of members of the syndicate who were also directors of the company cannot be lawfully counted in order to constitute a two-thirds vote in favor of the resolution to reduce the amount of preferred stock is without any foundation in reason or in law. They voted upon that resolution, not as directors, not in their fiduciary capacity, but solely in the right of the shares of stock held by them. A most valuable privilege, which attaches to the ownership of stock in a corporation, is the right to vote upon it at any meeting of stockholders. As to that resolution, considered by itself, as stockholders, they owed no greater duty to their stockholders than those stockholders owed to them. Like other stockholders, they had a right to be influenced by what they conceived to be for their own interest, and they cannot lawfully be denied that right, nor can it be limited or circumscribed by the fact that they occupied the position of directors in the company. With respect to the bankers' contract a very different rule applies. The rule that directors cannot lawfully enter into a contract in the benefit of which even one of their number participates without the knowledge and consent of the stockholders is so firmly entrenched in our jurisprudence that it is not open to debate. It is emphasized and enforced in the following, among many other cases: *Staats v. Bergen*, 17 N. J. Eq. 554; *State, Winans, Prosecutor, v. Crane*, 36 N. J. L. 394; *State, Stroud, Prosecutor, v. Consumers' Water Co.* 56 N. J. L. 422, 28 Atl. 578; *Gardner v. Butler*, 30 N. J. Eq. 702; *Guild v. Parker*, 43 N. J. L. 430; *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505; *State, West Jersey Traction Co., Prosecutor, v. Camden Public Works*, 56 N. J. L. 431, 29 Atl. 163. The rule is imbedded in our jurisprudence, and it cannot be too strongly stated or too vigorously applied. But in the cases cited the contract was made by the trustee without the knowledge or consent of the *cestui que trust*, and without subsequent ratification or adoption by which the vice in it could be cured. The object of the rule is to prevent directors from secretly using their fiduciary position for their own emolument, and not to impair the right of stockholders to enter into any lawful engagement with a full disclosure of the facts. In *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 522, Mr. Justice Dixon, in delivering the opinion of this court, says: "After an examination of all the cases cited, and such others as I have found, and a careful consideration of the principle, and the results of regarding and disregarding it, I have come to the conviction that the true legal rule is that such a contract is not void, but voidable, to be avoided at the option of the *cestui que trust*, exercised within a reasonable time. I can see no further safe modification or relaxation of the principle than this." It is a settled rule of corporation law that the personal interest of directors renders a transaction voidable at the option of the stockholders, and not void *per se*.

Under the declaration of this court in the case last cited the shareholders may, within a reasonable time after the disclosure to them of the interest of a director, elect to avoid the contract; but, if an unreasonable time is allowed to elapse without exercising such option, during which the position of directors becomes so changed that it would be inequitable to vacate the engagement, equity would refuse to interpose. *A fortiori*, when the contract is entered into by the stockholders with the directors, or when the stockholders expressly authorize the directors to enter into a contract, when the stockholders have notice of the directors' interest, the agreement will be unassailable in the absence of actual fraud or want of power in the corporation. In this case, not only was the bankers' contract made with J. P. Morgan & Co., and approved by a two-thirds vote of the shareholders, with knowledge that J. P. Morgan was one of the directors of the steel corporation,—a fact which they may be presumed to have known,—but also in the circular letter accompanying the call of the stockholders' meeting to be held on the 19th of May, it was expressly stated as follows: "To further the success of the plan, there has been formed a syndicate, including some directors, which will receive four fifths of the 4 per cent compensation to be paid under the contract with Messrs. J. P. Morgan & Company, mentioned in the notice of stockholders' meeting." The deliverance of this court with respect to the sufficiency of notice in *Gale v. Morris*, 30 N. J. Eq. 285, is as follows: "If the party notified make reasonable investigation, he obtains actual knowledge of these facts; if he choose not to make it, he is charged constructively with knowledge of them. The rule merely prohibits him from taking advantage of his own imprudence to the detriment of another. But as to the matters that lie within the notice, the principle assumes another form. It charges the party with knowledge of those matters so far as reasonable inquiry has not dissipated their credibility. If he is unwilling to act upon the facts as the notice presents them, then the law demands that he shall make proper examination, and upon the result of that examination he may safely stand. *Williamson v. Brown*, 15 N. Y. 354. But if he prefer not to examine, it must be because he is satisfied to act as if the matters disclosed in the notice were true; and he cannot afterwards complain if his rights are made to rest upon them so far as they are true. The information given by the notice is equivalent to that obtained by inquiry." In *Haslett v. Stephany*, 55 N. J. Eq. 68, 36 Atl. 498, Vice Chancellor Pitney said: "For these reasons I think that the facts above stated, which were clearly within defendant's knowledge, were sufficient to put him upon inquiry. The general doctrine that facts which are sufficient to put a party upon inquiry are sufficient to charge him with all such knowledge as he would have acquired by a proper inquiry in the ordinary course of business is, as I take it, thoroughly established in this state. It was 60 L. R. A.

so held in the court of appeals in the case just cited [*Karitan Water Power Co. v. Veghte*, 21 N. J. Eq. 463] and that case followed *Hoy v. Bramhall*, 19 N. J. Eq. 563, 97 Am. Dec. 687, in the same court. The doctrine of those cases has always been followed in New Jersey." The cases in England are to the like effect. *Phosphate of Lime Co. v. Green*, L. R. 7 C. P. 43; *May v. Chapman*, 16 Mees. & W. 355. The stockholders of the company are, therefore, chargeable with express notice that some directors were interested in the bankers' contract, and by reasonable inquiry at the meeting of May 19th they could have ascertained the names and number of such directors. They signified by their votes that they approved the contract with such full knowledge.

In *Durfee v. Old Colony & F. River R. Co.* 5 Allen, 230, Chief Justice Bigelow says: "It may be stated as an indisputable proposition that every person who becomes a member of a corporation aggregate by purchasing and holding shares agrees by necessary implication that he will be bound by all acts and proceedings, within the scope of the powers and authority conferred by the charter, which shall be adopted or sanctioned by the vote of the majority of the [shareholders of the] corporation, duly taken and ascertained according to law. This is the unavoidable result of the fundamental principle that the majority of the stockholders can regulate and control the lawful exercise of the powers conferred on a corporation by its charter." In the case of the steel corporation the right of the majority does not rest upon implication. In the by-laws adopted by the stockholders, in pursuance of authority given by the act of incorporation, such power is expressly given to the majority. In *Leavenworth County v. Chicago, R. I. & P. R. Co.* 134 U. S. 688, 33 L. ed. 1064, 10 Sup. Ct. Rep. 708, it was held that the action of the stockholders validated the contract where nine out of thirteen directors were personally interested. In the cases of *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402, and *Bjorngaard v. Goodhue County Bank*, 49 Minn. 483, 52 N. W. 48, a like infirmity in contracts was held to be eliminated by the vote of a majority of stockholders. The like view is expressed by the court of appeals of Maryland in *Shaw v. Davis*, 78 Md. 308, 23 L. R. A. 294, 28 Atl. 619, as follows: "It may be stated, as the result of all the authorities, that, whenever any action of either directors or stockholders is relied on in a suit by a minority stockholder for the purpose of invoking the interposition of a court of equity, if the act complained of be neither *ultra vires*, fraudulent, nor illegal, the court will refuse its intervention, because powerless to grant it, and will leave all such matters to be disposed of by the majority of the stockholders in such manner as their interest may dictate; and their action will be binding on all, whether approved of by the minority or not." The healing effect of the ratification by stockholders upon a voidable contract entered into by directors is fully recognized in *Grant v. United Kingdore*

Switckback R. Co. L. R. 40 Ch. Div. 135. In the case *sub judice* the contract was, in effect, made between the stockholders themselves and J. P. Morgan & Co., and it cannot be successfully assailed, without maintaining that stockholders are without capacity to make a valid contract with the directors of their company. It would be manifestly contrary to fair dealing and good faith to permit stockholders to invite directors to enter into an engagement, and, after the directors had put themselves in a position in which the contract could be enforced against them, to permit the stockholders to deprive them of the benefits of it. In my investigation no case has been found which will justify such a result. In the proper application of a legal rule, it cannot be necessary, in order to do justice to one party, to do manifest injustice to the other. Such inequity would condemn the application of the rule, not the rule itself.

On the ground which has been discussed, upon the facts presented, the complainant's case is without support in law. He made no inquiry, did not attend the meeting, and now attempts to deprive the two thirds of the stockholders who did attend the May meeting of the benefit of a contract which they then approved, and which, as has been held in the *Berger Case*, the corporation had power to make. As was declared in that case (citing *Ellerman v. Chicago Junction R. & Union Stockyards Co.* 49 N. J. Eq. 217, 23 Atl. 287), individual stockholders cannot question, in judicial proceedings, corporate acts of directors, if the same are within the powers of the corporation, and in furtherance of its purposes, are not unlawful or against good morals, are done in good faith and in the exercise of an honest judgment. Much less can a shareholder challenge like action taken by a majority of his costockholders.

The remaining grounds upon which the complainant rests his claim to relief relate to the act of 1902. This act, as this court adjudged in the *Berger Case*, is a restraining act, and required a due observance of its provisions by the steel company as a condition precedent to the right to enter into the conversion scheme. The first alleged infirmity relied upon by the complainant is that dividends were not made in conformity with the requirement of the act of 1902, which is a supplement to the general corporation act. The language of the act with respect to this condition is: "Every corporation organized under this act . . . that shall have issued preferred stock entitling the holders thereof to receive dividends at a rate exceeding 5 per centum per annum, and that shall have continuously declared and paid dividends at such rate, on such preferred stock, for the period of at least one year next preceding the meeting." The amended certificate of incorporation of the company provided that "the holders of the preferred stock shall be entitled to receive, when and as declared, yearly dividends at the rate of 7 per cent per annum, payable quarterly on dates to be fixed by the by-laws." It is ad-

mitted that a dividend of 1½ per cent was declared by the company for the three months beginning on the 1st of April, 1901, and ending on the 1st of July, 1901; that a like dividend was declared for the three months beginning July 1, 1901, and ending October 1, 1901; that a like dividend was declared for the three months beginning October 1, 1901, and ending January 1, 1902, and that a like dividend was declared for the three months beginning January 1, 1902, and ending April 1, 1902,—all of which dividends were paid by the company to the stockholders within the time fixed by the by-laws and before the meeting of May 19, 1902. This provision in the act of 1902 was drafted in contemplation of the 18th section of the corporation act of 1896, giving power to create preferred stock, and prescribing that "the holders thereof shall be entitled to receive, and the corporation shall be bound to pay, thereon, a fixed yearly dividend to be expressed in the certificate not exceeding 8 per centum, payable quarterly, half yearly, or yearly, before any dividends shall be set apart or paid on the common stock, and such dividends may be made cumulative." The dividends on the preferred stock were, by the amended certificate of incorporation of the steel company and the by-laws, made payable quarterly, were cumulative, and to be paid before any dividend was paid on the common stock. A dividend on the preferred stock might have been passed, and it was, therefore, intended by the act of 1902 to require, in compliance with § 18, that, before its provisions could be taken advantage of, the company must have paid a dividend at the rate of 7 per cent for the full year next preceding the meeting to retire the preferred stock; and it was a compliance with that section whether the dividend was paid quarterly, half-yearly, or at the end of the year. The dividend required by the 18th section is a yearly dividend of 7 per cent, and it was paid in four quarterly payments.

The vice chancellor held, in construing this legislation, that, if the dividend had been paid annually, there must have been two dividends of 7 per cent each, covering two previous years, to make the payment continuous; that, if the dividends were paid half-yearly, there must have been three payments of 3½ per cent each, covering eighteen months, in order to make the payment continuous; that, if paid quarterly, as in this case, there must have been five payments of 1½ per cent each, covering fifteen months to satisfy the statute; and so, if the dividends had been paid monthly, there must have been thirteen dividends covering a period of thirteen months. The mere statement of this view is destructive of it. Thus interpreted, the law would provide no fixed, determinate, uniform time during which dividends must be paid, but would leave it optional with the corporation to get the benefit of the law by making dividends so payable that a period either of two years or only thirteen months need be covered. As to a corporation making dividends payable

annually, one rule would prevail, while to a corporation paying quarterly a different rule would apply. The very essence of a law is that it is uniform and universal within the territory to which it relates. It must apply in the same way to everyone. It cannot be varied at the will of the corporation. The construction adopted in the court below is clearly erroneous, and gives a meaning to the word "continuous" which is wholly unwarranted. It, of course, must not be given its strictest meaning, which would require a never-ceasing payment of dividends, like the continuous flow of water. Applied to dividends, it means, "during one year," which is equivalent to the words of the act "for the period of at least one year." The act does not prescribe that 7 per cent dividends shall have been continuously declared and paid for the period of at least one year next preceding the meeting, but that dividends at the rate of 7 per cent shall be paid. The force of the word "continuously" evidently is that dividends at the rate of 7 per cent must be paid for a continuous period of one year, so that, where dividends are paid quarterly, a quarterly dividend cannot be passed without losing the benefit of the act. The payment of dividends is to be for the period of one year. The dividends are to be paid out of surplus over and above the amount of the capital stock and outstanding indebtedness, and are to be made for the "period." When a dividend is made, it is made as a dividend for the period of three months then previously elapsed. A dividend for a future period has not been known in the business history of corporations. When a dividend is paid, it is paid for the period then elapsed. In this case a dividend at the rate of 7 per cent was paid for the first quarter, and a like dividend for the second, third, and fourth quarters of the year next preceding the meeting of the stockholders. If that was not a payment continuously at the rate of 7 per cent for one year next preceding the meeting, for what year was it a continuous payment? The meaning of the draftsman of this provision may be further elucidated by dropping out of it the words "for the period of at least one year next preceding the meeting." The act will then read: "A corporation that shall have continuously declared and paid dividends at the rate of 7 per cent on such preferred stock." This language is ambiguous. It might be construed to mean a corporation that had paid three consecutive dividends at the rate of 7 per cent that would be a continuous payment. It might also be held to mean a corporation that had continuously declared and paid dividends during the entire period of its corporate existence. To exclude this uncertainty, the words were added, "for the period of at least one year next preceding the meeting." The dividend was required to extend over the entire preceding year, and the failure to pay the dividend for any one of the quarters would break the continuity, and require the company thereafter to make four consecutive

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quarterly dividends of 1½ per cent each to make the act of 1902 available.

The cases as to publications in newspapers, cited and relied on by the vice chancellor as his only authority, are not in point. Our laws require publication of notice of sale "at least four weeks successively, once a week, next preceding the time of sale." It has been uniformly and properly held to require a publication for four full weeks once a week, and that the publication must begin four weeks next before the day of sale, and that four full weeks must elapse between the first publication and the day of sale. The statute requires that there shall be four weeks' notice of sale, and, if sale can be made after four weekly publications, it might be made after the expiration of only twenty-two days. A publication has no relation to a previously elapsed period. It is a publication only on the very day it is made, while a dividend relates to and is for a time previously run. All that the act of 1902 requires with respect to payment of dividends is that the provision of § 18 of the general corporation law shall be complied with.

The other objections urged as to the want of conformity by the defendant corporation with the requirements of the act of 1902 have been duly considered, and are deemed to be without merit. There is no ground presented by the case or agitated in the briefs of counsel which will justify the interposition of a court of equity to arrest the proposed action of the defendants.

The decree below should be reversed, and the injunction dissolved, with costs in this court and in the court below.

John Vernou BOUVIER, Jr.,

v.

BALTIMORE & NEW YORK RAILWAY COMPANY, *Plff. in Err.*

(67 N. J. L. 281.)

*1. The "Act to Authorize the Transfer of Estates in Expectancy," approved March 14, 1851 (1 Gen. Stat. p. 881), is still

*Headnotes by COLLINS, J.

NOTE.—*Transferability of a right of entry for condition broken.*

I. Nature of the right, 750.

II. Rule against transferability.

a. Before breach of condition, 754.

b. After breach of condition, 758.

III. Exceptions to rule.

a. Statutory, 760.

b. After breach where the law against maintenance is not in force, 762.

c. As to devises, 762.

d. Easements on condition, 764.

IV. Summary, 764.

I. Nature of the right.

As a preliminary to collation of the cases holding that a right of entry for breach of a condition subsequent is or is not transferable, it may be useful to call attention to the nature

available under that title if necessary, notwithstanding its attempted transfer to "An Act Respecting Conveyances" (Pamph. L. 1898, p. 876, § 19), and its inclusion in "An Act to Repeal Sundry Acts Respecting Conveyances" (Pamph. L. 1898, p. 711).

2. Such act may not extend so as to authorize transfer of a right of entry, for condition broken, after the breach; but, independent of statute, such a right is, in this state, transferable, after breach, because the policy that in England forbade a transfer, namely, the prevention of maintenance, is not in force here. The case of Schomp v. Schenck, 40 N. J. L. 195, 29 Am. Rep. 219, approved.
3. A right of entry for condition broken, held by two or more persons, will not support partition or alternative judicial sale of the land involved.
4. One of two or more persons holding a vested right of entry for condition broken may, without actual entry, main-

tain ejectment for the land involved. *Quere*, can the defendant effectually object to non-joinder of the other holders by giving notice under § 37 of the practice act?

5. Except as above modified, the case of this title in 65 N. J. L. 814, 47 Atl. 772, approved.

(March 17, 1902.)

ERROR to the Supreme Court to review a judgment in favor of plaintiff in an action brought to recover possession of certain real estate. *Affirmed*.

Statement by Collins, J.:

The plaintiff below recovered verdict and judgment in ejectment, and error is assigned upon exceptions sealed at the trial. Both parties claim title under the same deed, the defendant by reason of the conveyance, and

of the right itself, and to the qualities that affect the question of its transferability.

In a well-considered article on *Estates upon Condition*, 1 Am. Law Rev. 265, the elementary principal is stated as follows: "The old, common-law limitation upon conditions required, only, that they should not be repugnant to the grant, and should be reserved to the grantor and his heirs. A reservation to a stranger, after creation of an estate in fee upon condition, would have violated the rule which prohibits the creation of an estate in fee upon a fee, and would be void. It was a necessary consequence that the possible future interest which, on breach of condition, would exist in the grantor, was not assignable or devisable, but remained in him and his heirs in strict privacy. The interest which remained after the creation of an estate in fee upon condition was not held to be an estate in the land, but only in the condition,—a future possible right of entry and action which the rule against maintenance prohibited to be assigned or devised."

A condition subsequent in a conveyance in fee can only be reserved for the benefit of the grantor and his heirs, and no stranger can take advantage of a breach of the condition. *Fonda v. Sage*, 48 Barb. 109; *Roble v. Sedgwick*, 4 Abb. App. Dec. 73; *Skipwith v. Martin*, 50 Ark. 141, 6 S. W. 514; *Norris v. Milner*, 20 Ga. 563; *Boone v. Clark*, 129 Ill. 466, 5 L. R. A. 276, 21 N. E. 850; *Throp v. Johnson*, 3 Ind. 343; *Cross v. Carson*, 8 Blackf. 138, 44 Am. Dec. 742; *McElroy v. Morley*, 40 Kan. 76, 19 Pac. 341; *Warwick v. Andrews*, 25 Me. 530; *Davis v. Memphis & C. R. Co.* 87 Ala. 641, 6 So. 142; *King's Chapel v. Pelham*, 9 Mass. 501; *Schulenberg v. Harriman*, 21 Wall. 44, 22 L. ed. 551; *Holden v. Joy*, 17 Wall. 211, 21 L. ed. 523; *Dewey v. Williams*, 40 N. H. 222, 77 Am. Dec. 708; *Jones v. St. Louis, K. C. & N. R. Co.* 79 Mo. 92; *Gorman Min. Co. v. Alexander*, 2 S. D. 557, 51 N. W. 346.

Bartlett conveyed to Fox with covenant by Fox for himself, his heirs and assigns, that no structure should be erected upon the land whereby the view or prospect of the bay from any part of the premises of Green should be obstructed or impaired, and, in case of breach, the premises were to be forfeited to Bartlett for the use of Green. The consideration for the deed to Bartlett had been paid by Green. It was held that this was not merely a covenant, but a conveyance upon condition which was valid, Green not being a stranger. *Gilbert v. Peteler*, 38 N. Y. 165, 97 Am. Dec. 785.

Where Hogan made a contract with Mark to convey land to the latter upon condition that no part thereof "should ever be used or occu-

pied as a tavern," and thereafter Hogan conveyed to trustees, subject to this agreement, and subsequently Hogan and the trustees united in a deed to Mark subject to the condition, and thereafter the trustees reconveyed to Hogan all the property that had not been transferred by them,—it was held that the condition was reserved to Hogan, and not to the trustees, and that Hogan was not a stranger to the title. *Post v. Well*, 8 Hun. 418. This judgment was affirmed by the court of appeals, but upon the ground that the clause in question did not constitute a condition subsequent, but was a covenant created for the benefit of adjoining property. 15 N. Y. 361, 5 L. R. A. 422, 22 N. E. 145.

A right of re-entry for condition broken "is not a reversion; nor is it the possibility of reversion; nor is it any estate in the land. It is a mere right or chose in action, and, if enforced, the grantor would be in by the failure of a condition, and not by a reverter. . . . When property is held on condition all the attributes and incidents of absolute property belong to it until the condition be broken." *De Peyster v. Michael*, 6 N. Y. 467, 506-507, 57 Am. Dec. 470.

"A mere failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and, until they do so by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate. This was the common law, and it has not been altered by statute so as to give a right of entry to an assignee in any instance not coupled with a reversionary interest, as in the cases of estates for years and for life, except in cases of leases, or, rather of grants in fee reserving rent. . . . But where a fee simple without a reservation of rents is granted upon a condition subsequent, as in this case, there is no estate remaining in the grantor. There is simply a possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone." Such an interest is not an "expectant estate" under the Revised Statutes of New York, which make expectant estates descendible, devisable, and alienable in the same manner as estates in possession (1 Rev. Stat. 725, § 35). "He [the grantor in a conveyance upon condition] has no present right or interest whatever, and no more control over it than a son has in the estate of his father who is living. . . . A voluntary reconveyance would be hardly more improbable than a reverter." *Nicoll v. New York & E. R. Co.* 12 N. Y. 121, 131, 134.

The interest of a grantor in a conveyance

the plaintiff by reason of an alleged breach of its conditions.

The following are the salient facts involved: The Baltimore & New York Railway Company, the defendant below, was incorporated under the general railroad law on November 19, 1888, for the purpose of constructing a railroad about 6 miles long through Union county, from near where the Central Railroad of New Jersey crosses the Rahway river to the railroad bridge across Arthur Kill. Its filed route of 100 feet in width crossed for about a quarter of a mile a tract of about 100 acres of land, in the township of Linden, owned and possessed by Frederick A. Reichard and William H. Hume. On March 22, 1889, these landowners, in consideration of the covenants of their grantee and of \$1,199, conveyed to the railway company, its successors and assigns,

so much of their land as was within such filed route, and an adjoining triangle of 60/100 of an acre at the northwest end of the strip,—about 5½ acres in all. The deed of conveyance contained this provision: "And in consideration of the premises it is hereby mutually agreed and covenanted by the respective parties hereto that the grant of land herein contained is made and received upon the following conditions; that is to say: First, that the said party of the second part shall make, erect, and build, within three months after the completion of laying the tracks over the route of said railway company, and thereafter maintain, a passenger station upon the aforesaid piece of land, where the same at the northwesterly part thereof is more than 100 feet wide; second [provides that no building shall be erected on the land conveyed except for rail-

upon condition" becomes a mere possibility of reversion." *Towle v. Remsen*, 70 N. Y. 303.

"When a conveyance in fee is made upon a condition subsequent the fee remains in the grantee until a breach of condition and a re-entry by the grantor. . . . The possibility of reverter merely is not an estate in the land, and, until the contingency happens, the whole title is in the grantee." *Vall v. Long Island R. Co.* 106 N. Y. 283, 287, 60 Am. Rep. 449, 12 N. E. 607.

In *Uplington v. Corrigan*, 151 N. Y. 143, 37 L. R. A. 794, 45 N. E. 359, the court says, in describing the right of entry: "At common law it was only a possibility of reverter, and not a reversion." The interest of the heirs of the grantor is described as "the bundle or aggregate of the rights which resided in and survived the death of the grantor or ancestor."

In *Ohio Iron Co. v. Auburn Iron Co.* 64 Minn. 404, 67 N. W. 221, the court says: "The right of re-entry is not an estate or interest in land; nor does it imply the reservation of a reversion. It is a mere chose in action, and, when enforced, the grantor is in through the breach of the condition, and not by reverter."

Where, upon foreclosure of a mortgage, certain parties in interest subsequent to the mortgage claimed that the title of the mortgagor as to three fourths of his interest in the property was subject to a condition subsequent, the court says: "Such a condition, however, defeats the estate to which it is annexed only at the election of him who has a right to enforce it. No one entitled to enforce the condition has sought to defeat the estate granted to Francis Strong, and, until this is done, the mortgagee has a right to enforce his security to the same extent as if a condition were not contained in the deed." *Hayward v. Kinney*, 84 Mich. 591, 48 N. W. 170.

Counter to the weight of authority upon the principle stated in the case last cited would seem to be the case of *Dolan v. Baltimore*, 4 Gill, 394. There a grantor had conveyed land to trustees in trust for the erection of a Roman Catholic church upon part of the land, and for the use of the remainder of the lot as a burying-ground, with a condition subsequent that, if the church should not be built and the ground so used, the deed should be void. The whole of the land was used for a burying-ground, and the church was built upon other land at some little distance. After the death of the trustees the priest of the church and a member of his congregation brought an action against the city of Baltimore to restrain a sale of the land for default in payment of an assess-

ment for paving the street. The court held that it appeared from the bill that there had been a breach of the condition subsequent, and that, in the absence of allegations and proofs of waiver by the grantee or his heirs, the estate would be held to have reverted to them, and that, therefore, plaintiffs had no standing in court for relief in equity.

The Massachusetts courts seem inclined to attribute more of substance to the grantor's right of entry than do the courts of most other states.

In a case where what was claimed to be a condition subsequent was held to be a conditional limitation, the court notes, as one of the distinguishing qualities of an estate on condition subsequent, that it "leaves in the grantor a vested right which, by its very nature, is reserved to him as a present existing interest, transmissible to his heirs," and says: "A grant of a fee on condition only creates an estate of a base or determinable nature in the grantee, leaving the right or possibility of reverter vested in the grantor." *Church in Brattle Square v. Grant*, 3 Gray, 142, 148, 63 Am. Dec. 725.

In *Dunlap v. Bullard*, 181 Mass. 161, it is held that the considerations laid down in *Austin v. Cambridgeport*, 21 Pick. 215, III. c. 4, *infra*, and *Church in Brattle Square v. Grant*, 3 Gray, 142, 63 Am. Dec. 725, *supra*, to the effect that where an estate is held by the grantee upon condition subsequent there is left in the grantor a contingent reversionary interest, "are equally applicable whether the estate subject to the condition subsequent is an estate in fee or an estate for life or years. They apply where, by the terms of an instrument which purports to be an underlease, there is left in the lessor a contingent reversionary interest to be availed of by an entry for breach of condition which restores the sublessor to his former interest in the premises." Accordingly, it is held in that case that, where a lessee for years sublets the premises for the entire remainder of the term, but with an increased rent payable to the sublessor, and, as the court says, "what is more in point, the right is reserved to the lessor to enter and expel the lessee for nonpayment of rent or breach of any of the covenants in the lease," it is a sublease leaving part of the "estate of the term" in the sublessor, and preventing that privity of estate between the original lessor and the sublessee which would have resulted in case of an assignment of the whole of the term.

To similar effect is the case of *Patten v. Dedson*, 1 Gray, 325.

Notwithstanding the strong current of au-

road purposes]; third, that the said party of the second part shall forthwith, from the date hereof, begin to, and lay, make, construct, and keep in repair, and forever thereafter maintain, a double-track railway upon and over the said strip of land of 100 feet in width, hereinbefore described; fourth [provides for re-entry by the grantors, their heirs, executors, administrators, or assigns, in case of refusal or neglect] to lay, make, construct, and keep in repair, and thereafter maintain, a double-track railway over and upon said lands [or] to locate, build, and maintain thereafter a passenger station upon the portion thereof, as above described and required." Shortly after this conveyance the grantee began the construction of a railroad upon its filed route, and on July 1, 1890, had laid over its whole length one continuous track, upon

which trains were run, and a second track from its western terminus for a distance of about 3,900 feet. The roadbed was graded throughout of sufficient width for two tracks, except for about 4,000 feet from the easterly terminus, where a single-track trestle was built. Between July 1, 1890, and December 1, 1891, the second track mentioned was continued easterly about 2,200 feet, extending over about two thirds of the length of the strip acquired from Reichard and Hume; and within the same time there was also constructed a second track, from a point about 4,000 feet west of the bridge over Arthur Kill for a distance of 3,355 feet to the westward. Since then there has been no railroad construction except for increasing the storage yard at the western terminus, and for connecting near there with the Lehigh Valley Railroad. Since July 1, 1890,

thority in New York to the effect that a reservation of a right of entry for condition broken leaves no fragment of the estate in the grantor, there are two cases in the court of appeals in that state which turn upon the distinction between a sublease and an assignment of the term of the lessee, which seem to be more nearly in accord with the Massachusetts doctrine than with that elsewhere maintained in New York. One of these cases is *Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407, where an instrument executed by a lessee, purporting to lease to another the whole unexpired term demised to the original lessee, was held to be a sublease, and not an assignment. The court says: "It is in the form of a lease. It reserves to the Bronners [the original lessees] rent at a new rate and at a new time of payment. It stipulates for a right of entry on nonpayment of rent and on the breach of certain conditions contained in it. It provides for a surrender of the premises to them on the expiration of the term. Thus, the Bronners did not part with their whole interest in the premises and in the lease thereof to them."

This doctrine is reaffirmed in *Ganson v. Tift*, 71 N. Y. 48. In this case it was urged that the original lessee by the execution of what purported to be a sublease to others had assigned his entire interest therein, inasmuch as the sublease was to terminate at the same time with the original lease. The court says: "The instrument referred to contained a provision reserving a right of re-entry for nonpayment of rent or a breach of other conditions, and that, at the expiration of the term, or other sooner determination of the demise, the lessee should quietly surrender and yield up possession of the demised premises to the lessor. This constituted a sublease of the premises, and not an assignment of the entire term which transferred any right of action against the defendant."

The comments of Judge Finch in a dissenting opinion in *Stewart v. Long Island R. Co.* 102 N. Y. 601, 617, 55 Am. Rep. 844, 8 N. E. 200, throw light upon the doctrine laid down in the two cases last cited. "The characteristic difference between an assignment of his lease and an underletting by the original tenant resides in the inquiry whether, as a result of the transaction, the primary lessee has transferred his whole and entire estate, and completely parted with his title, or has retained in himself some fragment or shred of his estate, either substantial, or even formal and technical. An underletting implies a constituted relation of landlord and tenant between the parties contract-

ing; and that, in turn, the existence in the landlord of an estate superior to the leasehold and out of which the latter is carved; for there can be no tenure held of one whose title is utterly destroyed. This rule prevails over the apparent intention, not because that intention ceases to be the test and standard of interpretation, but because an impossible intention is never presumed in preference to one possible and operative between the parties. The rule in its origin under the feudal system had a substantial and beneficial force. To the superior lord a service of fealty was due from the tenant in virtue of his tenure, and, if the lessee could part with his whole estate to one holding only under him, the service of fealty was gone, and so, in that case, the new tenant was deemed to hold under the paramount title as an assignee of the lease, put in the place and room of the original tenant, and bound by his covenants to render his service. Of course, that useful result has gone out of the doctrine, and it remains with us simply a rule of legal logic, much less deserving the power to override and pervert the discovered intention of the parties. As a consequence, a plain tendency to enforce that intention, even upon very narrow and technical grounds, has been developed. Originally, a reversion in the primary lessee of some fragment of his estate was needful to support a sublease. It was said that it might be for a day, an hour, or even a minute, but must nevertheless be, and leave in the primary lessee a reversion having a tangible existence. But that reversion now may be purely technical, and the product of reasoning rather than of substantial fact. It has been held that where the original tenant transferred for the identical term of his own lease, but the transferee covenanted to surrender to him, a reversion was implied from that fact, although no man can measure it as a tangible thing, since both surrenders, that of the subtenant to the primary lessee, and that of the latter to the original landlord, are due under the contracts at the precise moment of time. (*Collins v. Hasbrouck*, 56 N. Y. 157, 15 Am. Rep. 407; *Ganson v. Tift*, 71 N. Y. 48.) Indeed, the cases cited seem to go further than that, and to hold that the reservation of a right of re-entry for breach of condition, and even the reservation of a new rent, makes the instrument a sublease."

The prevailing opinion, however, in *Stewart v. Long Island R. Co.* 102 N. Y. 601, 617, 55 Am. Rep. 844, 8 N. E. 200, denies that, as between the original lessor and the sublessee, or assignee, the mere reservation of a right of en-

the company has continuously operated its railroad in carrying coal and freight. It has never operated it as a passenger road or carried passengers except upon excursions. It has never constructed any passenger stations. The portions of a second track constructed have been in constant use as sidings. On June 28, 1893, by deed of that date, Frederick A. Reichard conveyed to William H. Salter his undivided half part of the 100-acre tract first mentioned, subject to the conveyance to the railway company, and assigned to the grantee all his rights under that conveyance "of, in, and to all and every of the covenants, agreements, and conditions of the defendant therein specifically set forth, and the land therein described to which the same was subject." On October 16, 1894, William H. Salter conveyed and assigned to Edith M. Sergeant

and A. Paluel De Marmon the premises and rights conveyed and assigned by the deed last stated. On October 9, 1896, under decree in chancery made June 9, 1896, on a bill of partition of the whole property, wherein Andre Paluel De Marmon was complainant, and Edith M. Sergeant and William H. Hume were defendants, Roderick Byington, a special master in chancery, after public sale, gave a deed purporting to convey to Edith M. Sergeant and Andre Paluel De Marmon the 5½-acre tract conveyed by Reichard and Hume to the defendant. On October 16, 1899, Edith M. Sergeant and her husband and Andre Paluel De Marmon gave a bargain and sale deed purporting to convey said tract and the grantors' rights therein to John Vernou Bouvier, Jr., the plaintiff below.

The facts above stated are condensed from

try in the original lessee for nonpayment of rent will have the effect to prevent the instrument from operating as an assignment of the entire interest in the original lessee, and therefore the case, while not distinctly overruling *Collins v. Hasbrouck* and *Ganson v. Tift*, tends to restrict their authority upon this point and to be more in harmony with the other cases already cited relating to the qualities of a right of entry.

The case of *Sexton v. Chicago Storage Co.* 129 Ill. 318, 21 N. E. 920, is to the same effect as *Stewart v. Long Island R. Co.* 102 N. Y. 601, 55 Am. Rep. 844, 8 N. E. 200, in holding that, where a lessee for years assigns his entire term, though it be by what purports to be a stipulation reserving a different rent from that in the original lease, and a right of entry in the assignor for nonpayment of rent, no estate is left in the assignor, only a right of action to enforce covenants.

The transfer by a lessee of the entire remainder of his term, though by an instrument in form a sublease, is in fact an assignment, and the assignee is liable to the original lessor on the covenants contained in the lease. *Constantine v. Wake*, 1 Sweeney, 239.

II. Rule against transferability.

The principle is stated in 2 Cruise, Dig. p. 44, as follows: "It is a rule of common law that no one can take advantage of the breach of a condition expressed but parties and privies in right and representation, as heirs, executors, or administrators of natural persons and the successors of bodies politic. So that neither privies nor assignees in law, as lords of escheat, nor privies in estate, as persons in remainder or reversion, could formerly enter for a condition broken."

This rule applies both before and after breach of the condition, and in most of the cases where the rule is held to be applicable no distinction, based upon the time of the breach, is made. But, as stated in Hare's note to *Dumport's Case*, referred to in *Bouvier v. Baltimore & N. Y. Ry. Co.*, the reasons for the rule in the two cases are different, there being in the one case a mere possibility, no more coupled with an interest than the possibility that a son will inherit from his living father, and therefore in its nature not transferable, while in the other case the obstacle in the way of a transfer is the policy against maintenance. Therefore, in citing the cases, it will be convenient to separate them into the two classes.

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a. Before breach of condition.

Nicoll v. New York & E. R. Co. 12 N. Y. 121, was an action in ejectment. The grantor had conveyed to the Hudson & Delaware Railroad Company a strip of land running through his farm for the right of way of the railroad, the grant being upon condition that the company should construct its railroad within the time prescribed by the act incorporating the same. Before breach of this condition plaintiff took title to the farm subject, only, to such rights as the railroad company then had to a portion thereof sufficient for the track of its road. The defendant claimed under the Hudson & Delaware Railroad Company. In holding, as stated under I., *supra*, that the grantor had before breach only the possibility of a reverter, the court illustrated as follows: "Suppose A sell to a banking corporation in fee, by express words, a lot of land on which to build a banking house. If the bank does not sell that land, but retains it till the expiration of its charter, it will revert to him, or, if he be dead, to his heirs. Now, what estate had A after he had conveyed in fee to the bank? None whatever. He had only a possibility of a reverter,—a naked and very remote possibility, but nothing that he could convey to an assignee. He had sold his entire interest, and received the full value of it. The presumption was it would never return. The law would not favor its return, and the grantee, who enjoyed the entire estate and upon whose violation alone it could return, would not be likely to so far neglect his own interests as to permit its return. A voluntary reconveyance would be hardly more improbable than a reverter. Just such an estate, and no other, had Dederer in this land when he conveyed to the plaintiff. In both cases the estates granted were upon condition. In the case of the bank, the condition was implied in law. (*Angell & A. Corp.* 128.) In this case, the condition was expressed."

In *Rice v. Boston & W. R. Corp.* 13 Allen, 141, an action to recover land conveyed by the plaintiff's father to the defendant upon condition, the grantor had died before any breach of the condition. Before his death the grantor had conveyed to his son, the plaintiff, a large tract of land, the description of which included the premises in question, by deed of warranty. Plaintiff alleged a breach of the condition after his father's death, and brought the action, claiming a right of entry as his father's heir. The court held that, by reason of the conveyance from the father to the son, the possibility of reverter was extinguished. The court refers

a written stipulation of the attorneys of the parties, produced and offered at the trial. The only additional evidence was testimony for the defendant, in attempted excuse for the noncompletion of the contemplated double-track railway. The trial judge was, among other things, requested to charge the jury that if they should find either of the conditions of the deed of March 22, 1889, was broken before Salter took his deed, or before his grantees took theirs, or before the master's sale and conveyance, or before the deed to the plaintiff was given, then, in either case, the plaintiff was not entitled to maintain his action; and, further, that the right of entry for condition broken was not subject to partition, and the land in possession of the defendant was not subject to be sold in such a suit. He refused so to charge, and directed the jury as follows:

to the rule as stated in Co. Litt. 214a: "Nothing in action, entry or re-entry can be granted over" and to the reason given for it, to wit: "For avoiding maintenance, suppressing of rights, and stirring up of suits," which would happen if men were permitted "to grant before they be in possession." It is held, moreover, that the deed from father to son was not simply void so as to leave the title in the grantor to descend to his heir, the plaintiff, but that, by virtue of the penal statutes against maintenance and champerty in England, the last of which, 32 Hen. VIII. chap. 9, expressly prohibited the granting or taking any such right or interest under penalty, both on the grantor and the buyer or taker, of their forfeiting the whole value of the land or interest granted, the right of entry itself was extinguished. Upon this point the court says: "Neither party to a conveyance which violates the rule of law can allege his own unlawful act for the purpose of claiming an advantage to himself. The grantor of a right of entry cannot be heard to say that his deed was void, and that the right of entry still remains in him, because this would be to allow him to set up his own turpitude in engaging in a champertous transaction as the foundation of his claim. His deed is, therefore, effectual to estop him from setting up its invalidity as the ground of claiming a right of entry which he had unlawfully conveyed. Nor can the grantee avail himself of the grant of the right of entry for a like reason. He cannot be permitted to set up a title which rests upon a conveyance which he had taken in contravention of the rules of law. Both parties are, therefore, cut off from claiming any benefit of the condition. The grantor cannot aver the invalidity of his own deed, nor can the grantee rely on its validity. Both being participators in an unlawful transaction, neither can avail himself of it to establish a title in a court of law."

The action in *Denver & S. F. R. Co. v. School Dist. No. 22*, 14 Colo. 327, 23 Pac. 978, was ejectment. There one Magnus had conveyed to plaintiff upon a condition subsequent that the property should not cease to be used for the purposes of a school. Before breach of the condition Magnus had conveyed to one under whom defendant claimed. The court says: "As Magnus had conveyed his entire estate, it is clear that nothing remained to him which he could convey to Peabody unless the limitation was such as to leave him vested with an estate in reversion which could be the subject of grant. Such reversion could not exist, however, unless, from the nature of the limitation, it ap-

"If you find that the company has failed to complete the laying of a double-track railway over the land in question in accordance with the conditions of the deed within a reasonable time, and that such reasonable time had elapsed before this suit was brought, your verdict should be for the plaintiff; otherwise it should be for the defendant." The jury rendered a general verdict in favor of the plaintiff.

Mr. Edward Q. Keasbey, for plaintiff in error:

Conditions subsequent, by which a vested right is defeated, are *stricti juris*, and must be construed strictly against the grantor; and the breach of the conditions must be clearly shown in order to obtain a judgment against the grantee in possession.

1 Sheppard's Touchstone, 133, § 8; *Den*

pears that the event upon which it was based in the nature of things must happen. That event was the abandonment of the use of the premises for school purposes. It is manifest that such an event might never occur. The premises might always be used for the purpose for which they were conveyed. This being true, Magnus was not vested with a reversion or an estate in reversion, and there was nothing left in him save the mere possibility of a reverter. No interest in the estate, therefore, could pass by his deed to Peabody, and, as a matter of course, as Peabody took nothing he could convey nothing either to McGavock or to the appellant. Whether these deeds might not operate as an assignment of the reversion or the possibility of reverter it is unnecessary to determine. It is sufficient to say that they did not convey the title, or vest the grantees named in them with any right or interest, either present or contingent, in the body of the land itself."

Where the city of New York had conveyed land on condition, with a proviso that such condition should not be released except on consent of a third party, and the grantee conveyed subject to the condition, and thereafter, and before breach of the condition, the city by ordinary deed without reference to the condition, conveyed to the grantee from the first grantee, it was held that the condition was gone. The court says: "It is well settled that where a deed of property in fee is made with a condition subsequent imposed and a right of re-entry reserved to the grantor, the right of re-entry is a mere right in action, and not an interest in the land; that it is not assignable nor grantable; that it descends to the grantor's heirs, and does not pass by a conveyance. And any deed by which the original grantor or his heirs undertakes to transfer, assign, or grant the land, or the reversion of it, while it may be ineffectual to convey title to the grantee, does operate to put an end to the rights of the grantor." *Berenbrock v. St. Luke's Hospital*, 23 App. Div. 339, 48 N. Y. Supp. 863, Appeal dismissed, 155 N. Y. 655, 49 N. E. 1093.

The owner of a tract of land conveyed one lot on the condition that the grantee should not neglect or refuse to maintain a boundary fence between the lot and the remainder of the tract. The grantor afterward conveyed the remainder of the tract to C., who himself removed the fence and mortgaged the land to his grantor, who entered for breach of condition in the original deed of the lot. The court seems to have treated the condition as in the nature of an easement for the benefit of the grantor's es-

ex dem. Southard v. Central R. Co. 20 N. J. L. 13; *McKelway v. Seymour*, 29 N. J. L. 321; *Ludlow v. New York & H. R. Co.* 12 Barb. 440; *Hoyt v. Kimball*, 49 N. H. 322.

The grantors are not entitled to be restored to the possession of the land without tendering back the consideration money which they received.

The conditions relate to two pieces of land severally, and the breach of the condition relating to one piece does not affect the other.

Horner v. Chicago, M. & St. P. R. Co. 38 Wis. 165.

The grantors have waived the exact performance of the conditions by acquiescence for many years in the existing conditions, and the plaintiff, a stranger, cannot now demand a forfeiture.

Dumpon's Case, 4 Coke, 119, 1 Smith,

Lead. Cas. (Hare & W.) 112; *Kenner v. American Contract Co.* 9 Bush, 202.

The plaintiff has not acquired the right of re-entry for condition broken.

If the conditions have been broken at all, they were broken before the conveyance made by Reichard, one of the original grantors, to William H. Salter, June 28, 1893. The right of entry had then become a present right to bring an action of ejectment, and was no longer a future or contingent estate or right of entry for breach of condition that might occur thereafter. The right of entry for condition broken could only be exercised by the grantor and his heirs. The right was not assignable or devisable.

Co. Litt. 214c, 215a, 233b; 2 Cruise, Dig. 42; 2 Washb. Real Prop. 450; 4 Kent, Com. 124; Sheppard's Touchstone, Preston's ed. 120; *Den ex dem. Southard v. Central R.*

tate in the remainder of the tract, and held that, if it was a condition which vested in the grantor as owner of the tract, and not merely a personal covenant, it was attached to the land and passed to the grantee of the tract, and that such grantee, in removing the fence, had waived the condition, and that it could not be revived by the grantor. The decision, however, does not stand upon this ground alone, for it was held that without demand or notice to maintain the fence there had been no breach of the condition. *Merrifield v. Cobleigh*, 4 Cush. 178.

Where a grantor conveyed upon condition, and took back a mortgage, and in the usual form transferred the mortgage and "the real estate thereby conveyed," and thereafter entered for condition broken, his title was held to be superior to that of the assignee of the mortgage. *Merritt v. Harris*, 102 Mass. 326.

Where the owner of a tract of land divided it into lots, and conveyed these lots each subject to certain conditions subsequent, and afterwards attempted to release his right to enforce the conditions with reference to one of the lots, in an action brought by the owner of an adjoining lot to restrain violation of the condition, it was held that the condition and restrictions were inserted for the benefit of the purchasers of the lots from the original owner, and for the benefit of the grantees of such purchasers, and that, therefore, the restrictions could be enforced in equity by and against such trustees. The court says: "The right of entry on breach of condition cannot be assigned to a stranger, and, if the conditions and restrictions were for the benefit of purchasers and their grantees, these conditions and restrictions could not be released to a purchaser or his grantee without the assent of the other purchasers or their grantees for whose benefit they were imposed." *Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122.

In the case of *Locke v. Hale*, 165 Mass. 20, 42 N. E. 331, one Johnson, who owned and occupied as a residence land on Pleasant street, conveyed land on the opposite side of the street to Taylor "upon the conditions that" only buildings of a certain class should be built thereon, and that dwelling houses should be set back a certain distance from the street line, "with reversion to the grantor, his heirs and assigns, in case of any breach of such condition." The grantee of this land holding by warranty deed from the grantee of Taylor brought the action for breach of the covenant against encumbrances. The court held that the provisions could not be construed as subjecting the lot conveyed to an easement or servitude in favor of the 60 L. R. A.

premises occupied by Johnson as a residence. The court says: "A more natural construction would be, it seems to us, that it was expected that other lots besides the one purchased by Taylor would be sold out of the tract of which that was a part, and that the condition or restriction which was inserted in the deed to him was one which it was expected would be inserted in other deeds for the common benefit and advantage of parties so purchasing, and their successors in title. Whether regarded as a condition or restriction, it constitutes an encumbrance. . . . The defendant has placed some stress on the use of the word 'assigns' in the provision creating the encumbrance. The right of entry for breach of condition subsequent is not assignable, and, if the provision is to be regarded as creating a condition subsequent, the word was inapt. (*Hopkins v. Smith*, 162 Mass. 444, 38 N. E. 1122.) We think that, if it is not to be rejected altogether, it is to be regarded as inserted rather to show that the condition or restriction was a continuing one, than with a purpose to establish an easement or servitude in favor of the premises occupied by Johnson as a residence."

Where defendant had conveyed to one Goddard upon condition that, if defendant, his heirs and assigns, should support Goddard and his wife the deed should be void, and there had been an assignment by Goddard to plaintiffs as security for any payments by plaintiffs for the support of Goddard and his wife, in an action to recover the land for breach of condition the instrument was held not to be a mortgage, not being given as security for a debt or liquidated damages. The court says: "If the condition of the deed was broken before the assignment to plaintiffs, and the grantee in the deed had regularly entered for the breach and revested the title in himself, it would seem that the deed to the plaintiffs would be sufficient to convey to them the title to the property, and that they might well maintain this action. . . . The right to enter for condition broken, and, much more, the right of entry in case a condition should be broken at a future time, is not an assignable interest." *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700.

In the case of a deed to a son who gave back a mortgage conditioned for the support of the grantor and his wife, it was held that "the interest of the mortgagee is not assignable before breach of the condition, and no action at law can be maintained by an assignee unless where there has been an actual breach, and, perhaps, an entry for condition broken before the assignment." *Bryant v. Erskine*, 55 Me. 157.

Co. 26 N. J. L. 13; Cornelius v. Den ex dem. Ivins, 26 N. J. L. 376; Nicoll v. New York & E. R. Co. 12 N. Y. 121; Williams v. Jackson ex dem. Tibbits, 5 Johns. 489; Schulenberg v. Harriman, 21 Wall. 44, 22 L. ed. 551; Ruch v. Rock Island, 97 U. S. 693, 24 L. ed. 1101; Marwick v. Andrews, 25 Me. 523; Hooper v. Cummings, 45 Me. 359; Davis v. Gray, 16 Wall. 203-230, 21 L. ed. 447-456; Henderson v. Hunter, 59 Pa. 335; Dumpor's Case, 4 Coke, 119, 1 Smith, Lead. Cas. 8th Am. ed. 135.

This rule of the common law has been strictly maintained, except so far as it has been abrogated by statute.

Spencer's Case, 5 Coke, 16, 1 Smith, Lead. Cas. (Hare & W.) 155; Co. Litt. 214b; Nicoll v. New York & E. R. Co. 12 Barb. 460; Underhill v. Saratoga & R. Co. 20 Barb. 455; Jackson ex dem. Varick v. Wal-

dron, 13 Wend. 178; Vermont v. Society for Propagation of Gospel, 2 Paine, 545, Fed. Cas. No. 16,920.

At common law the right of entry for conditions broken, whether before or after a breach, created no estate or real interest, but a mere right of action; and it is now only assignable so far as it is made so by statute.

DePeyster v. Michael, 6 N. Y. 467, 57 Am. Dec. 470; Vail v. Long Island R. Co. 106 N. Y. 283, 60 Am. Rep. 449, 12 N. E. 607; Rice v. Boston & W. R. Corp. 12 Allen, 141; Dumpor's Case, 4 Coke, 119, 1 Smith, Lead. Cas. 8th Am. ed. 135.

The right of entry for condition broken was not subject to partition, and the land in the possession of the defendant was not subject to be sold in such a suit.

At common law, lands and other real es-

In *Upington v. Corrigan, 151 N. Y. 143, 37 L. R. A. 794, 45 N. E. 339*, premises had been conveyed upon condition and before breach of condition the grantor had died leaving a will containing a valid residuary clause. After breach of condition the plaintiff, as one of the heirs at law of the grantor, brought ejectment to recover the property, and a main question in the case was whether the right of entry descended to the plaintiff as heir, or passed to the residuary devisee under the will. It was claimed on behalf of the devisee that, although the right of entry was not devisable at common law, the Revised Statutes of New York had altered the law by the provision that "every estate and interest in real property descendible to heirs may be devised" (2 Rev. Stat. 57, § 2). The court held that this language was as comprehensive as it could be to cover real interests, but that a right of entry was not such an interest. The court says: "In chapter 1, part 2, of the Revised Statutes, upon the nature, qualities, and alienation of estates in real property, art. 1 of title 2 creates various estates in lands, and divides them into those in possession and in expectancy. The latter class is again divided, first, into future estates limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination of a precedent estate; and, second, into reversions; which latter are defined to exist where the residue of an estate is left in the grantor, or his heirs, commencing in possession on the termination of a particular estate granted. By § 35 of the same article it is also provided that 'expectant estates are descendible, devisable, and alienable in the same manner as estates in possession.' If, therefore, there was any estate left in Mrs. Davey [the original grantor] upon her grant to Hughes [the original grantee], it was not one known to our statute on real property, and all expectant estates, within which class it would have to fall, are abolished by the article, except such as are therein defined, and which must be either estates limited to commence in possession at a future day, or reversions. The real interest contended for here would not satisfy the requirement of either class. The mere possibility of reverter, which was all there was in this case, could not be included within the 'reversions' spoken of by the statute, within its letter or spirit. The statute of wills, through the use of such precise words as 'every estate and interest in real property descendible to heirs,' obviously must have reference to such as are recognized by the Revised Statutes to be estates of inheritance. We would be without

warrant in asserting the existence of any estate in Mrs. Davey in the premises granted to Hughes, whether at common law or under the Revised Statutes. She had an election to enter for condition broken, and she could release her right to do so. To those rights her heirs, after her decease, succeeded by force of representation, and not by descent." The court also says: "That which the grantor retained was never regarded as an interest in real property, or as an assignable chose in action, and cannot be deemed such through any construction of our statute. Until the law is changed by some legislation, it must be regarded as still the settled rule that no one can take advantage of the breach of a condition subsequent, annexed to the grant of a fee, but the grantor or his heirs; or, in the case of an artificial person, its successors. Every estate and interest formerly enjoyed by the grantor were vested by the deed in the grantee. He undertook and agreed to perform the condition which is annexed to the grant, and the presumption was that he would perform. If he, or those who succeeded in interest, failed to do so, within a reasonable time, then it became optional with the grantor to enter for a breach of the condition, and to have a forfeiture of the estate declared. The grantor having died, the right to insist upon a forfeiture for breach of the condition remained in the heir, as the person who occupies the place of the deceased."

In *Branch v. Wesleyan Cemetery Asso. 11 Ohio C. C. 190*, one Kirby, owning a tract of land, conveyed part of it to the trustees of a church upon condition subsequent that they should erect and maintain a church upon the property. Thereafter, and before breach of the condition, he conveyed his interest in the tract, subject to the former grant to the trustees, to the defendant. The land granted to the trustees was used for church purposes until long after the subsequent conveyance of the tract by Kirby. Thereafter the church was burned, and had never been rebuilt. In an action brought by the church the prayer for relief was "that defendants be required to set up their interest in said land that the same may be adjudged null and void, the plaintiff's title quieted, and for all proper relief." It was held that the deed from Kirby to the church vested in it an estate in fee subject only to be divested by breach of the condition, and that the right to take advantage of the breach was not assignable, and did not pass to the defendant by the deed to it.

Where a grant was made to the grantor's son upon condition that he support the grantor and

tate which were capable of division were divided between coparceners upon a writ of partition, and set off to the coparceners by metes and bounds, and certain incorporeal hereditaments incapable of division were allotted to the elder sister, allowance being made to the others out of the rest of the estate.

Co. Litt. 164b; Cruise, Dig. 469.

At common law none but coparceners were compellable to make partition, and the plaintiff must be in possession when the suit is brought.

1 Bacon, Abr. title, Coparceners, D; Co. Litt. 167a; *Adam v. Ames Iron Co.* 24 Conn. 230.

The statutes 31 Hen. VIII. chap. 1, and chap. 2, extending the writ of partition to lands held by joint tenants and tenants in

common, have always been construed to refer to lands in possession.

Stevens v. Enders, 13 N. J. L. 271; *Smith v. Gaines*, 39 N. J. Eq. 545.

Independently of statutes, a suit in partition could not be maintained by one whose undivided estate was in the reversion or remainder only.

Smith v. Gaines, 39 N. J. Eq. 545; *Re Burroughs*, 13 N. J. L. 284, note; *Stevens v. Enders*, 13 N. J. L. 271.

The statutes authorizing a partition of estates in remainder do not include the right of entry for condition broken upon land held by grantees in fee.

Smith v. Gaines, 39 N. J. Eq. 545; *Roarty v. Smith*, 53 N. J. Eq. 253, 31 Atl. 1031.

Partition cannot be had of land held in adverse possession.

Adam v. Ames Iron Co. 24 Conn. 230.

pay all his debts, and, after the death of the grantor, another son proved a debt against the estate, and, on failure of the grantee to pay, brought an action against him in ejectment to recover his interest in the property on the ground of a breach of the condition, it was held that he could recover. *Jackson ex dem. Reeves v. Topping*, 1 Wend. 388, 19 Am. Dec. 515.

b. After breach of condition.

Where a grantor on condition subsequent, after breach of condition, but before entry, conveys all his interest in the property, the condition is gone. The court says: "There is no person capable of making the entry or claim. The grantor cannot, for he has parted with his interest; the grantee cannot, because he is a stranger to the condition." *Hooper v. Cummings*, 45 Me. 359.

When the original grantor upon condition, without ever having entered for a breach of the condition, releases his claim to the estate by a deed to a stranger, the condition is extinguished. *Craig v. Franklin County*, 58 Me. 495.

A right of entry for condition broken after breach is not subject to levy on execution. *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657.

In an action in equity by one claiming as assignee to enforce a forfeiture for a breach of condition, the court says: "A right of entry for condition broken is not assignable at common law, and we have no statute which makes it so." *Warner v. Bennett*, 31 Conn. 468.

An assignee for the benefit of creditors cannot recover land for breach of condition contained in a deed by his assignor. *Underhill v. Saratoga & W. R. Co.* 20 Barb. 455.

A doctrine contrary to that of the case last cited is found in *Stearns v. Harris*, 8 Allen, 597. Under Mass. Gen. Stat. chap. 118, § 44, providing that, in case of a general assignment, there should vest in the assignee all the assignor's rights of action for any goods or estate, real or personal, it is there held that a right of entry for condition broken after breach passes to an assignee in insolvency, and therefore the grantor cannot enforce the right. It was so held in an action by the assignor in which the general assignment was set up by the defendant as a bar to the plaintiff's right.

In an action by the heir of a grantor upon condition to recover the property on the ground of forfeiture by breach of condition, it was held that, the grantor, after his conveyance upon condition, having conveyed a portion of the same land to another, though the latter convey-

ance was void as against the prior grantee, it was operative between the parties to it. The court says: "The land being a single parcel, the condition on which it was conveyed could not be apportioned by the grantor; and the reason given in the books for this rule is that a condition is 'against common right' (1 Greenleaf's, Cruise, Real Prop. 511). Whenever the reversion is granted by the maker of the condition the condition is gone." *Tinkham v. Erie R. Co.* 53 Barb. 393.

In an action of ejectment brought by one who claimed under a conveyance from the original grantor subsequent to what was claimed to be a breach of conditions in the prior grant to one under whom defendants claimed, it was held that the action could not be maintained, and that in New York the rule of the common law, based upon the doctrine of maintenance, was in force. *Towle v. Remsen*, 70 N. Y. 303.

In *Sedgwick v. Stanton*, 14 N. Y. 289, it was held that in New York there is nothing of the law of maintenance left, except the provisions embodied in 2 Rev. Stat. 691, §§ 5, 6 (now found in §§ 129 and 130 of the Penal Code), which prohibit any person from taking any conveyance of lands from any person not in possession while such lands are the subject of controversy by suit, knowing the pendency of such suit, and also prohibit the buying or selling of any pretended title to lands unless the grantor and those under whom he claims shall have been in possession for the space of a year before the sale.

Where a grant of land had been made by the British government in 1763, subject to a condition that 5 acres in each 50 acres should be cultivated within five years from the date of the grant, and the right of the state of Vermont in the land was derived under the treaty of peace at the close of the Revolution, the court says: "The condition was, therefore, broken, and the forfeiture incurred before the state could pretend to claim any interest in the land, and it may admit of some question whether a mere right to enforce a forfeiture would result from the Revolution, and be transferred to the state. If title to the territory is derived under the treaty of peace, and the state of Vermont is to be considered as standing in the character of a grantee, it would seem to be at variance with the principles of the common law, which, for the purpose of discouraging maintenance and litigation, will permit nothing that lies in action, entry, or re-entry to be granted over. By the common law no grantee or assignee of a reversion could take advantage of a re-entry by force of a condition broken."

The denial of the title of the plaintiff by one of the defendants will defeat a bill for partition, and partition cannot be had until the plaintiff's title is established at law.

Lucas v. King, 10 N. J. Eq. 280; *Hay v. Estell*, 18 N. J. Eq. 251; *Riverview Cemetery Co. v. Turner*, 24 N. J. Eq. 18; *Hoyt v. Tuers*, 25 N. J. Eq. 360; *Stoekbouser v. Kanouse*, 49 N. J. Eq. 592, 26 Atl. 333.

It is a rule of almost universal application that proceedings for partition can be instituted and maintained only by one having an estate in possession, or entitled to immediate possession of the premises to be partitioned.

17 Am. & Eng. Enc. Law, p. 694; *Brownell v. Brownell*, 19 Wend. 367; *Striker v. Mott*, 2 Paige, 387, 22 Am. Dec. 646; *Sullivan v. Sullivan*, 66 N. Y. 37; *Rickard v. Rickard*, 13 Pick. 255; *Stevens v. Enders*, 13 N. J. L. 271.

It was held, also, in this case that a forfeiture had been saved by the performance of the condition by those who had an interest in the land. *Vermont v. Society for Propagation of Gospel*, 2 Paige, 545, Fed. Cas. No. 16, 920.

Where the condition was, among other things, that the grantor might reside on the land during his life, and after breach of other conditions the grantor, being in possession, conveyed his right to another, who, after the grantor's death, brought ejectment, it was held that the estate reverted without re-entry, the grantor being in possession, and the court adds: "But it is said that, after the death of Edward Almond [the grantor] the plaintiff, his grantee, who never was in possession, might have entered. That could not be; for none but a feoffor or his heir could enter, and the reason why a right of entry cannot be assigned is, that a contrary doctrine would favor maintenance and promote litigation. 1 Inst. 214. As, then, neither the feoffor nor his assignee could enter, he would have been without remedy if the estate had not reverted in him by operation of law without any act done on his part." *Hamilton v. Elliott*, 5 Serg. & R. 376.

In *Den ex dem. Southard v. Central R. Co.* 26 N. J. L. 13 (referred to in *BOUVIER v. BALTIMORE & N. Y. R. Co.*), the plaintiff claimed as residuary devisee of a grantor who had conveyed to defendant's predecessor upon condition. The action was ejectment on the ground that the condition had been broken during the life of the devisior. It was held, in the first place, that there had been no breach of condition, and, in the second place, that the devisee could not take advantage of the breach, the court citing the common-law authorities, and holding that the rule was in force in New Jersey.

In *Thompson v. Bright*, 1 Cush. 420, it is held that the state cannot assign its right to enter for condition broken without first recovering possession, and that the case is analogous to the inability of the state to grant an escheat until office found.

One who claimed under a deed from the original grantor after breach of a condition in a prior deed of the premises sued in trespass, and it was held that no right of entry had passed to the plaintiff on the ground that the common-law rule against maintenance prevented. *Guild v. Richards*, 16 Gray, 309.

Where a tenant had done that which by statute was made sufficient to avoid his lease, and afterward the landlord had conveyed his interest to the plaintiff, and the plaintiff brought his action, claiming to take advantage of the breach, the court says: "The ancient doctrine

Either an actual entry, or the bringing of a suit in ejectment, is necessary to divest the title of the grantee.

3 Kent, Com. 139; *Kenner v. American Contract Co.* 9 Bush. 202; *Guild v. Richards*, 16 Gray, 309; *Martindale*, Conv. 110; 2 Washb. Real Prop. 451, 452; *Ludlow v. New York & H. R. Co.* 12 Barb. 440; *Nicoll v. New York & H. R. Co.* 12 N. Y. 121; *State, Morris Canal & Bkg. Co., Prosecutors, v. Brown*, 27 N. J. L. 13; *United States Pipe Line Co. v. Delaware, L. & W. R. Co.* 62 N. J. L. 254, 42 L. R. A. 572, 41 Atl. 759; *Ruoh v. Rock Island*, 97 U. S. 693, 24 L. ed. 1101; *Jones*, Real Prop. § 708.

A condition of re-entry is not an estate or interest in land, even when attended by the reservation of rent.

Dumpon's Case, 4 Coke, 119, 1 Smith,

that a mere right of entry for forfeiture cannot be assigned has never been relaxed." *Trask v. Wheeler*, 7 Allen, 109.

Where, pursuant to a judgment in condemnation proceedings, the defendant obtained title to land for its railroad upon conditions subsequent, and before breach of the conditions the owner of the land of which the premises in question had been a part, and who had been a party to the judgment, conveyed her land to another, and he, after breach of the condition, conveyed to plaintiff, who brought ejectment against the defendant, the court says: "The right of a person who has created an estate upon condition to demand a forfeiture of the estate is not assignable." *Piper v. Union P. R. Co.* 14 Kan. 574.

A grantor conveyed to a railroad company "the right of way for its railroad, and the right to construct said railroad according to the provisions of the charter of said company over and through the tract of land held and owned" by the grantor. After the railroad had been graded plaintiff obtained the grantor's title, and, claiming a breach of condition, brought an action to restrain the use of the land by the defendant, a railroad company which claimed under the original grantee. The court refused to find that the original deed to the railroad company contained a condition, but held that, if it could be so construed, the right of entry could not be transferred, citing the common-law rule against maintenance. *Paul v. Connersville & N. J. R. Co.* 51 Ind. 527. *Ft. Wayne, M. & C. R. Co. v. Gough*, 51 Ind. 600, involves the same principle, and is decided in the same way.

Where one conveyed a portion of his land with restrictions upon the use of the granted premises, and with a condition that a violation of the rights of the grantor should work a forfeiture of the estate of the grantee, one who claimed by title from the grantor was held to be entitled to maintain, against one claiming under the grantee, an action in equity to restrain by injunction a violation of the agreement. It was held that jurisdiction in equity in plaintiff's suit was not affected by the existence of the condition subsequent, for the reason that a breach of that would create a forfeiture only in favor of the grantor or his heirs and their rights, and remedy at law did not pass by grant to the plaintiff. *McMahon v. Williams*, 79 Ala. 288.

In a case that arose in Illinois in ejectment, plaintiff claimed that the land had been granted or dedicated on condition that it should be used for schools or churches, and that the condition

Lead. Cas. 8th Am. ed. 135; *DePeyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470; *Bangor v. Warren*, 34 Me. 324, 56 Am. Dec. 657; *Hunt v. Bishop*, 8 Exch. 675; *Nicoll v. New York & E. R. Co.* 12 Barb. 460; *Underhill v. Saratoga & W. R. Co.* 20 Barb. 455; *Flanders v. Lamphear*, 9 N. H. 201; *Eastman v. Batchelder*, 36 N. H. 141, 72 Am. Dec. 295; *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Clark v. Holton*, 57 Ind. 564.

Mr. Richard V. Lindabury for defendant in error.

Collins, J., delivered the opinion of the court:

It is unnecessary to state the various exceptions sealed at the trial on rulings assigned for error in this court. They are suf-

had been broken. He claimed by assignment from the heirs of one of the dedicators who owned three eighths of the land. The court says: "If the conditions subsequent were broken, that did not, *ipso facto*, produce a reverter of the title. The estate continued in full force until a proper step was taken to consummate the forfeiture. This could be done only by the grantor during his lifetime, and after his death by those in privity of blood with him. In the meantime only a right of action subsisted, and that could not be conveyed so as to vest the right to sue in a stranger." *Ruch v. Rock Island*, 97 U. S. 693, 24 L. ed. 1101.

III. Exceptions to rule

a. Statutory.

The common-law rule against the transfer of a right of entry for condition broken applied as well to leases as to other forms of conveyance. The early statutory change relating to leases is thus explained in 2 Cruise, Dig. p. 45: "Upon the dissolution of the monasteries by King Henry VIII. most of the estates were granted to private persons who could not take advantage of the conditions contained in the leases which had been formerly made of them. This produced the statute, 32 Hen. VIII. chap. 34," giving to grantees of the King, or of others and their heirs, executors, successors, and assigns, "the like advantage by entry for nonpayment of rent, for doing waste and other forfeiture . . . as the lessors and grantors ought, should, or might have had at any time or times."

This statute of Hen. VIII. was generally adopted as part of the common law of the colonies, and has, in substance, been embodied in the statutes of most of the states. Taylor, Land, & T. § 439.

In Connecticut, New Jersey, and California there are statutory provisions permitting a transfer of the right to take advantage of conditions broken upon grants of fee, as well as upon leases. The Connecticut statute authorizes a transfer before breach, and is in terms as follows: "When, after an estate in real estate has been created by grant or devise upon express condition, the reversion shall, before breach of such condition, become vested in any person other than the grantor or his heirs, such person shall, on breach of such condition, have the same right of entry upon such real estate, and the same remedy for such breach by entry, suit, or otherwise, as the original grantor, or those who legally represent him, would have if 60 L. R. A.

ficient to present the questions argued, of which we will now dispose. It is conceded that by the deed of March 22, 1889, the grantee took an estate upon condition subsequent, and that upon a breach the grantors might re-enter the land conveyed as of their former estate. I will take up, in order, the contentions of the plaintiff in error:

1. That neither of the conditions imposed was in fact broken. It is plain that a failure to lay two railroad tracks for the whole length of the 100-foot strip within a reasonable time after the conveyance was a breach of the third condition. We are satisfied with what was said on this subject by Chief Justice Depue in the supreme court when the case was there on a special verdict held abortive because silent on essential matter. *Bouvier v. Baltimore & N. Y. R. Co.* 65 N.

still owning such reversion." Conn. Gen. Stat. 1888, § 1053; Gen. Stat. 1875, 471.

In *Hoyt v. Ketcham*, 54 Conn. 60, 5 Atl. 606, one Skiddy had conveyed to Robertson with a condition subsequent, and afterward had released to the husband of Robertson all his interest in the property. After Skiddy's death his administrator with the will annexed, having a power of sale, had conveyed to plaintiff, who also had the title of Robertson and her husband. It was held that, while a right of entry was not assignable by the common law, it had been made so by the statutes of Connecticut, and that, therefore, the conveyance by Skiddy to Robertson's husband had released the condition, and also, that, if any interest remained in Skiddy, it had been transferred by the deed of his administrator with the will annexed.

The New Jersey act of March 14, 1851, is discussed in *BOUVIER v. BALTIMORE & N. Y. R. Co.* It contains the following language: "Any person may devise, or may convey, assign, or charge, by any deed, or any such contingent or executory interest, right of entry for condition broken, or other future estate or interest in expectancy, as he may now, or shall hereafter, be entitled to, or presumptively entitled to, in any lands, tenements, or hereditaments, or any part of such right, estate, or interest respectively, although the contingency on which such right, estate, or interest are to vest may not have happened; . . . and provided, also, that no chose in action shall by this act be made assignable at law, and that nothing in this act contained shall render any contingent estate or other estate or expectancy therein mentioned liable to be levied upon and sold by virtue of any execution."

As stated in *BOUVIER v. BALTIMORE & N. Y. R. Co.* it is not clear whether the case of *Cornelius v. Den ex dem. Irons*, 26 N. J. L. 376, applies to a devise before or after breach. If after breach the latter case seems to be overruled, so far as it holds the statute of March 14, 1851, to be applicable to such a case, by *BOUVIER v. BALTIMORE & N. Y. R. Co.*

By the California Civil Code "a right of entry or of reversion for breach of condition subsequent can be transferred" (§ 1046); and "any person claiming title to real property in the adverse possession of another may transfer it with the same effect as if in actual possession." (§ 1047.)

In New York state the early re-enactment of 32 Hen. VIII. chap. 34, was followed in 1805 by chap. 98 of the Laws of that year, extending the act to grants or leases in fee, reserving rents. In the early part of the nineteenth

J. L. 314, 47 Atl. 772. Whether a double track over the whole route would not have been needful for performance of such condition need not be decided. The verdict establishes that the time that had elapsed when the suit was brought was more than reasonable for the purpose. Without doubt, a much shorter time would have been unreasonably long.

2. That a tender back of the consideration money was a prerequisite to re-entry. No authority is stated for this proposition, and it seems entirely unsound. The conditions of the conveyance must be presumed to have entered into its consideration.

3. That a breach of the third condition gave a right of re-entry on the 100-foot strip alone. The contention is that the conveyance was of two separate parcels, and that a breach of the third condition could have

no effect with respect to the triangle adjoining on the northwest the 100-foot strip that lay within the filed route of the railroad. We do not so interpret the instrument. The conveyance was of a single tract, describing it by metes and bounds. It was not even provided that the passenger station contemplated should be wholly within the northwest triangle. The conveyance was plainly an entirety.

4. That performance of the conditions of the conveyance was waived. There was no evidence of any waiver. Mere delay in asserting the right of re-entry cannot prejudice that right where the question of performance itself is one of reasonable time. Indulgence in such a case is no waiver.

5. That there was incidental error in the charge. An assumption of the trial judge of a purpose of the grantors, in imposing

century many grants of this kind came under the consideration of the courts, particularly in the litigation over the validity of reservations of rent in grants included in the Van Rensselaer manor, and much learning is embodied in the opinions of the courts wherein these grants are under discussion. In *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278, it was held that an annual rent reserved by deed with clause of distress upon a grant in fee was valid as a rent-charge although there was no reversion in the person entitled to it, and that, by virtue of chap. 98 of the Laws of 1803, the devisee of the grantor might maintain covenant against the grantee; and in *Van Rensselaer v. Ball*, 19 N. Y. 100, it was likewise held that the devisee of the grantor might maintain ejectment under the right of re-entry devised to him as appurtenant to the rent-charge. The common-law rule and the statutory change applicable to the case are concisely stated by Judge Denio in writing the opinion of the court as follows: "But, assuming that the estate conveyed to William Ball [the grantee in the deed in fee reserving rent in question] was defeasible by the nonperformance of the condition to pay the annual rent; no one but the grantor or his heirs could, at common law, enter for the breach of a condition subsequent. (Litt. § 347; Co. Litt. 214b; 4 Kent, Com. 127; *Nicol v. New York & E. R. Co.* 12 N. Y. 121.) 'This was the consequence of a maxim of the common law, that nothing in action, entry, or re-entry, could be granted over; for, as Coke says: 'Under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession.' (Co. Litt. *supra*.) The reason upon which this maxim was founded has, no doubt, become in great measure obsolete; still, the principle that a right of entry cannot in general be granted over is, I am inclined to believe, still a part of the law, notwithstanding the tendency of modern decisions and the provisions of the Code. This, then, is the first difficulty in the plaintiff's case. He brings this action as the assignee, by devise, of the grantor, and not as his heir; and he is disabled from maintaining the action, unless the act of 1803, and its different re-enactments, apply to the case. (Laws 1803, chap. 98; 1 Rev. Laws 1813, 364, § 3; 1 Rev. Stat. 748, § 25.) I have elsewhere stated the origin and history of the series of enactments in favor of the assignees of reversions, of which this forms a supplement, and have shown that it enabled the grantees of a perpetual rent-charge to maintain an action on

the covenants for the payment of rent. But the original statute of 32 Hen. VIII. (chap. 34) gives to the assignee mentioned in it, not only a remedy by action, but the 'like advantages' 'by entry for nonpayment of the rent,' which the grantors might have had; and this feature is preserved in the re-enactments in this state (2 Jones & V. 184; 1 Rev. Laws 1813, 363, § 1); and, in the Revised Statutes of 1830, the expression is that the assignees 'shall have the same remedies by entry, action, or otherwise,' as their grantor or lessor had or might have had. (Vol. 1, 747, § 23.) Then follows the provision first introduced by the act of 1805, and continued in the revisions, that this provision shall extend to grants or leases in fee, reserving rents, as well as to leases for life or years. But in all the acts the expression is retained which is found in the statute of Henry VIII., 'as if the reversion had remained in such lessor or grantor.' In grants in fee, there being no reversion, these words are inapplicable, or, at least, incongruous; and, to make the provisions coherent, they should be read as though the language were, 'as if said right of entry had remained in the lessor or grantor;' or this particular expression in the statutes should be limited to the cases embraced in the provisions where the grantor had a reversion, and be dropped in the cases where it is made to relate to grants in fee, upon the rule of construction *reddendo singula singulis*. No one can for a moment doubt the intention of the legislature to confer upon the assignees of a grantor in fee reserving rent, the remedy by entry for the nonpayment of such rent, precisely as the grantor himself had it before he parted with the right. In other words, the design is plain to make the right of entry transferable, and thus to change, to this extent, in favor of this class of conditions, the rule of the common law. This is so manifest to my mind from the reading of the statutes, that anything I could further say would be likely to obscure, rather than to elucidate, it."

In *Van Rensselaer v. Read*, 26 N. Y. 558, the decision in *Van Rensselaer v. Hays*, is again examined, and the principle therein laid down is affirmed.

In *Van Rensselaer v. Dennison*, 35 N. Y. 303, it was further held, in reference to the character of the rent-charge, which carried with it when assigned the right of re-entry, that, while such rent was not an estate in the land, it was an incorporeal hereditament devisable and assignable. To the same effect are *Van Rensselaer v. Barringer*, 39 N. Y. 9; *Hosford v. Bal*

conditions on their conveyance, that their remaining land should be made more valuable and accessible, is criticised. The idea seems to be that no such purpose was expressed, and that the remarks to the jury on that subject bore unfairly on the question of reasonable time of constructing a double-track railway over the strip conveyed. We see no ground for criticism. The purpose suggested was inherent in the premises.

6. That the plaintiff below showed no right in himself, (a) because a right of entry for condition broken is not transferable after breach, (b) or, if at all, not in partition proceedings. There seems to be no good reason why, even before June 28, 1893, the date of the deed given by Reichard to Salter, a double-track railway might not have been constructed over the 100-foot strip conveyed

by the deed of March 22, 1889, which was made on condition of such a construction. Consequently, if a right of entry for condition broken cannot, after breach, be legally assigned, the trial judge should have complied with some or one of the requests to charge, above recited, that were based on that doctrine. I find nothing definite said by the old reporters or law writers on the subject of transfer of rights of entry for condition broken, until Littleton, treating of estates upon condition, after noting the requirement of the law as to the reserving of rent, wrote thus, as prefatory to a statement that the grant of the reversion of leased lands did not convey a right of entry for breach of condition to pay rent: *Le second chose est, que nul entrie ou re-entrie (que est tout un) peut être reservee ne done a aucun person, forsque tantolement al*

lard, 39 N. Y. 147; Central Bank v. Heydorn, 48 N. Y. 268; Tyler v. Teidorn, 46 Barb. 439.

In Van Rensselaer v. Slingerland, 26 N. Y. 580, it was held that the Laws of 1846, chap. 274, § 3, abolishing distress for rent, recognised the assignable quality of a condition for re-entry for nonpayment of rent reserved in a grant in fee, and gave to the assignee of the rent the same right to maintain ejectment as to grants made prior to its passage as was given by Laws of 1806, chap. 98.

In *People ex rel. Rosekrans v. Haskins*, 7 Wend. 463, the court says: "A rent-charge,—that is, a rent reserved upon a lease in fee with right of re-entry and distress,—is an interest in lands which is bound by a judgment, and may be sold on execution as real estate." *Contra*, it is held in *Payn v. Beal*, 4 Denio, 405, "that rent reserved on a lease in fee is neither lands, tenements, nor real estate within the meaning of the statute authorizing the sale of lands on execution."

In *Cagger v. Lansing*, 64 N. Y. 417, in discussing the legal effect of a referee's report in an action in ejectment brought by the devisee of the first Van Rensselaer, the court says: "The report did find, then, as fact, that there was a grant in fee of the lands, with a charge upon them of a yearly rent in perpetuity, to the grantor, his heirs and assigns, with clauses for an entry and for distress for rent. The interest in the rent owned by the grantor, as matter of law from those facts, was an estate in it in fee simple. . . . It was such an interest in land as may be levied upon for the debt of him who owns it."

In *Cruiger v. McClaughry*, 51 Barb. 642, affirmed in 41 N. Y. 219, it was held that one of several heirs of a grantor of the fee reserving rent may maintain ejectment for his undivided share of the fee on proof of condition broken. It was held that, while a rent-charge cannot be apportioned by act of the parties, it can be by descent as act of the law, so as to enable each heir to sue upon the covenant for his share of the rent; and that the statute (1 Rev. Stat. 505, § 33) giving "the landlord" right to maintain ejectment on nonpayment of the rent was intended to give to each of several heirs the right to maintain ejectment for his portion of the estate.

b. After breach where the law against maintenance is not in force.

Another exception to the rule that the right of entry for condition broken is not transferable is set forth in *BOUVIER v. BALTIMORE & N. 60 L. R. A.*

Y. R. Co., holding that, as the reason for denying the quality of transferability after breach of condition is founded upon the law of maintenance, where the law against maintenance is not in force the reason does not exist, and the right is transferable.

The case of *McKissick v. Pickle*, 16 Pa. 140, cited in *BOUVIER v. BALTIMORE & N. Y. R. Co.*, was as follows: The plaintiff in ejectment claimed as one of the grantees on condition. The defendant was in possession under purchase of the grantor's interest at a sheriff's sale under execution against the grantor. The court held that there was no breach of the condition, but adds: "On this point we think the judgment must be reversed. But, as the cause goes down for another trial, it becomes necessary to notice another point, and that is, Can the sheriff's vendee enter for a condition broken? The deed provides that the property shall revert to the party of the first part, and to his heirs and assigns. . . . That a grantor cannot reserve such a right will hardly be contended, as in Pennsylvania there is no policy of law which forbids it. The law against maintenance has never been adopted in this state. The reason assigned why a condition in England could not be assigned is because no title could be made to land held by another adversely, as that was against the law which forbade maintenance. And hence, the usual rule that none but the grantor or his heirs can enter for condition broken. This reason does not apply here, where the grantor expressly reserves the right. . . . This is a fair case for the application of the maxim *Cessante ratione cessat ipsa lex*."

It was also held, on the authority of *Hayden v. Stoughton*, 5 Pick. 528 (cited in the next following paragraph), that the right of the grantor before breach was subject to levy and sale under execution. The court adds: "The interest of Ferguson therefore, whatever it was, passed to the sheriff's vendee, and as such his vendee had a right of entry by the express terms of the deed. In a condition at law it is true that none but the grantor and his heirs can enter for condition broken. No assignee or stranger can do so. But I know of no rule of policy in this state where the ancient doctrine of maintenance does not prevail, which prohibits a grantor or deviser from directing otherwise."

c. As to devise.

The Massachusetts cases holding that a right of entry is devisable without a statutory change in the common law are at variance with the general rule. The case of *Hayden v. Stoughton*,

feoffor ou al donor, ou al lessor, ou a lour heires; et tiel re-enter ne poyt estre grant a un auter person. The date of the publication of the Tenures is unknown, but Littleton died A. D. 1481. The statute of uses (27 Hen. VIII. chap. 10), passed A. D. 1535, gave opportunity for much amelioration in the transfer of rights in land, but beyond the introduction of conditional limitations, by which estates might be granted in remainder on breach of condition of the first grantee's title, there seems to have been no judicial modification of Littleton's doctrine, and no legislative relief, except that in 1540, by 32 Hen. VIII. chap. 34, the benefit of conditions in leases, for life or years, reserving rent, were allowed to pass with the reversion. On the other hand, in the same year, Parliament enlarged the pretended titles act of A. D. 1377 (1 Rich. II. chap.

9), by 32 Hen. VIII. chap. 9, forbidding bargain, sale, or purchase of rights or titles in land where the grantor was not in possession. Not long afterwards Montagu, chief justice, declared that this statute was largely affirmatory. *Partridge v. Strange*, 1 Plowd. 77, 88. Coke, writing before A. D. 1628, in his comment on Littleton's declaration, gives the reason of the doctrine as follows: "*Que nul entrie, etc.*, . . . Here Littleton reciteth one of the maxims of the common law; and the reason hereof is for the avoyding of maintenance, suppression of right and stirring up of suits, and therefore nothing in action, *entrie* or *re-entrie* can be granted over; for so under colour thereof pretended titles might be granted to great men whereby right might be trodden downe and the weake oppressed, which the common law forbiddeth as men to grant before they

5 Pick. 528, decided in 1827, involved a devise of real estate to a town as a site for a school-house and with a provision that it should be built within 100 rods of the place where a meeting-house stood. It was held to be a condition subsequent, and that the right of entry passed to the residuary devisee under the will, and not to the heir. The right of entry was treated as a contingent interest, remaining in the deviser, and devisable by him.

In *Harrison v. Foote*, 9 Tex. Civ. App. 576, 80 S. W. 838, the instrument in question was held to create a conditional limitation, and not an estate upon condition subsequent; but the court adds that if it were the latter the result would be the same, "as we think," on the ground that the interest of the grantor on condition would pass to the defendants as his residuary devisees, on the authority of *Hayden v. Stoughton*, cited in the last preceding paragraph.

Hayden v. Stoughton, is approved, also, in *Kenner v. American Contract Co.* 9 Bush. 202; but in that case the devisee was held to have waived the condition.

The case of *Doe ex dem. Wells v. Scott*, 3 Maule & S. 300, cited as an authority in *Hayden v. Stoughton*, does not seem to be a parallel case. The will in that case contained a devise to J. M. provided that, within six months after the decease of the testator, he assured to R. M. and his children certain premises. The will contained a residuary devise. Both J. M. and R. M. died unmarried before the testator. The case simply held that it was not a lapsed devise resulting in intestacy as to the property designated, but that the contingency of a forfeiture of the devise to J. M. such as actually occurred must have been within the intent of the testator, and that in that event she intended the estate to pass by her residuary devise.

Brigham v. Shattuck, 10 Pick. 306, decided in 1830, is similar to *Hayden v. Stoughton*. That, also, was a devise of lands to a town upon condition with a general residuary clause, and it was held that the residuary devisee, not the heir, could take advantage of the breach of the condition. The court says: "Upon the hypothesis that the devise was conditional, here was a contingent reversionary interest to arise upon the happening of the forfeiture by a breach of a condition subsequent. This interest was capable of being devised, and the residuary devise is broad enough to embrace it."

It will be noted that the two cases last cited both depend upon a devise of real estate upon condition with a general residuary clause in the will. It is suggested by the learned author of the article on *Estates upon condition*, 1 Am. 60 L. R. A.

Law. Rev. 265, cited under I., *supra*, that these cases might be sustained as relating, in effect, to conditional limitations taking effect by way of executory devise, and therefore not exceptions to the rule now under consideration, inasmuch as by will a fee can be limited upon a fee. But the same writer admits that no such explanation can be given of the later case of *Austin v. Cambridgeport*, 21 Pick. 215. That was a grant on condition subsequent. The grantor made his will which included a general residuary clause. After the death of the testator a breach of the condition occurred. It was held that the right to take advantage of the breach passed to the residuary devisee, and that the heir of the grantor could not maintain an action to recover the property. The court says: "No difficulty exists in the case on the ground of any adverse possession at the time of making the devise, as the premises were held by a concurrent, and not an adverse, title. The interest of the testator and the tenants, united, composed only the entire fee-simple estate,—as much so as in the ordinary case of an estate for life to A, remainder to B. Nor does any objection arise on the ground of any change in the nature of the interest between the time of making the will and the death of the testator. The interest of the testator at both these periods of time was not a present right of entry, but a contingent possible estate. That such an interest is devisable in England seems well established by the case of *Jones v. Roe*, 3 T. R. 88, and the cases there cited." The case of *Jones v. Roe*, however, seems hardly an authority for the doctrine mentioned, as the court says in the latter case: "The short question is whether the interest which a person takes by virtue of an executory devise be or be not devisable." It was simply held that under the statute of wills, 34 and 35 Hen. VIII. chap. 5, such an interest was devisable as an interest in lands. The court expressly says: "This does not include a bare possibility or hope of succession, but a possibility coupled with an interest."

One Eaton, who was the owner of two adjoining lots of land, sold lot A, upon which there was a store building, to defendants, and retained lot B as a residence, the deed of lot A containing the words "upon the express condition that said W [the grantee], his heirs and assigns, shall never erect any building nearer the street line of said land than the store building now thereon." Plaintiff claimed by means conveyances from Eaton as the owner of B, and brought an action to restrain the defendants from extending the store nearer the street. It was held that the deed of lot A was upon con-

be in possession." Co. Litt. 214a. About the same time, in his remarks upon *Lampet's Case*, 10 Coke, 46, 48, he wrote of "the great wisdom and policy of the sages and founders of our law, who have provided that no possibility, right, title, nor thing in action shall be granted . . . to strangers, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people and chiefly of tenants and the subversion of the due and

equal execution of justice." To the same effect is the declaration in Bacon's Abridgment, the foundation of which work is generally attributed to Chief Baron Gilbert: "A possibility, right of entry, or thing in action, or cause of suit, or title for a condition broken, cannot be granted or assigned over by law; for, if this were permitted, it would promote maintenance, and prove prejudicial to such as, being able to contend with those with whom the original contract was,

dition subsequent, and did not create a restriction for the benefit of the owner of lot A. The court says: "It must be held, therefore, that the deed from Eaton to the defendants conveyed a conditional fee, and that the right of reverter remaining in the grantor up to the time of his death went to his heirs or devisees." *Clapp v. Wilder*, 176 Mass. 332, 337, 50 L. R. A. 120, 57 N. E. 692.

Where a grantor conveyed land upon condition, but remained in possession and devised the land to defendant, who continued in possession, it was held that the defendant could not enter upon her own possession for condition broken, but that she had an equity which was sufficient to defend her possession in an action by the plaintiff to recover the land. There had been a judgment for defendant, and the court granted a new trial for errors in instructions to the jury upon other points. *Thompson v. Thompson*, 9 Ind. 323, 68 Am. Dec. 638.

C. Easements on condition.

The rule against a conveyance of a right of entry seems not to apply where an easement is granted on condition, and the right to take advantage of a breach of the condition may be regarded as appurtenant to the servient tenement. A grantee of the fee of land which is burdened with an easement, the easement having been granted upon condition subsequent, may maintain an action in equity for specific performance of the condition, or, in default thereof, for a decree that the easement has been forfeited for condition broken. *Pinkum v. Eau Claire*, 81 Wis. 301, 51 N. W. 550.

In *Reichenbach v. Washington Short Line R. Co.* 10 Wash. 357, 38 Pac. 1126, plaintiffs and others had conveyed to one Mason a right of way across certain lots, the conveyance being upon condition subsequent. After a breach of the condition the other owners conveyed their interest in the lots to plaintiffs, and an action was brought to procure a cancellation of the deeds and possession of the land. It was held that the deed had conveyed merely an easement, and that the rule against an assignment of right of entry did not apply, and that the right to take advantage of an abandonment necessarily passed to the owner of the servient tenement, whoever he might be.

IV. Summary.

Where an estate in land is granted, whether for years, for life, or in fee, the existence of a condition subsequent in no way lessens the quantity of the estate granted. The grantor is divested of the entire estate of the term or the fee, and the grantee is invested with the same estate. The effect of the condition is simply that, if a breach shall occur, the grantor shall have a right to re-enter and thereby become re-vested with his former estate. Before breach this is regarded as a mere possibility, coupled with no interest in the land, and therefore no more transferable by act of the grantor than the possibility that he to whom he has conveyed an

estate may voluntarily reconvey. The death of the grantor, however, does not extinguish the possibility, and the right to take advantage of it passes to his heir. After breach of the condition, what was before a mere possibility becomes a right to secure a reversion of the former estate by entry, or by action at law. Until such entry or action the quantity of the estate of the grantee is still unimpaired. If the right of entry is never exercised, the estate remains as before. The grantee still has possession with all the advantages which by the common law belong to possession. Under feudal conditions, he who was out of possession was likely to be tempted to part with his claim to those who might gain possession by force or favor, rather than by right. To avoid this, and to discourage maintenance, the common law forbade the transfer of rights of entry. Not only was a deed purporting to convey a right of entry ineffective to transfer the right to the grantee, but, by virtue of the forfeiture imposed in the early statutes as a penalty for an attempted transfer of such a right, the deed operated to destroy the right in the grantor. There was, however, nothing in the spirit of the law or the letter of the statutes to prevent a release of the right by the grantor to the grantee or one claiming under the grantee, and such a release operated to extinguish the possibility of a right if before breach, or the right of entry if after breach. In most of the states the common-law rule, as stated above, so far as applicable to grants in fee upon condition, is still in force.

The rule against transfers of rights of entry as applied to estates for years and for life was relaxed by statute 32 Hen. VIII., chap. 34, permitting the benefit of conditions to pass with the reversion. This statute has generally, and in substance, been re-enacted in this country. In New York, where grants in fee, reserving rent, were formerly in use, there was similar statutory authority for transfer of the benefit of conditions as incident to a transfer of the rent. In Connecticut and New Jersey statutes have been passed authorizing the transfer of the benefit of conditions in grants in fee before breach, and in California the right of entry itself after breach is made transferable by statute. In New Jersey and Pennsylvania the law against maintenance is held not to be in force, and, therefore, the transfer of a right of entry after breach of condition is without obstacle. In Massachusetts the decisions seem not to be entirely consistent with each other, and some of them to be at variance with the current of authority elsewhere. The rule against maintenance, with its penalty of forfeiture, is held to be in force, and a right of entry after breach of condition is held not to be assignable; but it is also held that, before breach, the right is "a contingent possible estate," and as such is devisable. Where an easement is granted on condition, the right to take advantage of the breach may be transferred with the dominant tenement as appurtenant thereto.

H. W. C.

might find themselves depressed by a powerful adversary." Title *Assignment*, A, and substantially the same statement, title *Grants*, D. Mr. Hargrave, in note 212, Co. Litt., expresses the same view.

It is needless to quote other writers or judges. All who give a reason for the doctrine ascribe it to the judicial desire to prevent maintenance. A distinction not always clearly made should, however, be borne in mind. Before breach, as in case of any determinable fee, there is in the grantor only a possibility of reverter. 4 Kent, Com. *11, note; *Nicoll v. New York & E. R. Co.* 12 N. Y. 121. After breach there is a vested right. Judge Hare in his note to *Dumport's Case*, 1 Smith, Lead. Cas. *112, perspicuously states this distinction: "Before breach the reason why an assignee cannot take advantage of a condition really depends upon the inherent incapacity of the condition itself. But after breach the condition itself is gone, and there arises in its stead, whatever may be its terms, in the case of freehold estates, at all events when created by a common-law conveyance, a right or title of entry which is as little capable of assignment as the condition, although the obstacle to its assignment is of a different nature, arising out of the policy of the common law and the provisions of the statute of maintenance, which forbade the sale or transfer of claims or demands unsustained by possession and resting solely in entry or action." In most of the states of the Union it has been assumed that the English doctrine of nontransferability of rights of entry for condition broken is the law, and so it well may be as to attempted transfers before breach; but after breach it would seem that the test must be the existence or nonexistence of the English law as to maintenance. Judge Hare, after the passage cited, argues that even in those states like Pennsylvania, where it had been declared that the English statutes on that subject had never been adopted, an incapacity of transfer should still be maintained, for the reason that the title of the grantee on condition will endure until re-entry; but the argument is aside from the point. It is not the land, but the right of entry, that is the subject of the transfer. In Pennsylvania, after Judge Hare wrote, the question came before the supreme court for decision, and it was held, in a case where the condition was reserved to the grantor and his assigns, that the right of entry was subject to sale. Rogers, J., said: "This is a fair case for the application of the maxim, *Cessante ratione legis, cessat ipsa lex*." *McKissick v. Pickle*, 16 Pa. 140. In the case in hand it will have been noticed that the right of entry for breach of condition was reserved to the assigns, but I do not regard that as essential. I think that in any case, wherever the English law against maintenance is not in force, a right of entry for condition broken should be held transferable after breach of the condition. Before breach I think transfer, to be legal, must be authorized by legislation.

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In England, as before stated, by 32 Hen. VIII. chap. 34, the benefit of condition in leases for life or years, reserving rent, was allowed to pass with the reversion. By the wills act of 1837 (1 Vict. chap. 26, § 3) all rights of entry for condition broken were made devisable, and in 1844, by 7 & 8 Vict. chap. 76, § 5, they were made assignable. This later legislation was the prototype of an enactment in this state approved March 14, 1851 (1 Gen. Stat. p. 881), by which, under the title "An Act to Authorize the Transfer of Estates in Expectancy," such rights were included within an authority to devise, convey, assign, or charge by deed contingent or executory interests and future estates, and interests in expectancy in lands, tenements, and hereditaments. An attempt was made in the recent revision of some of our statutes to transfer the provisions of this one to the "Act Concerning Conveyances," where it appears as § 19 (Pamph. L. 1898, p. 676); but as the repealer of the original act (Pamph. L. 1898, p. 711) has the similar title of "An Act to Repeal Sundry Acts Respecting Conveyances," we may disregard this attempt, which is very desirable, as the legislation is meant to embrace devises, assignments, and charges, and the new title may be deemed to be inadequate. The difficulty I find in relying in all cases on this statute inheres in the expression that it is only on the happening of a contingency that a right is to vest in the transferee. This language does not appear in 7 & 8 Vict., and it seems to me that its effect must be to limit the authority of transfer, as far as rights of entry for condition broken are concerned, to a transfer before breach of the condition, and that is the contention of the plaintiff in error. It is suggested, also, that the proviso in the act that no chose in action shall thereby be made assignable at law excepts rights of entry, after breach, from its operation; but I do not take that view. Some judges have spoken of the right, after breach, as a mere chose in action, but the designation is inaccurate. A right of entry is an interest in land. A chose in action is, perhaps, not definable with exactness, but it certainly is not that. It does not extend, even under modern legislation, beyond a right to recover debt or damages or some interest in personalty. The Victorian statute included personal property, and the proviso was appropriate. It probably was retained in our act through inadvertence, unless its application was intended to be to hereditaments having some characteristics of personalty. In *Cornelius v. Den ex dem. Ivins*, 26 N. J. L. 376, our statute was given effect in the supreme court in a case where it is not clear, from the opinion, whether the devise upheld was before or after breach. The decision, of course, is not controlling in this court.

But, although it may be that the statute only authorizes a transfer before breach, I think a transfer after breach is also valid for the reason that moved the supreme court of Pennsylvania to a like decision. I would

not say, as did that court, that a right of entry can be levied on and sold in execution, but I think that in this state it may be transferred, at the will of the holder. In *Schomp v. Schenck*, 40 N. J. L. 195, 204, 29 Am. Rep. 219, it was rightly held in the supreme court that the English law against maintenance is not in force in New Jersey. The opinion of Chief Justice Beasley in that case makes this very clear. He says: "By the act of November 24, 1792 (Pamph. L. 794), Judge Paterson was authorized to collect and put in form all the statutes of England and of this state which then remained in force here, and Mr. Griffith, in referring to the revision that was the result of this authority, says that the compiler 'omitted, as inapplicable, the English statutes relative to the buying and selling of titles (1 Rich. II. chap. 9; 32 Hen. VIII. chap. 9), as he did also those against maintenance. 1 Edw. III. chap. 14; 20 Eliz. chap. 4, etc. Also of Champerty, 3 Edw. I. chap. 25; 28 Edw. I. chap. 11.' The question then arises, What was the meaning of this omission? I can perceive no other solution except the inference that Judge Paterson considered them neither a part of the statute law of this state nor as adapted to our circumstances. By the Constitution of 1776 it was declared, in article 22, 'that the common law of England, as well as so much of the statute law as have been heretofore practised in this colony, shall still remain in force, until they shall be altered by a future law of the legislature;' and when, therefore, this particular series of acts was not comprised in this accurate and authentic compilation of the laws in force, it seems manifest that such leaving out was a meditated exclusion. If it be said that such a rejection of the statute law did not affect the common law, and that by the common law maintenance was prohibited, my answer is that, since the publication of the body of selected laws just referred to, there is no trace of the prevalence of any part of such a doctrine, either in our practice, judicial dicta, or decisions. It is obvious that Mr. Griffith inferred that the entire doctrine of maintenance and champerty was thought by Judge Paterson to be 'inapplicable' to the polity of this state. And, although in some of the older legal digests and commentaries the doctrine of maintenance is said to be a part of the common law, nevertheless I am strongly of the opinion that it would be altogether impracticable to ascertain of what rules such doctrine consisted, as embodied in that ancient system." He then goes on, most eruditely, to show that there is the best reason for believing that, although often spoken of as appears above by the old writers as part of the common law, maintenance is entirely the creature of English statutory law, and of the judicial construction of such law, and that the consequence is that when this set of acts was designedly left out of our statute book there existed no rational ground for the contention that any part of the law of maintenance in any form remained in force in this state. He points out 60 L. R. A.

also the destructive effect on the doctrine of the act of March 17, 1713-14 (Paterson's Laws, p. 6; 1 Gen. Stat. p. 877, § 119), which gives to the grantee to uses "as full and ample possession" of lands as if he were "possessed thereof by solemn livery of seisin and possession." That statute alone seems to me to authorize a transfer after breach of a right of entry for condition broken. It differs from the English statute of uses in many particulars, being far more liberal in its provisions. *Melick v. Pidcock*, 44 N. J. Eq. 525, 542, 15 Atl. 3. I am aware that there is the weight of the opinion of Chief Justice Green in the supreme court in the case of *Den ex dem. Southard v. Central R. Co.* 26 N. J. L. 13, that except for the act of March 14 1851, there could be no such transfer, but this aspect of the case was not presented to his mind.

It is said that choses in action have always been held in this state to be "not assignable" at law, except by statute. Such is the expression used in an opinion in this court. *Ruckman v. Outcater*, 28 N. J. L. 571. Even taken literally, that would not preclude a different decision as to rights of entry for condition broken; for there are considerations other than the mere prevention of maintenance that have influenced the judicial attitude towards choses in action. The protection of the rights of the defendant against the assignor has been the main care of the courts, and is always afforded in enabling statutes such as that of this state. 2 Gen. Stat. p. 2591, § 340. But all that is meant by such an expression as that quoted is that a chose in action was not assignable so as to permit the assignee to sue in his own name in a court of law. Subject to that restriction, even in England, from a very early day, choses in action have been assignable in fact, and no consideration of the prevention of maintenance has been allowed to prevail. *Dacey, Parties*, 67; *Wald's Pollock, Contracts*, 202; *Buller, J., in Masters v. Miller*, 4 T. R. 321, 340. That there was no inherent nonassignability appears from the fact that the restriction was never imposed on an assignee of the Crown. *Ibid.* Chief Justice Hornblower in *Allen v. Pancoast*, 20 N. J. L. 68, cleared up the confusion that had existed on the subject, and *Carpenter, J., in Parsons v. Woodward*, 22 N. J. L. 196, 206, said that the ancient rule that choses in action were not assignable only remained to give form to legal proceedings to collect them, so that, ordinarily, it was necessary to sue at law in the name of the original claimant; the holder being treated rather as an attorney than as assignee. In equity any possibility, right, or expectancy may, for valuable consideration, be assigned. *Bacon v. Bonham*, 33 N. J. Eq. 614. I can see no reason to deny efficacy at law to a conveyance, devise, or other transfer of a vested right of entry. There seems to be no technical obstacle in the way of such a transfer, and there certainly is no other.

We are next to inquire if there can be compulsory partition of land in which the

parties have only a right of entry for condition broken. If there can be no partition, then, of course, there can be no judicial sale, for that is a mere alternative, which must be resorted to where lands are incapable of actual partition. I am of the opinion that there can be no such partition. When this case was before the supreme court, Chief Justice Depue said that by the act of March 14, 1851, the mere right of entry at common law was "converted into an actual estate." With deference I must dispute that proposition. Whatever the scope of the act, it has no greater effect than to permit the transfer of the right; it does not and cannot affect its nature. In *De Peyster v. Michael*, 6 N. Y. 506, 57 Am. Dec. 470, the court of appeals of New York held that the enlargement of 32 Hen. VIII. chap. 34, by extending it to conveyances in fee reserving rent, "only authorized the transfer of a right, and did not convert it into a reversionary interest, or into any other estate." A division of the reversion destroys such a right, though assignable under that statute. Co. Litt. 215a; Taylor, Land. & T. § 296. A right of entry for condition broken is inherently indivisible. An entry by one of two or more joint grantors would inure to the benefit of all, and it is obvious that an attempt to sever the joint right before entry would be ineffectual although doubtless, where the right is assignable, one of the joint owners may assign his interest. The fact of such assignment simply puts the assignee in the place of the assignor. I find nothing in any statute of this state extending partition, or sale in lieu thereof, to a right of entry for condition broken. Furthermore, partition normally can be judicially compelled of such lands only as are in the possession of the parties to the proceedings. *Stevens v. Enders*, 13 N. J. L. 271; *Re Burroughs*, 13 N. J. L. 284, note. Our legislation extending the right of partition to remaindermen and reversioners depends upon the consent of the owner of the particular estate in possession. *Smith v. Gaines*, 39 N. J. Eq. 545. Entry, or its equivalent, is essential to the perfection of the right. Probably the beginning of a suit in ejectment will suffice. It was so adjudged in the supreme court in *Cornelius v. Den ex dem. Ivins*, 26 N. J. L. 376, and I do not question that decision, but until entry, or what is equivalent thereto, partition of the lands involved seems to me impossible. A right of entry for condition broken may be waived. The English statute of 7 & 8 Vict., above cited, was repealed in the year following its enactment. The present act of 8 & 9 Vict., chap. 106, extends only to "a right of entry," whether "immediate or after, and whether vested contingent, into

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or upon any tenements or hereditaments in England of any tenure." In *Hunt v. Bishop*, 8 Exch. 675, it was held that the new statute did not embrace rights of entry for condition broken; and in *Jenkins v. Jones*, L. R. 9 Q. B. Div. 128, 131, Jessel, M. R., suggests that the reason why a right of entry for condition broken is not assignable by virtue of that statute is that it was at the election of the person entitled to enter whether he would take advantage of the breach of the condition. It was not yet an estate. It was said in the supreme court in this case that the grantee of an estate on condition is not interested in the partition proceedings, and that a decree to which all persons in interest are parties is, as against him, effectual; but it must be remembered that the matter is jurisdictional, not as to persons only, but as to subject-matter. The doctrine laid down in the opinion of Chief Justice Beasley, in *Munday v. Vail*, 34 N. J. L. 418, which has become a classic on this subject, applies in full vigor.

There are cases holding that where a condition is imposed upon an estate for the benefit of other lands of the grantor it will pass with the title of the other lands. *Merrifield v. Cobleigh*, 4 Cush. 178, is such a decision. In the present case, had the sale been of the 100-acre tract, there would be room for argument that the benefit of the condition passed to the purchaser; but what was attempted was an independent decretal sale of the 5½ acres held by the railway company. I can find no support therefor.

But this conclusion does not dispose of the case adversely to the judgment. The purchasers at the sale in partition already held the right of entry in common with Hume. Although they took no title through such attempted sale, their previous right in the property remained. In their bargain and sale deed to Bouvier that right was embraced. Bouvier and Hume then held in common a right of entry or alternative suit. Either could exercise that right. One tenant in common may alone bring ejectment. 2 Gen. Stat. p. 1285, § 24. If the defendant had the right at all to object to non-joinder of the other, which is doubtful, he could only do so by notice, under § 37 of the practice act (2 Gen. Stat. p. 2539). Unless otherwise provided, the practice in personal actions is applicable in ejectment. 2 Gen. Stat. p. 1283, § 9. The direction to the jury was not erroneous.

It is assigned for error that the verdict was against the clear weight of evidence, but that is not assignable for error. *Flanagan v. Guggenheim Smelting Co.* 63 N. J. L. 647, 44 Atl. 762.

I shall vote to affirm this judgment.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York *ex rel.*
Louise NORTH, *Appt.*,
v.

James D. FEATHERSTONHAUGH *et al.*,
Respts.

(172 N. Y. 112.)

1. Whether or not the construction of a granite curb in place of an old one of bluestone is new work or the repair of old work is a question of fact, upon which the determination of the trial court is not reviewable on appeal.
2. The determination of a public improvement commission to construct a new curb, sustained by some evidence of its necessity, is not reviewable by the courts, where the commission has statutory authority to construct curbing whenever they deem the same necessary, and whenever, in their judgment, the public convenience requires it.
3. No illegal burden is placed on abutting property owners, who are required to bear the original cost of street paving, by a provision in the paving contract requiring the contractor to maintain the work for a period during which such a pavement, if properly laid, ought to wear, although the duty to repair pavements is by statute placed on the city at large.
4. Abutting owners subject to assessment for a street improvement cannot complain that the specifications required compliance with the labor law as to hours and wages, if, before the bids were received, the law had been declared unconstitutional, and the improvement commissioners announced that the requirements with reference to it would not be enforced, while the successful bidder testifies that the bid was not increased by reason of such law.
5. A provision in a contract for street improvement that laborers must be paid in cash, and not in store orders, will not be held to be unreasonable or illegal if it is authorized by statute.
6. That a notice of hearing as to a street improvement specified a brick pavement will not invalidate a determination to pave with asphalt and set a new curb, if the hearing covered those matters, and the statute empowered the commissioners to change or modify their original determination in reference to the improvement.
7. The proceedings of a public improvement commission in awarding a contract for street improvement are not reviewable by certiorari.

(October 7, 1902.)

A PPEAL by relator from an order of the Appellate Division of the Supreme Court, Third Department, confirming the determination of the public improvement

commission of Cohoes in reference to a public improvement. *Dismissed.*

The facts are stated in the opinion.

Mr. Lewis E. Carr, with *Messrs. MacLean & Doyle*, for appellant:

Certiorari is the appropriate remedy, and brings up for review upon this appeal the entire proceedings had before, and taken by, the public improvement commission of the city of Cohoes in reference to the paving and recurring of Saratoga street, including the alleged illegal provisions contained in the specifications for such work.

N. Y. Code Civ. Proc. §§ 2122, 2140; *People ex rel. Ackerly v. Brooklyn*, 8 Hun, 56; *People ex rel. Mitchell v. Lawrence*, 54 Barb. 580; *People ex rel. Citizens' Gaslight Co. v. Brooklyn Bd. of Assessors*, 39 N. Y. 81; *People ex rel. Erie & G. Valley R. Co. v. Tubbs*, 59 Barb. 401; *People ex rel. Curtis v. Utica*, 65 Barb. 9; *Heywood v. Buffalo*, 14 N. Y. 534; *People ex rel. Cook v. Hildreth*, 126 N. Y. 360, 27 N. E. 558.

The public improvement commission being a purely statutory body, the measure of its power is to be found solely in the legislative act which called it into being.

Schenectady v. Union College, 66 Hun, 179, 21 N. Y. Supp. 147.

The determination of the commission to construct granite curb along Saratoga street at the lot owners' expense was without legal authority. It was not new work, but a repair of old work.

People ex rel. Smith v. Brooklyn, 21 Barb. 484.

The requirements in the specifications that bidders must observe the provisions of the labor law were unwarranted and illegal.

People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716; *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776; *Meyers v. New York*, 58 App. Div. 534, 69 N. Y. Supp. 529.

The requirements of the specifications that the contractor will be obliged to keep the pavement in repair without expense to the city for a period of eight years necessarily tended to impose upon property owners additional burdens, and were unwarranted and illegal.

People ex rel. Hall v. Maher, 56 Hun, 81, 9 N. Y. Supp. 94; *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701; *Excelsior Paving Co. v. Leach* (Cal.), 34 Pac. 116; *Portland v. Bituminous Paving & Improv. Co.* 33 Or. 307, 44 L. R. A. 527, 62 Pac. 28; *McAllister v. Tacoma*, 9 Wash. 272, 37 Pac. 447, 658; *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W.

NOTE.—For other cases in this series as to validity of guaranty of work or provision for repairs in contract for street improvement, see *Portland v. Portland Bituminous Paving & Improv. Co.* (Or.) 44 L. R. A. 527, and *note*; *Robertson v. Omaha* (Neb.) 44 L. R. A. 534; *State ex rel. Wilson v. Trenton* (N. J. L.) 44 L. R. A. 540; *Seaboard Nat. Bank v. Woesten* (Mo.) 48 L. R. A. 279; *Barber Asphalt Paving* 60 L. R. A.

Co. v. Hezel (Mo.) 48 L. R. A. 285; *Alameda Macadamizing Co. v. Pringle* (Cal.) 52 L. R. A. 264; *Shank v. Smith* (Ind.) 55 L. R. A. 564; and *Blochman v. Spreckels* (Cal.) 57 L. R. A. 218.

As to validity of statute fixing compensation which city must pay for labor or other service, see, in this series, *People ex rel. Rodgers v. Coler* (N. Y.) 52 L. R. A. 814.

603; *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125.

The requirement in the specifications in reference to the payment of the workmen is unreasonable and void.

Frorer v. People, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *State v. Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *People ex rel. Rodgers v. Coler*, 166 N. Y. 19, 52 L. R. A. 814, 59 N. E. 716.

Mr. J. Newton Fiero, with **Mr. Walter H. Wertime**, for respondents Featherstonhaugh *et al.*:

The writ of certiorari will not lie, since the public improvement act, under which the action complained of was taken, provides another exclusive remedy.

The proceedings taken by the public improvement commission are neither judicial nor quasi judicial in their character, so far as their determination to curb and pave the street in question is concerned.

People ex rel. O'Connor v. Queens County, 153 N. Y. 370, 47 N. E. 790; *People ex rel. Kennedy v. Brady*, 166 N. Y. 44, 59 N. E. 701; *People ex rel. Jamaica v. Queens County*, 131 N. Y. 468, 30 N. E. 488.

Certiorari will not lie, since the proceeding is not completed, and no official determination or adjudication has been had.

People ex rel. Cuyler v. Palmyra, 3 Hun, 549; *People ex rel. Dickinson v. Livingston County*, 43 Barb. 232.

Where the relator has another remedy, even though that remedy is not exclusive, the writ of certiorari will not lie to review the proceedings of local public authorities with reference to public improvements.

People ex rel. Kimball v. St. Lawrence County, 25 Hun, 131; *People ex rel. Dickinson v. Livingston County*, 43 Barb. 232; *People ex rel. Jamaica v. Queens County*, 131 N. Y. 468, 30 N. E. 488; *People ex rel. Gage v. Lohnas*, 54 Hun, 604, 8 N. Y. Supp. 104; *People ex rel. Kilner v. McDonald*, 4 Hun, 187.

The public improvement commission has power to construct the curb along Saratoga street at the expense of the abutting property owners; and its action was legal, proper, and within the scope of its authority.

Elliott, Roads & Streets, pp. 335, 336, 413; *Moran v. Troy*, 9 Hun, 540; *Re Furman Street*, 17 Wend. 649; *Denise v. Fairport*, 11 Misc. 202, 32 N. Y. Supp. 97; *Re Roberts*, 25 Hun, 371; 2 Dill. Mun. Corp. 4th ed. § 780, p. 959.

The specifications forming part of the contract requiring the contractor to keep the pavement in repair simply constitute a guaranty as to the character of the work, and not an agreement for subsequent repairs such as are required to be made by the city.

Kansas City v. Hanson, 60 Kan. 833, 58 Pac. 474; *Robertson v. Omaha*, 55 Neb. 718, 44 L. R. A. 534, 76 N. W. 442; *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458; *Allen v. Davenport*, 107 Iowa, 90, 77 N. W. 532; *Wilson v. Trenton*, 61 N. 60 L. R. A.

J. L. 599, 44 L. R. A. 540, 40 Atl. 575; *Cole v. People*, 161 Ill. 16, 43 N. E. 607.

An improvement contract is not invalid, as tending to increase the bids of contractors, and thereby impose upon abutting owners a burden properly resting upon the general public of the city, merely because it contains a stipulation that the contractor shall bear the expense of repairs during a certain period, if such stipulation is in effect a mere guaranty of the quality of the work and materials.

Schenectady v. Union College, 66 Hun, 179, 21 N. Y. Supp. 147; *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701; *Osburn v. Lyons*, 104 Iowa, 160, 73 N. W. 650; *Fehler v. Gosnell*, 99 Ky. 380, 35 S. W. 1125; *Verdin v. St. Louis* (Mo.), 27 S. W. 447.

Mr. Harry T. O'Brien, for respondent New York & Bermudez Co.:

The relator, by appearing before the public improvement commission and requesting that Saratoga street be paved with asphalt block, tacitly assented to the terms of the specifications under which the work would be done.

Sentenis v. Ladew, 140 N. Y. 463, 35 N. E. 651; *Lee v. Tillotson*, 24 Wend. 337, 35 Am. Dec. 624; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Re Cooper*, 93 N. Y. 507; *Conde v. Schenectady*, 164 N. Y. 258, 58 N. E. 130.

Haight, J., delivered the opinion of the court:

The court, upon the petition of the relator, issued a writ of certiorari to review the proceedings of the public improvement commission of the city of Cohoes in awarding a contract to the New York & Bermudez Company to curb and pave Saratoga street, in that city, from the south line of Newark street to the Mohawk river. On the 31st day of March, 1901, the public improvement commission of the city of Cohoes caused a map and general plans, with the specifications of the work to be done for the paving and curbing of Saratoga street in that city, to be filed in the office of the clerk of the city, together with an estimate by the engineer of the cost of the improvement. They then passed resolutions unanimously directing the improvement to be made, and that notice be given for a hearing of all persons interested. Thereupon a notice was published in the official paper of the city, in accordance with the provisions of the statute, of the determination made by the commissioners to pave Saratoga street between the points named with vitrified brick, and to construct a granite curb on each side of the street, with receiving basins, etc., and that a meeting of the commission would be held at their rooms in the city hall on the 4th day of April, 1901, to hear all persons interested in the improvement. On the day named for the meeting the relator and others appeared and filed a protest against the construction of the curbs with granite, and asked that the bluestone curbing, already in, be retained, and also filed a request that the pavement be made of asphalt blocks instead

of vitrified bricks. Thereupon the hearing was, upon the request of the relator, adjourned until the 10th of April, 1901, at which time the testimony of several witnesses was taken, bearing upon the question of the necessity of the change from bluestone to granite curbing. At the conclusion of the testimony there was a further adjournment until the 24th of April, 1901, at which time bids were received, pursuant to a notice previously published, inviting bids for the proposed improvement with granite curbing, and with the paving of either sheet asphalt, asphalt blocks, granite, Medina sandstone, repressed vitrified brick, and pressed vitrified block. The relator then made further objections to the proceedings, covering all the points which we shall hereinafter consider. Thereupon the bids were opened, and subsequently the contract was awarded to the New York & Bermudez Company to pave the street with sheet asphalt and to construct the curbs of granite for the sum of \$34,753.72.

The public improvement commission of the city of Cohoes was created by chapter 227 of the Laws of 1898, and derives its powers from the provisions of that act, as amended by chapter 550 of the Laws of 1899, chapter 213 of the Laws of 1900, and chapter 632 of the Laws of 1901. The amendment of 1901, having become a law after the contract herein referred to was issued, need not now be considered. The commission being a statutory body, we shall assume that the measure of its powers is confined to the legislative acts which called it into being.

The first contention on behalf of the relator is that the determination of the commission to construct a granite curb along Saratoga street at the lot owners' expense was without legal authority, and was not new work, but the repair of old work. We regard this contention as raising a question of fact, which was disposed of by the court below, and is not reviewable in this court. The evidence tended to show that the old curbing was of bluestone; that some portions of it had been in use for many years and were badly out of repair; that none of it was set in a concrete base, so as to prevent water from getting underneath; that the commissioners had determined to put the pavement and curbing upon a concrete base; that bluestone is composed of layers, some of which admit of the penetration of water, and when it freezes the stone is liable to crack; that in case of cracking it would necessitate the taking up of the curbing out of the concrete, and the insertion of new curbing, which would largely increase the original cost; that granite curb, when dressed and set in concrete, does not allow water to reach its base; and that it is not subject to cracking or deterioration by reason of the action of water or frost. After the conclusion of the testimony upon the subject, the commissioners made a personal examination of the existing curbing, and thereafter determined to construct the new curb of granite instead of bluestone. In their return they state that the reasons for

the determination were "that in their opinion, for the pavement on a concrete base, it would be necessary to use a curb stronger than the bluestone, and a stone which is not a layer or sandstone; that, in their opinion, the water falling upon the top of bluestone curb frequently gets in between the layers, and a frost occurring under those conditions will separate the layers, and it is, in their opinion, impossible to distinguish between bluestone which will separate and one which will not." We think it cannot be held that there was not any evidence to sustain the determination of the commissioners. Under the statute the commission is given power to cause any street and highway in the city to be paved, "and to construct any and all curbstones at the curb line which it may deem necessary for properly paving or repaving." Section 4. Also the said commission shall have power to pave any street, highway, etc., and to construct all necessary curbstones for the purpose of such paving, "when and wherever the public convenience in their judgment requires the same." Section 6. It will thus be seen that the statute provides for the construction of curbing by the commissioners whenever they deem the same necessary, and whenever the public convenience in their judgment requires it; and the commissioners, as we have seen, have exercised their judgment upon the evidence to which we have alluded, and determined that it was for the best interest of the public that the curbing should be constructed of granite. No question of law arises thereon which we think is reviewable in this proceeding.

In the next place, it is contended that the requirement of the specifications that the contractor will keep the pavement in repair without expense to the city for a period of eight years necessarily tended to impose upon the property owners burdens which were unwarranted and illegal. Under the statute one half of the expense of paving the street was required to be borne by the real estate adjacent and contiguous to that part of the street which the commissioners determined to pave, and the other half was to be paid by the city at large. The specifications complained of are as follows:

Years Guaranty of Maintenance.

The contractor will be required to keep all his work in repair for the period of eight years from and after its acceptance by the city, without expense to the city. From the date of the acceptance of the work by the city the contractor guarantees the asphalt pavement, that he will keep it in repair for the period of eight years as a part of the cost of the work; that is to say, that, from a date commencing with the acceptance of the work by the city to a date eight years subsequent thereto, he will maintain the asphalt pavement. The maintenance consists in repairs, renewals, and furnishing materials necessary to maintain the surface of the street paved by the contractor, at all times, in a perfect state of uniformity; the uniformity of the street to be equal to that

possessed by it when first accepted, and to be sufficient to present no marked hollows or projections, and not to admit of water standing in depressions either on the crown of the street or in the gutters. The surface of the street shall not show any cracks, scaling off, or other signs of disintegration by any action of the elements, and the pavement shall not show any wear greater than is usual with asphalt pavement of the best quality under equally heavy traffic. All imperfect work in the pavement, consisting of open joints, cracks, scaling off, or any other signs of failure, whenever found, are to be repaired in such manner as is prescribed heretofore for asphalt pavement.

Then follow provisions for restoring the pavement when the street has been opened by permission of the city or by water commissioners or abutting owners, but for such restoration the contractor is to be compensated.

In the case of *People ex rel. Hall v. Maher*, 50 Hun, 81, 9 N. Y. Supp. 94, the general term held that an ordinance of the city providing for the pavement of the street, containing a provision requiring the contractor to agree to keep the pavement in repair for seven years after its acceptance by the city without expense to the city, was in effect a charge of the cost of repairs upon the property of abutting owners, and was in violation of the provision of the charter which charges such expense upon the city at large. It will readily be seen that the question raised is one of considerable importance to the public, especially to the cities whose charters provide for the construction of pavement in streets at the expense of the abutting owners of real property, or the property benefited, and that the pavement, when constructed, shall be kept in repair at the expense of the city. Our attention has been called to no case in this court in which the question has been decided. In the case of *Gilmore v. Utica*, 131 N. Y. 26, 29 N. E. 841, the case of *People ex rel. Hall v. Maher*, 50 Hun, 81, 9 N. Y. Supp. 94, was distinguished, but the court apparently carefully refrained from approving of the conclusion there reached. In other jurisdictions the decisions appear to be in conflict. The cases of *Brown v. Jenks*, 98 Cal. 10, 32 Pac. 701; *Excelsior Paving Co. v. Leach* (Cal.) 34 Pac. 116; *Portland v. Bituminous Paving & Improv. Co.* 33 Or. 307, 44 L. R. A. 527, 52 Pac. 28; *McAllister v. Tacoma*, 9 Wash. 272, 37 Pac. 447, 658; *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603,—may be said to be in accord with the doctrine of the case of *People ex rel. Hall v. Maher*, 50 Hun, 81, 9 N. Y. Supp. 94. The cases which may be said to entertain a different view are *Kansas City v. Hanson*, 60 Kan. 833, 58 Pac. 474; *Latham v. Wilmette*, 168 Ill. 153, 48 N. E. 311; *Cole v. People*, 161 Ill. 16, 43 N. E. 607; *Allen v. Davenport*, 107 Iowa, 90, 101, 77 N. W. 532; *Osborn v. Lyons*, 104 Iowa, 160, 73 N. W. 650; *State, Wilson, Prosecutor, v. Trenton*, 60 N. J. L. 394, 38 Atl. 635, 60 L. R. A.

Affirmed in 61 N. J. L. 599, 44 L. R. A. 540, 40 Atl. 575; *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458; *Seaboard Nat. Bank v. Wooten*, 147 Mo. 467, 48 L. R. A. 279, 48 S. W. 939; *Barber Asphalt Paving Co. v. Hezel*, 155 Mo. 391, 48 L. R. A. 285, 56 S. W. 449; *Shank v. Smith*, 157 Ind. 401, 55 L. R. A. 564, 61 N. E. 932; *Barber Asphalt Paving Co. v. French*, 158 Mo. 534, 54 L. R. A. 492, 58 S. W. 934.

In the case of *Kansas City v. Hanson*, 60 Kan. 833, 58 Pac. 474, the contractor agreed to maintain in good order the pavement for five years after its acceptance, and to make all repairs which may, from any imperfection in the work or material, or from any crumbling or disintegration, become necessary within that time. It was further agreed that whenever any repairs were made necessary, from the construction of sewers laying of pipes or telegraph wires, or from any disturbances of the pavement by parties acting under permit of the city engineer, the contractor should restore the street, and receive pay therefor. Under this contract, *Doster, Ch. J.*, in delivering the opinion of the court, says: "We feel quite clear that the instrument should be construed as an agreement to make such repairs only as became necessary on account of indifferent workmanship or defective material used by the contractor. In other words, it is a guaranty by the contractor of the quality of the material used, and the character of the work performed by him. The taking by the city council of such a guaranty cannot, in law, be held to increase the cost of the pavement, or to impose upon the property owners payment for future repairs." In *Latham v. Wilmette*, 168 Ill. 153, 48 N. E. 311, the specifications provided that the contractor shall, without extra compensation, keep in repair for a period of two years after its acceptance, by making good any settlement or derangement of lines or grades of curbs, gutters, and crossings, and by replacing defective materials or work in curbs, gutters, crossings, and pavements. It was held that "this specification is no more than a guaranty that the work has been properly done, and the contractor makes the agreement to repair if defective." In the case of *Cole v. People*, 161 Ill. 16, 43 N. E. 607, the provisions of the bond required the contractor, without further compensation, to "keep in continuous good repair all pavement laid under this contract for a period of five years." Justice Magruder, in delivering the opinion of the court, says: "The provision complained of, which is quoted above, is merely a warranty or guaranty of the fitness of the material for the use intended. There is nothing in the provision to indicate that any of the money raised by special taxation is to be applied to the purpose of maintaining the pavement and keeping it in repair." In the case of *Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458, the contract for paving included an agreement to maintain the pavement without further cost for five years. It was held that the con-

tract did not thereby put upon the adjacent property owners any part of the cost of repairing; that the contract was a guaranty, and nothing more, for a sound pavement at the outset. In the case of *Wilson v. Trenton*, the contract guaranteed the endurance of the pavement for a period of five years, and the contractor agreed to maintain it in good condition, at his own expense, during that period. It was held that the repairs contemplated by the provisions of the contract were only those which arise from lack of durability of the pavement, and that such provision does not impose upon landowners abutting upon the street any burden other than that of having the pavement well constructed at the outset. We do not deem it necessary to specifically refer to the other cases above cited.

The paving companies, in their endeavor to induce municipal governments to adopt their pavement, are not slow in making representations as to its character and durability, and it would seem proper that some remedy should be preserved to the municipalities by which they can enforce their contracts and the representations of paving companies in this regard. It is true that the municipalities may employ inspectors to watch the pavement as it is laid, but this right has not proved to be an adequate protection to the cities. Contractors are anxious to make a large profit out of their contracts, and the temptation is strong to use cheap material and slight the work whenever it is possible for them to do so. In asphalt pavement, its durability depends very largely upon the character of the work, the condition of the foundation for the pavement, and the mixture of the material used; and it is not difficult on the part of the companies to deceive the inspectors in regard thereto. A guaranty on the part of the company as to the durability of the pavement affords a simple and complete remedy, which fully protects the public; and, when the time for which the guaranty continues is no longer than the ordinary durability of the pavement when laid with the best workmanship and material, it is not in contravention of the provisions of a municipal charter requiring repairs to be made at the expense of the city at large. Returning to a consideration of the specifications, we find them headed by the words, "Years Guaranty of Maintenance." Then follows a provision to the effect that the contractor will be required to keep all his work in repair for a period of eight years. Then, again, the contractor "guarantees the asphalt pavement," that he will keep it in repair "as a part of the cost of the work." Then, again, the specifications proceed to define what is meant by "keeping in repair,"—that he is to maintain uniformity of surface, and allow no hollows or projections that will admit of water standing in the depressions, and the surface of the street shall not crack, scale off, or disintegrate by the action of the elements, and shall show no wear greater than is usual to asphalt pavement of the best quality in equally heavy

traffic; all imperfect work, consisting of open joints, cracks, scaling off, or signs of failure, is to be repaired. Then, again, the displacement or derangement caused by cuts or trenches made by others, or the authority of the city, shall be paid for. There does not appear to be any controversy that the asphalt pavement, properly constructed with proper material upon a concrete base, will remain in good condition for the period named in the specifications, or even for a longer time. And we think the repairs required by the contract have reference to making good the imperfect work done, or the defective material used therein,—in other words, that it is in effect a guaranty as to the quality and character of the pavement. If we are correct as to this construction of the specifications, it follows that no additional burden was imposed upon the abutting property owners by reason of the eight-year requirement.

It is further contended that the requirement of the specifications that bidders must observe the provisions of the labor law invalidates the contract. The specifications invite the attention of contractors to the public act relating to the limitation of the daily service of laborers and mechanics upon the public works of the cities of the state, and then quote various provisions of the labor law, among which are the provisions to the effect that "contractors will punctually pay workmen, who shall be employed by them upon the work under their contract, in cash currency, and not in what is denominated store pay or orders." The specifications then call attention to §§ 3 and 13 of the statute (Laws 1897, chap. 415), and state that the contracts will be void and of no effect unless these provisions are complied with. The provisions referred to fix eight hours as a legal day's work, and provide that the wages shall not be less than the prevailing rate for a legal day's work, and that preference of employment shall be given to citizens of the state. The specifications evidently were prepared before the decision of our court was rendered in the case of *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716, in which it was held that the provision of the labor law requiring the payment of the prevailing rate of wages was unconstitutional and void. The bids, however, were not made up and handed in until after this decision. Before the bids were made, notice was given to the contractors that the commission would not enforce the provisions of the labor law which had been declared unconstitutional, and that the commission would not enforce any of the provisions of that law which may thereafter be declared unconstitutional. The bids were then made, and the superintendent of the New York & Bermudez Company, the company to whom the contract was subsequently awarded, swears that in the bid of his company, submitted to the public improvement commission, no item was included by reason of the specification providing for an observance of the provisions of the labor law, nor was

the price set for the work increased in any wise by reason of such provisions. The contract entered into only provides that the contractor will faithfully comply with all the provisions of the labor law of the state which may now be in force. The decision of this court in the *Rodgers Case* having been previously rendered, the provision of the labor law with reference to the payment of the prevailing rate of wages was not in force at the time the bids were made or the contract executed. The fact that the commissioners gave notice that they would not attempt to enforce the labor law, which the court had held unconstitutional, and the further fact that the bid made by the company to whom was awarded the contract was not increased by reasons of the provisions of that law, indicate very clearly that the taxpayers of the city, or the abutting owners upon the street sought to be improved, have suffered nothing by reason of the provisions of the labor law to which attention was called in the specifications. Some of the provisions of the labor law are undoubtedly constitutional and are still in force, and consequently the provisions of the contract to the effect that the contractor will observe those provisions which may now be in force furnish no ground for just complaint. A contract, the consideration of which is based upon a statute which is unconstitutional, is doubtless void. But the contract in this case does not depend upon the labor law for its consideration. The provisions of that statute incorporated into the specifications are extraneous matters which have no material effect upon the main provisions of the contract, and cannot affect those provisions unless it may tend to increase the cost of the work. The contractors must be presumed to have known the law, and consequently to have known that the provision with reference to the rate of wages was unconstitutional. They are deemed, therefore, to have made their bid with this understanding, even independent of the notice which was given to them by the commissioners. Their bid was not in fact increased by reason of the labor law, as appears from the testimony to which we have alluded. We think, therefore, that the provisions of the labor law which have been held unconstitutional may be eliminated from the specifications, and that the contract may stand unimpaired and in full force and virtue. This was, in effect, held in the case of *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L. R. A. 814, 59 N. E. 716. In that case the contractor sought a peremptory writ of mandamus to compel the comptroller to deliver to him a warrant on the chamberlain for the amount due him upon the contract, which was a contract in all essential features like the one now under consideration. The comptroller refused to deliver the warrant for the reason that the contractor had not complied with the provisions of the contract, which required him to pay the laborers employed by him the prevailing rate of wages. It was held that that provision of the labor law which had 60 L. R. A.

been incorporated into the contract was unconstitutional and void, but that the remaining part of the contract was in full force, and the mandamus was ordered to be issued.

The provision of the specifications to the effect that laborers must be paid in cash, and not in store orders, is a requirement of the statutes which as yet has not been condemned in this state. The objection taken to this specification was that it is erroneous, unreasonable, illegal, and unauthorized. It is not unreasonable or illegal if authorized by a statute. Our attention has been called to no provision of this or any of the charters of the cities of this state which permits the treasurer or other financial officer of a municipal government to keep a store, and pay the employees of the city with orders on the store. It may be different, however, with contractors; but, as we have seen, this specification is required by the statute, and no objection was taken upon the ground that the statute was unconstitutional, and it is not the practice of this court to determine the constitutionality of statutes unless the question is distinctly raised by the record.

Finally, it is contended that the determination of the commissioners to pave with sheet asphalt and to curb with granite was made by the commission without an opportunity of the abutting property owners to be heard on such determination. It is true that in the notice given for a hearing it was stated that the commission had determined to pave with vitrified brick, and a hearing was had upon that notice. The hearing, however, covered all matters pertaining to the improvement, the kind of pavement to be used, as well as the kind of curbing. The statute makes provision for the hearing, and then concludes: "Said commission shall have the power to change, alter, add to or modify their first and original determination in reference to such improvement, and shall also have the power and right to change their opinion in reference to what portion of the whole expense should be paid by local assessment." Laws 1899, chap. 550, § 4. After the hearing it appears that the commission did change their determination as to the character of the pavement it would adopt, and finally concluded to use sheet asphalt instead of brick.

Other questions have been discussed in the briefs of counsel, which we have considered, but they present no error that requires a reversal of the proceedings, and we do not deem it necessary to specifically refer to them.

In view of the fact that a large number of persons will become interested as taxpayers when an assessment is made to pay for the improvement contracted for, we have thought it wise to consider this case upon the merits. We are, however, of the opinion that the proceedings sought to be reviewed are neither judicial nor quasi judicial, and therefore, under the well-settled rules, are not subject to review by certiorari. *People ex rel. Jamaica v. Queens*

County, 131 N. Y. 468, 30 N. E. 488; *People ex rel. O'Connor v. Queens County*, 153 N. Y. 370, 374, 47 N. E. 790.

The appeal should therefore be dismissed, with costs.

Parker, Ch. J., and Gray, O'Brien, Vann, Cullen, and Werner, JJ., concur.

PEOPLE of the State of New York *ex rel.*
Charles E. CORKRAN, *Appt.*,

v.

James L. HYATT, *Respt.*

(172 N. Y. 176.)

1. The power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states of the Union, and no person can be surrendered by one state to another unless the case falls within the provisions of the United States Constitution.
2. A person who was not corporeally present in the demanding state at the time of the commission of a crime with which he is charged is not a fugitive from justice in another state within the meaning of the United States Constitution requiring the delivery up of fugitives from justice for punishment.
3. The presence of an alleged criminal in a state for a single day after the alleged commission of the crime, and nearly a year before the institution of any proceedings against him, is not sufficient to require his surrender by another state, in which he is found, as a fugitive from justice.
4. The determination by the governor that a person whose rendition for trial on a criminal charge is sought by another state is a fugitive from justice is reviewable by habeas corpus.
5. A crime will not be presumed to have been committed on a day when accused was in the state, for the purpose of upholding extradition proceedings against him as a fugitive from justice, if the indictment charges its commission on an earlier date, and no claim or suggestion is made of error in the charge.

(*Haight and Werner, JJ., dissent.*)

(October 7, 1902.)

A PPEAL by relator from an order of the Appellate Division of the Supreme Court, Third Department, affirming an order of a Special Term for Albany County dismissing a writ of habeas corpus which sought relator's discharge from custody to

NOTE.—For a case in this series holding that the constructive presence of an accused in the state where the crime is committed is not sufficient to make him a fugitive from justice from that state, see *State v. Hall* (N. C.) 28 L. R. A. 289.

On the general subject as to who are fugitives subject to extradition, see *note* to the case of *State v. Hall* (N. C.) 28 L. R. A. 289, and the later cases of *Re Sultan* (N. C.) 28 L. R. A. 294; *Drinkall v. Spiegel* (Conn.) 36 L. R. A. 486; *Ex parte Tod* (S. D.) 47 L. R. A. 560. 60 L. R. A.

which he had been committed in extradition proceedings. *Reversed.*

The facts are stated in the opinion.

Messrs. Moot, Sprague, Brownell, & Marcy, for appellant:

The constructive presence of Charles E. Corkran in the state of Tennessee, or his constructive participation in the alleged crimes, is not sufficient to sustain the governor's warrant, or require that he be delivered to representatives of the state of Tennessee, to be carried to that state for trial.

Spear, Extradition, pp. 311, 312; *State v. Jackson*, 1 L. R. A. 370, 36 Fed. 258; *Jones v. Leonard*, 50 Iowa, 106, 32 Am. Rep. 116; *Re Mohr*, 73 Ala. 503, 49 Am. Rep. 63; *Wilcox v. Nolze*, 34 Ohio St. 520; *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217; *Re Jackson*, 2 Flipp. 189, Fed. Cas. No. 7,125; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *State v. Hall*, 115 N. C. 811, 28 L. R. A. 289, 20 S. E. 729; *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Re Mitchell*, 4 N. Y. Crim. Rep. 596.

The fact that the relator went to the state of Tennessee July 2, 1901, for lawful business purposes, and was there during that day, and then went to the state of Tennessee again on the 16th or 17th day of July, 1901, and remained one day, and then returned to his home, does not furnish evidence of guilt, or evidence that he was fleeing from justice.

2 Moore, Extradition, § 584.

An alibi, like the absence of accused from a state when a crime is committed, is a perfect legal defense.

People v. Lyon, 90 N. Y. 210, 1 N. E. 763.

Messrs. Scherer & Downs, for respondent:

A person charged with crime may be extradited, although he was not within the demanding state at the time of the commission of the alleged offense.

People ex rel. Post v. Cross, 135 N. Y. 541, 32 N. E. 246; *Roberts v. Reilly*, 116 U. S. 80, 97, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Streep v. United States*, 160 U. S. 128-133, 40 L. ed. 365-369, 16 Sup. Ct. Rep. 244; *Re Adams* (N. Y.) 7 Law Rep. 386; *Adams v. People*, 1 N. Y. 173; *Reg. v. Jacobi*, 46 L. T. N. S. 595, note; *Re Cook*, 49 Fed. 833, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40.

The crime charged in the indictments herein was the crime of grand larceny, committed by false pretenses. The relator could have committed the crime within the state of Tennessee, although never physically present within that state.

Adams v. People, 1 N. Y. 173; *State v. Grady*, 34 Conn. 118; *Com. v. White*, 123 Mass. 430, 25 Am. Rep. 116; *Com. v. Smith*, 11 Allen, 243; *Lindsey v. State*, 38 Ohio St. 507; *United States v. Davis*, 2 Sumn. 482, Fed. Cas. No. 11,932; *People ex rel. Draper v. Pinkerton*, 77 N. Y. 245; *People ex rel. Jourdan v. Donohue*, 84 N. Y. 438; *Re Scrafford*, 59 Hun. 320, 12 N. Y. Supp. 943; *Re Bloch*, 87 Fed. 981; *Re Keller*, 36 Fed. 681; *State ex rel. Burner v. Richter*, 37 Minn. 436, 35 N. W. 9; *Hibler v. State*, 43 Tex. 197; *Kingstury's Case*, 106 Mass. 223; *Re*

Voorhees, 32 N. J. L. 141; *Drinkall v. Spiegel*, 68 Conn. 441, 36 L. R. A. 486, 36 Atl. 830.

The supreme court is limited on habeas corpus to review but one question, namely, the question of identity.

People ex rel. Broderick v. Morton, 156 N. Y. 136, 41 L. R. A. 231, 50 N. E. 791; *Re Davies*, 168 N. Y. 101, 56 L. R. A. 855, 61 N. E. 118; *People ex rel. Burby v. Howland*, 155 N. Y. 282, 41 L. R. A. 838, 40 N. E. 775; *Terlinden v. Ames*, 184 U. S. 270, 278, 46 L. ed. 534, 541, 22 Sup. Ct. Rep. 484.

Callen, J., delivered the opinion of the court:

The relator was arrested and held under a mandate or warrant of the governor of this state issued on the requisition of the governor of the state of Tennessee for the delivery of the relator as a fugitive from justice. The mandate of the governor recites that it has been represented to him that the relator stands charged in the state of Tennessee with having committed the crime of larceny and false pretenses in the county of Davidson, and that he had fled from said state and taken refuge in the state of New York. By stipulation between the parties it was conceded that the indictments attached to the requisition papers under which the governor issued his warrant were found on the 26th day of February, 1902, and that the alleged crimes charged in the indictments were committed on May 1, 1901, May 8, 1901, and June 24, 1901, respectively. At the hearing had on the return of the writ of habeas corpus it was further stipulated between the parties that the relator was not in the state of Tennessee at the time of the commission of any of the offenses charged against him, but in the state of Maryland, which was his residence. It appeared by his testimony that he went to Nashville, in Tennessee, on the 2d day of July, 1901, to accept the resignation of one Albright, the president and treasurer of the American Hardwood Company, in which the relator was interested, and was then elected president of the company in said Albright's stead; that that evening he left Nashville, and never was again in the state of Tennessee, except passing through there on the 16th or 17th of July. It is not claimed that the offenses for which the extradition of the relator was sought were committed when he was in the state of Tennessee, but it is contended that, though not corporeally present at the time of the commission of the offense, he may nevertheless be properly surrendered as a fugitive from the justice of that state where it was committed.

It is to be premised that the power of a government to punish for extraterritorial crimes is a very different question from that of its right to require the surrender to it from foreign countries, for trial and punishment, persons alleged to have committed such offenses. Some governments assume to impose the obligations of their penal laws, either in whole or part, on their citizens, no matter where they may be. We have a nota-

ble example of this rule in the recent punishment of a British peer for an alleged bigamy committed in the United States. Some governments assume to go even further, and punish an alien for an offense committed against their citizens, though the offense is committed in a foreign jurisdiction. Publicists and writers on international law differ greatly as to the right of the government to punish for offenses committed without its territory. A full review of this subject is to be found in the work of Mr. John Bassett Moore, late assistant secretary of state of the United States, on "Extraterritorial Crime." The power of any government to punish for such an offense necessarily depends upon its ability to obtain possession of the defendant; and, though each government assumes to define its own powers, still it may be restrained by the action of the government of which the offender is a citizen, invoked on his behalf, as was the case in the controversy between this country and Mexico in relation to which the report of Mr. Moore was written. Not so with extradition between the states of the Union. It is not governed by international law, but depends solely on the provisions of the Constitution of the United States and the act of Congress made from it. The power of a state to punish a fugitive from justice after obtaining custody of his person depends in no way on how that custody was obtained. Even if the offender has been kidnapped in another state and brought within the territory of the prosecuting state, that fact does not affect the jurisdiction of the latter to punish him for the offense. *Ker v. Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225; *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40. Nor will a person be relieved from prosecution at the intervention of the state from which he was abducted by violence. *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 Sup. Ct. Rep. 1204. In *Lascelles v. Georgia*, 148 U. S. 537, 37 L. ed. 549, 13 Sup. Ct. Rep. 687, it was said: "If the fugitive be regarded as not lawfully within the limits of the state in respect to any other crime than the one on which his surrender was effected, still that fact does not defeat the jurisdiction of its courts to try him for other offenses, any more than if he had been brought within such jurisdiction forcibly and without any legal process whatever." It was there held that interstate rendition did not depend on comity or contract, but on the provisions of the Constitution of the United States. It will thus be seen that the condition of a citizen of one state, surrendered to another for criminal prosecution, has not the safeguards which exist in international extradition, for the surrendering state is without any standing to intervene in his behalf, however much its process may have been abused. Therefore, it necessarily follows that no person can or should be extradited from one state to another unless the case falls within the constitutional provision, and that the power which independent nations have to surrender crim-

inals to other nations as a matter of favor or comity is not possessed by the states.

The provision of the Constitution of the United States (art. 4, § 2, subd. 2) is: "A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Under this, Congress has enacted (Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597): "Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit . . . charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested . . . and to cause the fugitive to be delivered . . ." It will be seen that, to authorize or require a state to surrender to another state an alleged offender, it is necessary, not only that such person stand charged with crime, but that he has fled from justice. What constitutes a fugitive from justice has been the subject of much discussion by eminent text-writers, and of many decisions by the courts and by the governors of the several states. There seems to be substantial unanimity in all the authorities on one proposition,—that, to be a fugitive from justice, a person must have been corporeally present in the demanding state at the time of the commission of the alleged crime. "The case, and the only case, for which the Constitution provides, is that of a person who is charged with crime in one state, and who flees to and is found in another state. This is the whole of the case." Spear, *Extradition*, 311. "The question of constructive presence at the commission of a crime has frequently arisen in the case of obtaining money or goods by false pretenses, and it has been held that such presence in the demanding state is not sufficient as a basis for a requisition for the surrender of a person as a fugitive from justice, although, if the person charged were to come within the jurisdiction of that state, he might be arrested and punished for the false pretenses there committed while he was corporeally elsewhere." Moore, *Extradition*, § 584. In *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148, it was said by Mr. Justice Harlan: "Undoubtedly, the act of Congress did not impose upon the executive authority of the territory the duty of surrendering the appellant, unless it was made to appear in some proper way that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding state at the time he is

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alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process." In *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291, it is said by Mr. Justice Matthews: "To be a fugitive from justice, in the sense of the act of Congress regulating the subject under consideration, it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense he has left its jurisdiction, and is found within the territory of another." In *Re Voorhees*, 32 N. J. L. 141, a fugitive is designated as one "who commits a crime within a state and withdraws himself from such jurisdiction." In *Wilcox v. Nolze*, 34 Ohio St. 520, it is said, referring to the constitutional provision: "These words, taken, as they must be, in their natural and obvious sense, do not include a case of constructive presence in the demanding state, and constructive flight therefrom, but relate only to a case where the accused is actually present in the demanding state at the time he commits the act of which complaint is made." The same principle has been held in *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217; *Jones v. Leonard*, 50 Iowa, 100, 32 Am. Rep. 116; *Re Mohr*, 73 Ala. 503, 49 Am. Rep. 63; *Re Jackson*, 2 Flipp. 183, Fed. Cas. No. 7,125; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968. It is stated in a note found in Mr. Moore's work on *Extradition* (p. 948) that "the interstate extradition conference held in New York City in August, 1887, refused to adopt a recommendation to the governors of the various states and territories that no demand be complied with where the fleeing was constructive, on the ground that the decisions of the courts already covered the case." *Hibler v. State*, 43 Tex. 197, is not in conflict with these authorities, for there a fugitive from justice was defined to be "a person who commits a crime in one state, for which he is indicted, and departs therefrom, and is found in another state." The only case cited as authority for a contrary doctrine is *Re Cook*, 49 Fed. 833, reported in the Supreme Court as *Cook v. Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; In the opinion there delivered by the district judge it is said: "One may commit an offense against a state upon whose soil he has never set his foot." I have already said this may be true, but it does not determine the question whether the offender is a fugitive from justice. In that case the petitioner was under arrest in Wisconsin, having been extradited by the governor of the state of Illinois. He sought relief from imprisonment by writ of habeas corpus from the United States circuit court for Wisconsin. The question of the propriety of his extradition was therefore not properly before

the court, and the decision of the circuit court remanding the relator was affirmed by the Supreme Court on the express ground that it was immaterial how the relator's presence in Wisconsin had been secured; that it was sufficient that at the time of the writ he was subject to its territorial jurisdiction. Nor did the case in fact require from the learned judge the statement cited. The relator was charged with having, as a banker, fraudulently received deposits. He had been in the state of Wisconsin a few days before, and, knowing the bank to be insolvent, gave his clerks directions to receive deposits. His subsequent departure from the state, under all the authorities, made him a fugitive from justice.

The question discussed has never been passed upon by the courts in this state, but has been considered by several of our governors. In *Re Mitchell*, 4 N. Y. Crim. Rep. 596, will be found an opinion by Governor Hill on an application for the extradition of Thomas Mitchell. Mitchell was charged with having committed manslaughter in Jersey City, by reason of his ownership of an unsafe building in that place, which fell and killed four persons. It appeared that Mitchell had not been in New Jersey for some weeks prior to the accident. The governor refused to extradite him, holding that "the actual presence of the accused party in the demanding state at the time of the commission of the alleged offense is a jurisdictional fact." This view has been accepted by the governors of Massachusetts, of Maryland, of Tennessee, and of Illinois. See Moore, *Extradition*, § 579 *et seq.* It is claimed that this court has held a contrary doctrine in *Adams v. People*, 1 N. Y. 173. The defendant, Adams, was indicted and convicted for obtaining money under false pretenses under a fraudulent warehouse receipt, which he transmitted from Chillicothe, in Ohio, to the prosecutors, merchants in New York City. The case in no respect involved the question of the constitutional obligation of the governor of Ohio to surrender the defendant to the authorities of the state of New York, but only of the power of this state to punish him after having secured jurisdiction of his person. Under the authorities already cited from the Supreme Court of the United States, it was of no importance how the jurisdiction of his person was obtained. If the relator was not otherwise subject to extradition to the state of Tennessee, because he was not personally present in that state at the commission of the alleged offenses, his subsequent presence in the state for a single day, nearly a year before the institution of any prosecution against him, could give that state no right to require his surrender. The question is whether he is a fugitive from justice, not whether the courts of the state of Tennessee have jurisdiction of his alleged offenses. That jurisdiction they had at all times, if at all, provided they could secure his person. I am at a loss to imagine how a man's voluntary visit to a state can constitute him a fugitive from the state, when he was not such before. 1 Cong. 60 L. R. A.

sider it as having exactly the contrary effect. If there be any force in this occurrence, it must be, not in his going into the state, but in his failing to remain there. It is not, however, suggested that he in any respect offended against the laws of Tennessee while present there. He went there for a specific purpose, and, his business accomplished, immediately left. It is not pretended that his stay was curtailed or that he left the state on account of any suspicion of a prosecution. Would he have been liable to extradition because, on a journey to New Orleans, his route passed through the state of Tennessee? Such a result seems to me utterly unreasonable. No distinction can be drawn between the two cases. In the *Case of Adams*, already referred to, the prisoner sought discharge from arrest by habeas corpus; and the opinion of Judge Vanderpoel, of the superior court of the city of New York, denying the application, is found in 7 Law Rep. 386. Adams came voluntarily into the state, and, after making an engagement to meet one of the prosecutors, suddenly left the state, and failed to keep his engagement. The decision proceeded on the ground that the evidence justified the inference that the prisoner prematurely departed from the state with the view of avoiding arrest and prosecution for his crime. The case has not escaped criticism, though its doctrine may be correct when limited to the facts of the case; that is to say, a departure from the state to avoid prosecution, of which there is no suggestion in the case before us. In truth, however, the questions discussed by the court were not properly before it at all. They could have been raised in the state of Ohio, but not in New York.

It is urged that this doctrine of the necessity of corporeal presence in the state where the offense is alleged to have been committed will render the several states asylums for criminals, the effect of whose offenses is injury to property or persons in other states. There is no practical danger of the kind. It may be safely stated that nearly every state, as well as our own, punishes crimes committed within the state, although the results of the crimes are effected without its territory. The relator would be properly surrendered to the state of Maryland, where he was at the time of his alleged offense, if that state made demand for him. On the other hand, there is great danger that citizens may be carried into other states to be punished for acts which are not criminal in the jurisdiction in which they were committed. The case of false pretenses is a notable example. By our Penal Code (§ 544) it is provided that "a purchase of property by means of a false pretense is not criminal, where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged." This was doubtless dictated by the knowledge that criminal charges of false pretenses are often instituted in reality to compel the payment of debt, and are easily fabricated. It may be that this provision of the Code has no extra-

territorial effect, and that a citizen of this state, if found in another state, may be punished there for alleged oral pretenses made here. But neither the Constitution nor the Federal statute requires this state to surrender him for prosecution in another jurisdiction. These considerations equally apply to prosecutions for libels alleged to have been committed in newspapers published here and circulated throughout the country. The real evil of the day is not the insufficiency of the criminal laws, but the excessive multiplication of statutory crimes.

It is suggested (though not by counsel) that I have construed the stipulation of the counsel for the state of Tennessee too broadly, and that it was intended to admit only that the defendant was not in Tennessee at the particular dates alleged in the indictment, not that he was absent from Tennessee at the commission of the offenses charged against him. The brief of the learned counsel entirely disposes of this suggestion. He makes but two points: (1) "A person charged with crime may be extradited, although he was not within the demanding state at the time of the commission of the alleged offense." (2) "The supreme court is limited, on habeas corpus, to review but one question, namely, the question of identity." I have, therefore, but followed the counsel's own construction of his admission.

We now reach the question whether the action of the governor can be reviewed on habeas corpus. It has been held by the Supreme Court of the United States, in *Robb v. Connolly*, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544, that the governor of a state, in the execution of the duty of surrendering fugitives imposed by the Constitution and the statute of Congress, does not act as a United States officer, and that a writ of habeas corpus may be issued by the state courts to test the validity of an arrest under his warrant. In *Roberts v. Reilly*, 116 U. S. 95, 29 L. ed. 549, 6 Sup. Ct. Rep. 300, it was said: "How far his [the governor's] decision may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive, are questions not settled by harmonious judicial decisions, nor by any authoritative judgment of this court." In *Cook v. Hart*, 146 U. S. 193, 36 L. ed. 939, 13 Sup. Ct. Rep. 43, it was held: "We have no doubt that the governor upon whom the demand is made must determine for himself, in the first instance, at least, whether the party charged is in fact a fugitive from justice, . . . but whether his decision thereon be final is a question proper to be determined by the courts of that state." The Constitution and laws of the state of New York, therefore, control the decision of the question we are now considering. While doubtless to a certain extent the action of the governor is executive or ministerial, it is not so in the broad sense in which the general functions of the office are conferred upon him by our Constitution. In *Re Guden*, 171 N. Y. 529, 64 N. E. 451, we have held that the power given to the governor to remove a sheriff upon charges and after a hearing

was executive, and the exercise of that power not subject to review by the courts. But the question here is of an entirely different character. It involves the liberty of the citizen. Speaking of the division of powers among the three great branches of the government, Parker, Ch. J., in the *Guden Case*, said: "There resides in the people of this and every state an absolute power to prescribe rules of action, through legislation; to enforce rules of action and to transact generally the affairs of government, through executive acts; and to determine controversies between, enforce rights belonging to, and redress wrongs done to, citizens of the state, through the courts." The liability of the citizen to arrest and detention, and the grounds therefor, therefore, necessarily present a judicial question, though the arrest and detention are effected by an executive or ministerial officer. The act of Congress provides that a copy of the indictment or the affidavit before a magistrate shall be proof of the charge of crime against any person whose extradition is sought, but it does not prescribe what shall be evidence that he is a fugitive from justice. The fact that he is a fugitive is therefore a matter of proof. While the warrant of the governor is presumptive evidence of the fact, there is no reason on principle why it should be conclusive. It was said by Judge Jenkins in *Re Cook*, 49 Fed. 833, referring to the case of *Roberts v. Reilly*: "That decision, by its very terms, implies that the action of the governor is only presumptively regular, and can be reviewed by the courts. Surely, it cannot be claimed that such action is conclusive upon personal right, and may not be inquired of by judicial tribunals. Surely it cannot be that the right to personal liberty hangs upon so slender a thread as the arbitrary will of the authorities of the demanding and surrendering states. 'No person shall be deprived of life, liberty, or property without due process of law.' That is the fundamental law of the land, coming to us from Magna Charta. It is not due process of law which condemns without hearing, which convicts without trial. . . . It is essential to compliance with such executive demand that the person whose surrender is demanded should be adjudged a fugitive from the justice of the demanding state. The decision of the executive is not conclusive of that fact." The writ of habeas corpus is in this state available to every person imprisoned or deprived of his liberty, unless he is restrained under the authority of the Federal government, or unless he is committed by virtue of a final judgment or decree of a competent tribunal of jurisdiction, or the final order of such a tribunal punishing him for contempt. The warrant of the governor is not a final judgment nor a decree, and, even were it such, it would be the duty of the court to see whether the jurisdictional facts exist which are necessary to authorize the action of the governor. The provision of § 827 of the Code of Criminal Procedure, directing that any person arrested on the governor's mandate shall be

brought before a judge of a court of record, and informed of his right to a writ of habeas corpus to inquire into his identity with the person named in the warrant, does not assume to limit the inquiry on a writ of habeas corpus to the question of identity. It was enacted for the benefit of any person arrested under such a warrant, and solely as an additional safeguard against illegal removal from the state. As was held in *People ex rel. Tweed v. Liscomb*, 60 N. Y. 560, 19 Am. Rep. 211: "This writ cannot be abrogated or its efficiency curtailed by legislative action. . . . The remedy against illegal imprisonment afforded by this writ, as it was known and used at common law, is placed beyond the pale of legislative discretion, except that it may be suspended when public safety requires, in either of the two emergencies named in the Constitution." If, therefore, on the return to the writ it is clearly shown that the relator is not a fugitive from justice, and there was no evidence from which a contrary view can be entertained, which is the fact in this case, as appears by the stipulation and concession of the parties, there is no reason why greater efficacy should be given to the warrant of extradition than to the warrant of any other magistrate by which a citizen is imprisoned or deprived of his liberty. In *People ex rel. Lawrence v. Brady*, 56 N. Y. 182, this court discharged the relator, who was held under a warrant of extradition issued by the governor of the state, on the ground that the affidavit on which the surrender was asked did not state a crime. In *People ex rel. Draper v. Pinkerton*, 77 N. Y. 245, the only question decided was whether the warrant of the governor recited the facts necessary to confer authority under the Constitution and laws of the United States, and was sufficient justification for holding the prisoner to be brought up on habeas corpus, without producing the papers or evidence upon which the governor acted. It was held that the recitals were to be taken as prima facie true, no proof to the contrary having been introduced by the prisoner. In *People ex rel. Jourdan v. Donohue*, 84 N. Y. 438, again the only question was the sufficiency of the executive warrant on its face. Referring to criticisms that had been made on the decision in the *Lawrence Case*, the court said: "And hence we have held that where the preliminary papers upon which a warrant of extradition has been granted are produced, and are before us, it is our right and our duty to examine them, and judge and determine, when our process is invoked, whether they are sufficient, under the law, to justify the warrant of extradition. . . . Our ruling in this respect has not escaped criticism; . . . but an opposite conclusion, which would make the determination of the executive final, even though the papers produced clearly showed that the essential preliminaries of the law were unfulfilled, does not yet commend itself to our judgment." In all these cases the question related to the sufficiency of the charge against the prisoner, not to his being a fugitive. But if the 60 L. R. A.

courts can review the action of the governor or on one prerequisite for extradition, it is difficult to see why they cannot equally review his action on the other. The great weight of authority in other states is in favor of such a review. It was so held in the cases of *Jones v. Leonard*, 50 Iowa, 110, 32 Am. Rep. 119; *Wilcox v. Nolze*, 34 Ohio St. 524; *Hartman v. Aveline*, 63 Ind. 344, 30 Am. Rep. 217; and *Re Mohr*, 73 Ala. 516, 49 Am. Rep. 70. In the *Wilcox Case* it is said: "Whether or not the accused committed the acts complained of while actually present in the demanding state is jurisdictional; and it is clearly competent, in such case, to show by parol evidence a defect in the executive power, however regular the extradition papers may be in matter of form." In the *Jones Case* it is said: "The governor of this state is not clothed with judicial powers, and there is no provision of the Constitution or laws of the United States or of this state which provides that his determination is final and conclusive in the case of the extradition of the citizen. In the absence of such a provision, we hold that the decision of the governor only makes a prima facie case; that it is competent for the courts in a proceeding of this character to inquire into the correctness of his decision, and discharge the prisoner." In the *Mohr Case* the learned court said: "We are of opinion that the probate judge did not err in discharging the petitioner, and that it was competent for him to hear oral evidence in order to establish the fact that the petitioner was not a fugitive from justice. Any other conclusion than this would establish a doctrine very dangerous to the liberty of the citizen. It would greatly impair the efficacy of the proceeding of habeas corpus, which has been often characterized as the great writ of liberty, and may be regarded, not less than the right of trial by jury, as one of the chief corner-stones in the structure of our judiciary system. It might justly be considered as alarming to announce that a writ which has so frequently been used for centuries past to prevent the encroachment of kings upon popular liberty is inadequate for the just purposes for which it has been invoked in this case."

There is little to be added to what has been so well said by the jurists of other states. The further suggestion, however, may be made, that no law gives a person sought to be extradited the right to a hearing before the governor, or to submit evidence in his behalf. Whatever in these respects may be accorded by the governor to the accused is a matter of favor, not of right. Therefore, unless he may review his extradition on habeas corpus, a citizen, on the fiat of an executive officer, without a hearing, may be transported a prisoner to the utmost confines of the country. It has been held by the Supreme Court of the United States that in the case of foreign extradition there must be some competent evidence before the magistrate, to authorize the surrender of the accused. *Ornelas v. Ruiz*, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689.

But if the orders made below are upheld, in the case of interstate extradition a citizen may be surrendered without the slightest evidence either of his guilt or that he is a fugitive.

The guilt or innocence of an alleged fugitive from justice is not to be determined on requisition proceedings, nor on the writ of habeas corpus. Therefore, if the charge was such as to necessarily require the presence of the accused within the state at the time of the commission of the offense, mere proof of an alibi would not in every case require or justify his discharge. But the question in the present case is not one of alibi, for the stipulation of the parties admits that the defendant was not personally present in the state of Tennessee at the commission of the alleged offenses.

For these reasons the orders of the *Special Term* and the *Appellate Division* should be reversed, and the relator discharged from custody.

O'Brien, J., concurring:

I agree with Judge Cullen in his exposition of the principles applicable to this case. It may possibly be useful to add to this very clear and able exposition of the law some suggestions with a view of eliminating from the case certain considerations that are misleading and wholly foreign to the questions involved, and a word with respect to the functions of the writ of habeas corpus and the procedure thereon in cases of interstate extradition. It is declared by statute to be a state writ to inquire into the cause of detention, and in a proper case to discharge the person from all restraint of his liberty. In some cases the writ cannot issue at all, namely, in cases where the restraint or detention is by virtue of a mandate from a court or judge of the United States in cases where such court or judge has exclusive jurisdiction. Neither can it issue in a case where the party is detained by virtue of the final judgment or decree of any competent tribunal, civil or criminal. Code, § 2016. The applicant for the writ must show affirmatively in his petition that he is not detained under any such process, and, should it appear upon the hearing that he is, then he must be remanded. *Id.* §§ 2032, 2033. In other words, when certain facts are made to appear as the cause of the detention, the inquiry can go no farther, but must stop, and the applicant must be remanded, however unjust in point of fact his detention may be. In all other cases there are no limitations upon the scope of the inquiry, but it must proceed until the issue is determined according to the rules of law applicable to such a case. The burden in the first instance is upon the officer or party who detains the person to show that such detention is authorized by some legal authority.

The relator in this case was not detained under process from any court, civil or criminal, but under an executive warrant commanding the defendant to deliver him to an agent of another state, to be brought to that state for trial upon a charge of crime *al-*

leged to have been committed in that state, and hence all the facts were open to inquiry. The defendant made return to the writ that he detained the relator under this warrant, but exhibited no other document or paper to sustain the warrant. The warrant on its face stated that it had been represented to the governor of this state by the governor of the state of Tennessee that the relator was charged in that state with the crime of larceny and false pretenses, and that he had fled from that state, and taken refuge in this state. These statements on the face of the warrant were to be taken as presumptively true in the first instance, and, if the inquiry rested there, the defendant had made out a *prima facie* case to justify the detention. It is important here to note, and to keep always in view, that when the defendant presented the executive warrant without any other document or paper or any other proof of the facts therein stated he raised only a presumption. The warrant did not conclusively establish the facts recited. It was so held by this court (*People ex rel. Lawrence v. Brady*, 56 N. Y. 182), and the law as laid down in that case has never been modified, but has been repeatedly approved. Indeed, I do not understand that there is now any difference of opinion as to the legal effect of the warrant as evidence. It raised a presumption, but nothing more. I am not aware of any case in any court of controlling authority where it was held to be conclusive, and no reason is given why it should be. But a mere legal presumption is good and justifies an act only until it is removed by proof of some other fact, and when so removed the act stands without authority or justification. That, in my opinion, is just what happened in this case, as will appear hereafter. It must be borne in mind all the time that we know nothing, and can know nothing, judicially, concerning the facts or circumstances of the larceny and false pretenses charged in the warrant. The record does not even contain the indictment, or any paper or proof as to the facts, if any, that transpired in the demanding state. All we know or can know are the things recited in the warrant. The statute provides (Code, § 2039) that the relator may, under oath, deny any material allegation of the return, or state any fact to show that his detention was illegal, or that entitled him to his discharge. The relator did so traverse the return, and thus put the facts stated in the warrant in issue. The court thereupon was required to proceed in a "summary way to hear the evidence," and dispose of the case as justice required. The relator proved one material fact conclusively, and that was that he was not within the demanding state at the time of the commission of the crime as that fact was averred in the indictment. I do not mean that his oath on that point was conclusive, but the proof was of a higher character, namely, the stipulation of the respective attorneys in open court. These were admissions upon the record that import absolute verity for all the purposes of the inquiry, and they had the legal effect to re-

move every presumption to the contrary that arose from the face of the warrant. 1 Greenl. Ev. § 186. It is important to understand the real scope and effect of these admissions. They were: (1) That three indictments were attached to the requisition papers upon which the warrant was issued, and, as they were not produced, we know nothing as to their contents, except as stated in the admission, and that statement was: (2) That all of them were found on February 26, 1902, and the alleged crimes were charged in the indictments to have been committed on May 1, 1901, May 8, 1901, and June 24, 1901, respectively. So that we simply know that the relator was charged with three distinct offenses of larceny and false pretenses committed on the dates above stated. (3) It was also admitted and stipulated that the relator was not within the state of Tennessee between May 1, 1899, and July 1, 1901, but was in that state on July 2, 1901. These are all the facts that the demanding state elected to disclose upon the hearing of the writ of habeas corpus as the grounds for taking the relator from this state against his will into another jurisdiction. Not a single fact is before us that raises any question as to the constructive presence of the relator in the demanding state on the dates named in the indictment, or that would warrant even the suspicion that he committed the crimes charged by means of an innocent agent. All that is said upon that subject is pure conjecture, without any fact upon which to build up the speculation. On the record before us the relator was presumptively personally present in the demanding state at the dates named, and there took and carried away the property claimed to have been stolen, or he did not and could not commit the offense charged in that state at all. It having been conclusively established that the relator was not in the demanding state on the dates when the crimes were charged to have been committed, it follows that he could not have committed the offenses, and certainly could not have fled from the justice of the demanding state. The authorities are unanimous in holding that a person cannot be a fugitive from the justice of the demanding state who was not in that state when the crime charged is alleged to have been committed. Constructive presence furnishes no basis for executive action. The cases on that subject are collected in a note to the case of *State v. Hall* (N. C.) 28 L. R. A. 289. The presumption arising from the recitals in the executive warrant was completely overthrown by the admissions upon the hearing before the court that the relator was not in the demanding state at the dates when it was alleged that the crimes were committed, and this left the warrant under which the relator was in custody without any basis upon which to rest.

This proposition is met only in one way, and by one line of argument, which should now be noticed. It is suggested that, since the relator was in the demanding state on the 2d day of July, 1901, for a few hours, on 60 L. R. A.

a temporary errand of business, that he may have committed some or all of the crimes charged while there on that day; and that, since the precise dates stated in the indictment are not material, it may be shown upon the trial that he actually did commit the crimes on that day, and hence this court should send the relator to the demanding state for trial. This suggestion may possibly have the merit of ingenuity, but as a method of reasoning or argument, or as a judicial utterance in a case involving personal liberty, it is to be hoped that this court will not adopt it. The state of Tennessee and its agent were represented at the hearing upon the writ by able counsel. All the facts and circumstances constituting the alleged crimes were open to inquiry. It could have been shown that there was or might have been a mistake in stating the dates in the indictment, or it could have been shown that the crimes were actually committed on the 2d day of July following; but nothing of the kind was claimed, or even suggested. The demanding state, its agent and counsel, for some reason elected to withhold all proof of the facts and circumstances of the alleged larcenies, and to stand upon the bare recitals in the warrant. The *prima facie* proof that the state gave, consisting only of the recitals of the warrant, that the relator was personally present there at the dates named and committed the crimes, was superseded and removed by the solemn and conclusive admissions in open court that he was not there at the time, and consequently could not have fled from justice. When the prosecution alleges and proves a larceny committed at a designated time and place, and makes no claim that it was committed at any other time or place, and the accused then shows by conclusive proof that he was not in the state on the days designated, nor for a year before, nor for eight days after, and the case rests upon these facts alone, without any proof to justify even a suspicion that the crime was committed eight days after the date laid in the indictment, it would be a strange rule of law that would permit the case to go to the jury in order to procure a finding that, after all, the time laid in the indictment was a mistake, and the crime was committed by the accused at the later date.

But the case of *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291, is cited to sustain this line of argument, and an expression of the learned judge who spoke for the court is made prominent. This court and every other court has often commented upon the value of isolated judicial expressions in an opinion as authority. The facts of the case upon which the decision was based must be compared with the one in hand, in order to enable us to interpret the decision and the language of the opinion. The difference in the facts of that case and the one at bar is so radical and fundamental that it will be seen at a glance that it has no application.

1. In that case the state of New York, the demanding state, took a very different

course from that adopted by the demanding state in the case at bar. It did not rest its right upon the recitals of the warrant, but produced all the papers upon which it issued; thus disclosing to the court all the facts and circumstances constituting the crime charged. The warrant was there supported by all the preceding facts, and the recitals became wholly immaterial. Not so here, since the recitals give us all the light we have, and they are conclusively contradicted by the admissions of record.

2. Not only did the court have all the papers before it, but proof was given *dehors* the record as to all the facts and circumstances of the crime. There was full disclosure, and nothing was withheld, so that at the close of the hearing the question whether the accused was or was not a fugitive from justice was one of fact. Not so in this case; since, after the admissions, we have not a single fact left to show that the relator fled from the state of Tennessee.

3. In that case there was nothing but the oath of the accused that he was not in the demanding state at the time charged in the indictment, and that was of no consequence against all the other proof to show that he was. His oath was not conclusive, whereas in the case at bar we have an admission that is conclusive that he was not in the state at the time, and nothing to place against it unless we are to presume that the crime was committed on the 2d day of July, when no one claims that it was. The court ought not to presume that the crime was committed on that day against the allegations of the indictment, and without any claim from any source that it was. If presumptions are to be made in such a case, they should be in favor of personal liberty, and not against it.

But the question whether the relator committed larceny in the state of Tennessee at any time when he was personally present there is not really in the case at all, since there is not now, and never was, any serious claim that he was in that state when the crimes charged were committed, otherwise than constructively. Constructive presence in the demanding state is the sole basis of the claim that the relator fled from its justice, and, as already suggested, there is no case or authority that I am aware of that sustains such a claim. All the cases are the other way, and we must either disregard these cases or adopt the fiction that the offenses were really committed by the relator while he was in the state on July 2, 1901.

It may, before closing, be profitable to call special attention to a case quite similar, since it shows how such cases as this are considered and disposed of by courts in the demanding state of Tennessee. I refer to the case of *Tennessee v. Jackson*, 1 L. R. A. 370, 36 Fed. 258, which is quite instructive. It appears that Jackson resided in Chicago. He sold to the prosecutor, who resided at Chattanooga, a horse, the bargain having been made by correspondence. The horse was shipped to the purchaser by rail at the place last named, and he remitted by mail

to Jackson, at Chicago, the purchase price. When the horse arrived, his qualities were found to be such that the purchaser claimed to have been defrauded out of the price by false and fraudulent statements. He proceeded to obtain a warrant from a justice of the peace at Chattanooga against Jackson in Chicago, charging him with obtaining money by fraud, and placed the warrant in the hands of a detective, who made an affidavit that Jackson had fled from the state of Tennessee and had taken refuge in the state of Illinois. On this affidavit and warrant he procured a requisition from the governor of Tennessee on the governor of Illinois for the delivery to him of Jackson. Armed with these papers, the detective proceeded to Illinois, and obtained a warrant from the governor of that state for the arrest of Jackson. He arrested him on the warrant, hurried him off to Tennessee, and there had him tried before the justice of the peace, convicted, and sent to jail. It will thus be seen that Jackson was not only extradited from his home in another state, but actually tried and convicted in the demanding state. But Jackson sued out a writ of habeas corpus in Tennessee, and was discharged on the ground that all the proceedings were based upon a falsehood, namely, that he had fled from Tennessee, where he had never been before. The opinion of the court is very brief, but pointed. After citing the act of Congress, the learned judge said: "According to the provisions of this law, there must be, not only the commission of the crime, but the person charged must be a fugitive from the state in which it was committed, before the executive authority can be called into action. Jackson was not a fugitive. He had not in all his life been in Tennessee; had never fled from it; and his case did not fall within the positive terms of this law. The oath of the detective was false, and the governors of the two states imposed upon. The whole proceeding was a fraud upon the law. If this arrest and imprisonment are to be maintained, the opportunities for wrong and abuse of this law will be great and widespread. Commercial transactions are largely conducted by mail and by telegraph. If the seller at one end of the line and the buyer at the other, with the aid of detectives, in cases of dispute and controversy between them, are to be allowed, under such proceedings as these, to have the citizens of one state carried to another state for trial under the false allegation that the person charged has fled, instances of oppression may not be few." It would be quite difficult to point out any material distinction between that case and the one at bar. It is quite clear that, should we send the relator to Tennessee, he would be entitled there to his discharge by the same court that discharged Jackson on the facts now before us. That court held that the accused party could not be deprived of his liberty by executive action based upon the false affidavit of a detective that he had fled from Tennessee to Illinois. That, in my opinion, is a safe precedent to follow in this

case. Someone in this case has made just such an affidavit. That must follow from the admission that the relator was not in the demanding state at the times stated in the indictment as the dates when the alleged crimes were committed. On the hearing in this case upon the return of the writ, the state of Tennessee could have shown all the facts and circumstances of the alleged crime for which it had demanded the surrender to it of the person of the relator, as this state did in the *Roberts Case*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291. But, instead of taking that course, all the facts and circumstances are left clouded in mystery, except so far as they are disclosed by the admissions referred to. When it admitted that the relator was not in the state at the times laid in the indictment, and gave no other light as to the facts, the case for detention failed. The state of Tennessee does not ask for the surrender of the relator on the ground that he committed any crime in that state on the 2d day of July, 1901; nor does it even suggest that its prosecuting officer made any mistake in stating the 24th of June as the true date of the commission of the offense. The relator is claiming the benefit and protection of the laws of this state, which guarantee to him his liberty against all unlawful restraint. If he has actually fled from the justice of the demanding state, of course he ought to be surrendered; but it is admitted that he did not, and it is safe to say that no one believes for a moment that he did, except, possibly, in the same way and in the same sense that Jackson fled from the same state in the case cited. Personal liberty must rest in this state upon a very frail and unsafe basis if this court can be induced to send the relator to Tennessee upon such a vague and fanciful conjecture as that which is at the foundation of the fiction that he may in fact have committed the crime on the 2d of July, and that the prior dates stated by the prosecuting officer of that state are the result of some error or mistake. When the state of Tennessee, or someone authorized to speak for it, is willing to assure us that the suggestion is based upon fact, and not upon fiction, it will be timely then to entertain it; but until then the courts of this state should treat its solemn admission upon the record according to its fair scope and meaning, which obviously is that the relator was not in the state when the crimes charged were committed. I am in favor of reversing the order.

Parker, Ch. J., and Gray and Vann, JJ., concur with Cullen and O'Brien, JJ.

Haight, J., dissenting:

The relator was arrested by the respondent and held in custody by virtue of a warrant issued by the governor of the state of New York, in which the respondent was required to arrest the relator, and deliver him into the custody of one Vernon Sharp, to be taken back to the state of Tennessee, from which he had fled, pursuant to a requisition 60 L. R. A.

of the governor of that state. The warrant recites the following facts as having been established before the governor of this state: "It having been represented to me by the governor of the state of Tennessee that Charles E. Corkran stands charged in that state with having committed therein, in the county of Davidson, the crimes of larceny and false pretenses, which the said governor certifies to be crimes under the laws of the said state, and that the said Chas. E. Corkran has fled therefrom and taken refuge in the state of New York; and the said governor of the state of Tennessee having, pursuant to the Constitution and laws of the United States, demanded of me that I cause the said Chas. E. Corkran to be arrested and delivered to Vernon Sharp, who is duly authorized to receive him into his custody and convey him back to the said state of Tennessee, which said demand is accompanied by copies of indictments and other documents, duly certified by the said governor of the state of Tennessee to be authentic and duly authenticated, and charging the said Chas. E. Corkran with having committed said crimes, and fled from the said state and taken refuge in the state of New York." Corkran procured a writ of habeas corpus to issue for the purpose of obtaining his discharge. On the return of the writ the attorneys for the parties stipulated "that three indictments were attached to the requisition papers, sent by the governor of the state of Tennessee to the governor of the state of New York for the extradition of Chas. E. Corkran; that each of said indictments was found on the 26th day of February, 1902; and that the alleged crimes were charged in said indictments to have been committed on the 1st day of May, 1901, on the 8th day of May, 1901, and on the 24th day of June, 1901, respectively." It was further conceded by counsel of the respective parties "that the relator was not within the state of Tennessee between the 1st day of May, 1899, and the 1st day of July, 1901." It was also conceded that the relator "was in the state of Tennessee on the 2d day of July, 1901." Taking the two stipulations together, it appears that the relator was not in the state of Tennessee on the dates charged in the indictment, but that he was in that state eight days after the date charged in the last indictment. In no place is it stipulated that he was not in the state at the time the offenses charged were committed. If this was an accidental omission, it has not been supplied by any of the evidence before us. The relator subscribed and verified the petition upon which the writ of habeas corpus was issued. In it he alleges "that it did not appear that there was any evidence before the governor of the state of Tennessee at the time he issued his demand that your petitioner was personally or constructively within the limits of the state of Tennessee when the crimes are alleged to have been committed." In his affidavit traversing the return to the writ he states that he had read the indictments before the governor of the state of New York upon which

his warrant of arrest was issued and that those indictments charged him with the commission of the crimes of larceny and false pretenses, specifying the dates named in the indictments. He then states that he was not in the state of Tennessee at any time during the months of March, April, May, or June, 1901. He also was sworn upon the hearing and gave oral testimony, in which he reiterates that he was not in the state of Tennessee during the dates mentioned in the indictments, but concedes that he was there on the 2d day of July, 1901. In neither the petition, affidavit, nor testimony does he swear that he was not in the state when the offenses charged were committed, but has refrained from so testifying.

There are cases in which time is a necessary ingredient of the offense,—as, for instance, the violation of the Sunday laws; but, barring a few exceptions, I do not understand that the precise time is a necessary ingredient of crimes, either under our Code or the common law. Section 280 of our Code of Criminal Procedure provides that “the precise time at which the crime was committed need not be stated in the indictment; but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the crime.” This provision of the Code is a substantial enactment of the common law upon the subject. 2 Hawk. P. C. 334; 1 Hale, P. C. 361; 1 Archbold, Crim. Prac. 85; *Com. v. Harrington*, 3 Pick. 26; *People v. Stocking*, 50 Barb. 573; *Reg. v. Firih*, 11 Cox C. C. 234; *People v. Emerson*, 53 Hun, 437, 6 N. Y. Supp. 274; *People v. Jackson*, 111 N. Y. 362-369, 19 N. E. 54. As we have seen, the last indictment charged the crime as having been committed on the 24th day of June. Time is not a material ingredient of the crimes of larceny or false pretenses. It would, therefore, have been competent upon the trial to show that the offenses charged were actually committed on the 2d day of July, when the relator was in the state, instead of the 24th day of June. The indictments were before the governor. They charged the commission of the crime of larceny. The usual allegation is that he did then and there take, steal, and carry away, which imports the presence of the person charged. Under the statute a charge may be established before the governor by the production of a copy of the indictment. It therefore furnishes some evidence upon which the governor may act. As we have seen, the relator has neglected to show, either by stipulation or by his own testimony, that he was not actually present at the time the offenses charged were committed. He has confined his testimony to showing that he was not there on the particular dates specified in the indictment. This is not sufficient. It consequently follows that the contention of the relator to the effect that the governor had no power to issue the warrant for his arrest and his return to the state of Tennessee for the reason that he was not personally present in that state when

the offense was committed is not raised by the record in these proceedings.

The warrant upon which the relator is detained recites all the facts necessary to give the governor jurisdiction to issue it. It is not contended that it is informal or defective in any particular. It recites that the governor of Tennessee presented papers to the governor of this state, duly authenticated, included copies of the indictments found, charging the relator with having committed the crimes of larceny and false pretenses in that state, and that he “has fled therefrom, and taken refuge in the state of New York.” This, if true, is sufficient to authorize the governor of this state to issue the warrant for his arrest and return to the state of Tennessee. The papers presented to the governor, upon which he made his determination to issue the warrant, have not been returned, or their contents made to appear by the relator, either in his petition or traverse. They consequently are not before us, and we are unable to determine whether the conclusion of the governor was proper, or without support of evidence. In the case of *People ex rel. Draper v. Pinkerton*, 77 N. Y. 245, the question under consideration appears to have been squarely decided. It is stated in the opinion that “the only material question which seems to be presented in this case is whether a warrant of the governor of this state for the arrest of a fugitive from the justice of another state, containing the recital of facts necessary to confer authority under the Constitution and laws of the United States, is a sufficient justification for holding the prisoner when brought up on habeas corpus, without producing the papers or evidence upon which the governor acted. We have no doubt but that the recitals are to be taken as prima facie, at least, true, and that the return setting forth the warrant containing such recitals is sufficient.” In the case of *People ex rel. Jourdan v. Donohue*, 84 N. Y. 438, Finch, J., in delivering the opinion of the court, says: “The sufficiency of the executive warrant to justify the detention of the prisoner is the sole question raised by the writ of habeas corpus and presented on this appeal. . . . Where, however, the papers upon which the warrant is founded are not produced, but are withheld by the executive in the exercise of official discretion and authority, we can look only to the warrant itself and its recitals for the evidence that the essential conditions of its issue have been fulfilled.” He then proceeds to state that all the essential requirements of the Constitution and statute are contained in the recitals of the warrant, and concludes by affirming the order dismissing the writ of habeas corpus. In the very recent case of *Turlinden v. Ames*, 184 U. S. 270-278, 46 L. ed. 534, 541, 22 Sup. Ct. Rep. 484, Chief Justice Fuller says: “The settled rule is that the writ of habeas corpus cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of subject-matter and of the accused, and the offense charged is within the terms of the treaty of extradition,

and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus. *Ornelas v. Ruiz*, 161 U. S. 502-508, 40 L. ed. 787-789, 16 Sup. Ct. Rep. 689, and cases cited; *Bryant v. United States*, 167 U. S. 104, sub nom. *Ea parte Bryant*, 42 L. ed. 94, 17 Sup. Ct. Rep. 744." And again, he concludes by saying: "The decisions of the executive department in matters of extradition within its own sphere, and in accordance with the Constitution, are not open to judicial revision; and it results that, where proceedings for extradition, regularly and constitutionally taken under the acts of Congress, are pending, they cannot be put an end to by writs of habeas corpus." See, also *Re Clark*, 9 Wend. 212. In the case of *Roberts v. Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291, we have a case in many respects very similar to the one under consideration. In that case the relator had been indicted in the state of New York for grand larceny. A requisition was made by the governor for his extradition from the state of Georgia. The governor of that state issued his warrant, upon which he was arrested and held in custody. Habeas corpus was then issued by the district court of the Southern district of Georgia. The accused made an affidavit denying his guilt, and also denying that he was in the state of New York on the day laid in the indictment as the date of the offense; but he did not deny that he was in the state at about that date. Mr. Justice Matthews, in delivering the opinion of the court, says, with reference to the claim that the relator was not a fugitive from justice, that it "is a question of fact which the governor of the state upon whom the demand is made must decide upon such evidence as he may deem satisfactory. . . . The determination of the fact by the executive of the state in issuing his warrant of arrest upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof." The judgment of the circuit court, remanding the prisoner to the custody of the agent of the state of New York, was affirmed. It will be observed that in that case the relator showed that he was not in the state at the date laid in the indictment; but this did not overcome the presumption of fact found by the governor that he was a fugitive from justice. Article 4, § 2, subd. 2, Const. U. S., provides that "a person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." The Revised Statutes of the United States (§ 5278, U. S. Comp. Stat. 1901, p. 3597), provide that,

"whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded of having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

It will be observed that, under the Constitution and statute to which we have referred, the application must be made to the "executive authority" of the state or territory to which the person charged with the crime has fled. The duty, therefore, devolves upon such executive authority to determine all the questions of fact which arise under the Constitution and statute. In this state the executive authority is vested in the governor. When the application was made for the arrest of the relator by the governor of Tennessee, it became the duty of the governor of this state to determine: (1) Whether a crime under the laws of Tennessee was charged as having been committed by the relator; (2) whether he was a fugitive from justice of that state. It appears that the governor has determined these questions from his recitals in the warrant. The first question was established by the production before him of the indictments found, duly certified and authenticated, and the second by the indictments and other documents duly certified by the governor of the state of Tennessee to be authentic. Neither the Constitution nor the statutes make any provision for a review of the determination of the governor, but our own statutes give to every person deprived of his liberty the right to apply for a writ of habeas corpus; and in case he is imprisoned by virtue of a warrant of the executive, under a demand for extradition, § 827 of the Code of Criminal Procedure gives him the right to a review for the purpose of determining his identity,—whether he is the person charged with crime under the demand for extradition. Under this writ the courts doubtless have the power to determine whether the executive has acted within the powers given him by the Constitution and statutes of the United States. When the papers upon which he has acted have been returned and become a part of the record in the proceedings upon habeas corpus, and it appears from such papers that no crime is charged as having been committed in the state demanding the return of the person, it has been held, though not without criticism, that the court may discharge him (*People ex rel. Lawrence v. Brady*, 56 N. Y.

182), but where the papers upon which the governor has acted in making his determination to issue the warrant are not before the court, and the contents of such papers do not appear, the recitals of facts found by him, contained in the warrant, must be taken as true, so far as the review by habeas corpus is concerned.

The prevalence of crimes committed in one state by persons actually in another state, through innocent agents employed by them, such as the forwarding of forged drafts, checks, and other instruments through the mails, express agencies, or otherwise, for the purpose of procuring money or other property thereon, makes it desirable that the question should be determined as to whether, under the Constitution and statutes of the United States, a person found in one state can be surrendered up, to be taken to another state for trial, for a crime committed therein, through some innocent agency of his, when he was only constructively present in the person of his agent. That question, however, ought to be determined by the Supreme Court of the United States. The conclusions reached upon the points above discussed render it unnecessary for this court to determine it in this case.

The order appealed from should be affirmed.

Werner, J., concurs with **Haight, J.**

Affirmed in 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456.

THOUSAND ISLAND PARK ASSOCIATION, *Respnt.*,

Ora TUCKER, Appt.

(173 N. Y. 203.)

1. Streets shown on the plan of the park of an association organized to maintain a camp meeting and lease lots to persons desiring the advantages of the ground are dedicated to the use of the lessees and those, at their request, using them for access to their lots, so that the association cannot prevent such use.
2. Exclusive rights are not given by a statute merely authorizing an association organized to maintain a camp meeting to purchase and deal in provisions and other commodities for supplying the needs of lot lessees and visitors, and to maintain stores and shops for that purpose, and to authorize others to engage in such pursuits, and to make and establish regulations therefor.
3. Power to prohibit hawking and peddling within a camp-meeting ground does not authorize the prohibition of the delivery therein of produce ordered by mail by lot lessees, although the price is not fixed until the goods are delivered.
4. Power to adopt a regulation requiring lessees of lots to purchase all supplies from the lessor is not reserved

NOTE.—For a case in this series holding that a camp-meeting association cannot impose tax on taking orders for provisions on grounds of, see *Northport Wesleyan Grove Camp-Meeting Asso. v. Perkins (Me.)* 48 L. R. A. 272, 60 L. R. A.

to an association organized for the maintenance of a camp meeting by a provision in the leases that the lessee shall keep and perform all such conditions or rules as the lessor shall from time to time impose, since such requirement is not reasonable.

(January 6, 1903.)

A PPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Special Term for Jefferson County in plaintiff's favor in an action brought to enjoin defendant from selling or delivering articles on the grounds of the plaintiff. *Reversed.*

The facts are stated in the opinion.

Messrs. Ford & Ford, for appellant:

The lot owners and those occupying under them have a right to have the streets remain open and be used as such.

Story v. New York Elev. R. Co. 90 N. Y. 122, 43 Am. Rep. 146; *Haight v. Littlefield*, 147 N. Y. 338, 41 N. E. 696.

Chapter 278 of the Laws of 1883, which purports to authorize plaintiff to deal in provisions, does not give it any authority to absolutely forbid such dealing by all except one individual.

People v. Jarvis, 19 App. Div. 466, 46 N. Y. Supp. 596; *New York v. Second Ave. R. Co.* 32 N. Y. 261.

Receiving orders outside of Thousand Island Park, and delivering articles in pursuance thereof to residents of the park, do not constitute dealing on the park within the meaning of the statute.

New York v. Hewamer, 59 App. Div. 4, 69 N. Y. Supp. 198.

What the residents could do by themselves they could do by others.

1 Am. & Eng. Enc. Law, 2d ed. p. 971; *Story, Agency*, 9th ed. § A 11.

The delivery of these articles by defendant in response to mail orders was not a bringing on of the articles for purposes of trade or sale.

Ree v. McKnight, 10 Barn. & C. 734.

If the residents had a right to bring on the provisions, an injunction would not lie to restrain their doing so in an irregular manner.

Albany Northern R. Co. v. Brownell, 24 N. Y. 348.

The regulation adopted by plaintiff, if it be construed to forbid the delivery of goods on mail order, is unreasonable and against public policy as restricting trade and creating a monopoly.

Weiler v. Equitable Aid Union, 92 Hun, 278, 36 N. Y. Supp. 734; *Round Lake Asso. v. Kellogg*, 141 N. Y. 348, 36 N. E. 326; *Bufalo v. Webster*, 10 Wend. 100; *Stamford v. Fisher*, 140 N. Y. 187, 35 N. E. 500.

The reasonableness of the regulation is a question of law.

Carney v. New York L. Ins. Co. 162 N. Y. 455, 42 L. R. A. 471, 57 N. E. 78; *People ex rel. Muir v. Throop*, 12 Wend. 186.

The acts of defendant did not constitute "traffic in" or "huckstering" on the streets of grounds of plaintiff.

Res v. McKnight, 10 Barn. & C. 734; *Stamford v. Fisher*, 140 N. Y. 187, 35 N. E. 500.

Chapter 278 of the Laws of 1883 is invalid in so far as it attempts to confer any exclusive franchises.

Re Union Ferry Co. 98 N. Y. 140; *Fox v. Mohawk & H. River Humane Soc.* 165 N. Y. 517, 51 L. R. A. 681, 59 N. E. 353.

As to those persons who had leased lots prior to its passage, the act of 1883 would be violative of both state and national constitutions as authorizing the plaintiff to restrict them in the enjoyment of their property and unlawfully interfere with their vested rights.

Forster v. Scott, 136 N. Y. 577, 18 L. R. A. 543, 32 N. E. 976.

The court will not aid plaintiff, by means of an injunction, to assume powers that are *ultra vires*.

Nassau Bank v. Jones, 95 N. Y. 115, 47 Am. Rep. 14; *Case v. Kelly*, 133 U. S. 21, 33 L. ed. 513, 10 Sup. Ct. Rep. 216.

An action at law is the ordinary remedy for selling or peddling without a license.

Buffalo v. Webster, 10 Wend. 100; *Bush v. Seabury*, 8 Johns. 418; *Brooklyn v. Breslin*, 57 N. Y. 591.

It is no part of the business of this court to enforce the penal laws of the state, or the by-laws of a corporation, by injunction, unless the act sought to be restrained is a nuisance.

Hudson v. Thorne, 7 Paige, 261; *High*, *Inj.* § 1248; *Ogden v. Welden*, 40 N. Y. S. R. 35, 15 N. Y. Supp. 790; *Waupun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446; *St. Johns v. McFarlan*, 33 Mich. 72, 20 Am. Rep. 671.

Messrs. Brown, Carlisle, & Hugo, for respondent:

The plaintiff has the absolute control of trade and traffic in merchandise on Thousand Island Park, and is entitled to the aid of a court of equity to protect this control.

Round Lake Asso. v. Kellogg, 141 N. Y. 348, 36 N. E. 326; *Chautauqua Assembly v. Ailing*, 46 Hun, 582.

Public policy requires that the lot lessees of the plaintiff association should be protected from the invasion of their homes by transient traders, who are oftentimes unscrupulous, dishonest, and dangerous persons.

Morrill v. State, 38 Wis. 433, 20 Am. Rep. 12; *Com. v. Gardner*, 133 Pa. 289, 7 L. R. A. 666, 19 Atl. 550; *Gaffty v. Rushville*, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609.

Huckstering without permission, and persisting in such acts, constitute a continuing trespass.

O'Reilly v. New York Elev. R. Co. 148 N. Y. 347, 31 L. R. A. 407, 42 N. E. 1063; *Bohlen v. Metropolitan Elev. R. Co.* 121 N. Y. 546, 24 N. E. 932; *McGrane v. New York Elev. R. Co.* 67 App. Div. 37, 73 N. Y. Supp. 498; *Garvey v. Long Island R. Co.* 159 N. Y. 332, 54 N. E. 57.

The persistent infringement of the regulation against huckstering by defendant constituted a continuing trespass, and an injunction restraining the practice of huckstering is the only complete remedy.

Garvey v. Long Island R. Co. 159 N. Y. 60 L. R. A.

332, 54 N. E. 57; *Coatsworth v. Lehigh Valley R. Co.* 156 N. Y. 451, 51 N. E. 301; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67.

The acts of defendant in trafficking about the docks and grounds of plaintiff resulted in irreparable injury to the plaintiff, and equity will enjoin such acts.

Troy & B. R. Co. v. Boston, H. T. & W. R. Co. 86 N. Y. 126.

The rule or ordinance of the plaintiff association, that "all trafficking in vegetables, meats, groceries, newspapers, and all other articles of merchandise usually sold in the markets of the association, or any huckstering whatsoever without permission on its docks and grounds, is hereby prohibited," is a reasonable regulation of trade, and is not arbitrary, oppressive, or in restraint of trade.

Round Lake Asso. v. Kellogg, 141 N. Y. 348, 36 N. E. 326; *Buffalo v. Webster*, 10 Wend. 100; *Bush v. Seabury*, 8 Johns. 418; *Brooklyn v. Breslin*, 57 N. Y. 593; *Meyers v. Baker*, 120 Ill. 567, 60 Am. Rep. 580, 12 N. E. 79; *Com. v. Bearse*, 132 Mass. 542, 42 Am. Rep. 450; *State v. Read*, 12 R. I. 135; *Buffalo v. Schleifer*, 2 Misc. 216, 21 N. Y. Supp. 913.

Chapter 278 of the Laws of 1883, entitled "An Act in Relation to the Thousand Island Park Association," is constitutional.

Kerrigan v. Force, 68 N. Y. 381, 6 Am. & Eng. Enc. Law, 2d ed. p. 1086; *New York & O. Midland R. Co. v. VanHorn*, 57 N. Y. 473; *People ex rel. Rochester v. Briggs*, 50 N. Y. 553; *People ex rel. Burrows v. Orange County*, 17 N. Y. 241; *People v. New York C. R. Co.* 24 N. Y. 485.

Cullen, J., delivered the opinion of the court:

The plaintiff was incorporated in December, 1874, under the provisions of chapter 117 of the Laws of 1853, entitled "An Act to Authorize the Formation of Corporations for the Erection of Buildings," under the name of the Thousand Island Camp Meeting Association, for the purpose of erecting buildings and laying out land for the use of persons who might attend camp meetings on the grounds of the association. In 1875 it acquired a tract of about 800 acres on Wellesley Island, in the St. Lawrence river, a part of which it laid out into parks or open squares and streets, and the remainder thereof subdivided into lots. It graded the streets, improved the parks or open spaces, constructed a dock, and built a tabernacle and other buildings, including a hotel. It leased to individuals a large number of the lots for the purpose of erecting cottages thereon. These leases ran for ninety-nine years, with the privilege of perpetual renewals, and by their terms were "granted and accepted according to the rules and regulations which may from time to time be adopted and promulgated for the government of said park, and which are hereby made part of the instrument." The leases specified that the regulations existing at their date and assented to by the lessees were: "(1) No

games or diversions of any kind, not approved by said association, will be allowed on any of the premises of the said association at any time. (2) The association reserves the right at all times to use, lay out, and lease all lands not already laid out or designated as streets or avenues. (3) The erection of privies is forbidden, except by consent of the association."

By chapter 4 of the Laws of 1879 the corporate name of the plaintiff was changed to its present title. By chapter 278 of the Laws of 1883 the plaintiff, in addition to the powers conferred upon it by its act of incorporation, was authorized "to purchase and deal in such provisions and other commodities and articles necessary and proper for supplying lot lessees, cottages, and visitors, and to maintain stores, shops, lumber yards, and other buildings and erections upon the corporate lands; to establish and conduct livery stables, baths, bath-houses, boat liveries, boat houses, and boats for hire; to authorize others to engage in such pursuits on said park; to make and establish regulations therefor; to improve the corporate property in any and all ways calculated to contribute to the pleasure, health, or well being of its lot lessees and visitors." By subdivision 6 of § 1 it was provided that nothing in the act should be construed to prevent the bringing of provisions and building or other materials upon the grounds of said association for the use of those bringing the same, and not intended for the purposes of trade or sale. In August, 1895, the trustees of the plaintiff enacted the following regulation: "All traffic in vegetables, meats, groceries, newspapers, and all other articles of merchandise usually sold in the markets and stores of the association or any huckstering whatsoever without permission, on its docks and grounds, is hereby prohibited." The defendant is a farmer in Jefferson county, who has supplied lot owners in the park with poultry, vegetables, and like products. The method in which he conducted his business was, as has been found by the trial court, by means of orders on postal cards sent to him by various lot owners. In compliance with such directions, he delivered the goods ordered to the various persons ordering them, on their respective premises. The complaint alleged the incorporation of the plaintiff, the improvement of its land, the lease of its lots, and the enactment of its regulations against trafficking already recited. It further alleged that the plaintiff had leased a store, a meat market, and other buildings to individuals, with a grant of the exclusive privilege of carrying on such business in the park; that the rental value of such premises depended largely upon the exclusive right so granted to the lessee to carry on the particular business. It was alleged that the defendant, in violation of said regulation, was trafficking in supplies sold in the stores and shops established by the plaintiff, and thus injuring its exclusive right to carry on business. The relief asked was that the defendant be enjoined from trafficking, selling, or delivering vegetables, meats, fruits, gro-

60 L. R. A.

ceries, and any other merchandise on the grounds of the plaintiff without its permission. The trial court found that the defendant had trafficked in vegetables and supplies under orders by post, in the way narrated. It held that the plaintiff possessed the exclusive privilege of dealing in merchandise within the limits of the park, that the regulation adopted by it was reasonable and valid, and that the conduct of the defendant violated such exclusive privilege. Judgment was granted enjoining the defendant from huckstering or trafficking in vegetables or other farm products for household use, or other merchandise usually sold in the market or stores of the plaintiff, and from continuing such traffic as theretofore conducted by him, by means of mail orders and personal delivery of goods, without first obtaining the permission of the plaintiff.

The real question involved in this case is the right of the plaintiff association to prevent the lessees and occupants of the plots which it has leased from obtaining their supplies by purchase from others than the plaintiff, or the persons to whom it has granted the exclusive privilege of dealing in such supplies. The action cannot be sustained on the theory that the defendant is a trespasser on plaintiff's lands, and that it is entitled to resort to equity to prevent a repetition of the trespass, unless it be first determined that he entered upon the park for the purpose of violating the plaintiff's right. Trespass on land can be maintained only by a plaintiff in possession. Therefore, so far as relates to the entry on the premises of the cottagers, the plaintiff has no standing to complain of a trespass. As far as the roads and streets in the park are concerned, the probability is that they were made public highways by chapter 242 of the Laws of 1895, which enabled the plaintiff to discharge its highway tax by work on those roads. In that case every one of the public had the right of passage over them. But however this may be, the lots leased were laid out on a map and plan of the park showing the streets and roads. By leasing the lots as designated on such maps, the plaintiff thereby dedicated the land in the streets and roads to the use of the lot lessees, and anyone using a road for access to the premises of such lessee on the latter's request can justify his presence there as against the plaintiff under such dedication. We therefore revert to the original question,—whether the defendant's errand was lawful as against the plaintiff.

The real theory of the action, and the ground on which the decisions of the courts below have proceeded, is that the plaintiff had the exclusive privilege to furnish stores and supplies to residents in the park, except in cases where the residents might personally bring their supplies with them, and that the defendant's conduct infringed on the plaintiff's exclusive privilege of trading or authorizing trading. The claim of the plaintiff to this exclusive privilege is based on two grounds: First, the statute of 1883; second, the covenants or conditions of the leases

granted by it to the various holders of cottage plots. As to the first, it would be sufficient to say that, if the statute granted to the plaintiff the exclusive right claimed, it would be in conflict with § 18, art. 3, of the Constitution, which prohibits the legislature from granting to any private corporation or association or individual any exclusive privilege, immunity, or franchise whatever. *Fox v. Mohawk & H. River Humane Soc.* 165 N. Y. 517, 51 L. R. A. 681, 59 N. E. 353. But the act of the legislature is not subject to any such construction. It does not purport to give the plaintiff any exclusive privilege of trading, or to forbid others from so doing. It authorizes the plaintiff to purchase and deal in provisions and other commodities for supplying lot lessees and visitors, and to maintain stores and shops for that purpose. Thus far it merely grants the plaintiff additional corporate powers—a grant which was necessary, for, by the statute under which it was originally incorporated, the plaintiff would have no right to carry on any business of the kind. It then empowers the plaintiff to authorize others to engage in such pursuits on the park, and “to make and establish regulations therefor.” I assume that by this statute there was given to the plaintiff the same power to regulate trade in the park that is generally granted to municipal corporations to regulate trade within their limits. More than this the legislature did not grant. The power to regulate a useful trade does not authorize its prohibition or the creation of a monopoly. “An ordinance cannot legally be made which contravenes a common right unless the power to do so be plainly conferred by a valid and competent legislative grant [with us the legislative power is restricted by the constitutional provision cited]; and, in cases relating to such a right, authority to regulate conferred upon towns of limited powers, has been held not necessarily to include the power to prohibit.” *Dill. Mun. Corp.* § 325. “The power to license and regulate a lawful and necessary business will not give the corporation the power to make contracts which create or tend to create a monopoly.” *Id.* § 362. The restraint or prohibition of hawking and peddling has always been regarded in this state as a justifiable exercise of the police power. *Buffalo v. Webster*, 10 Wend. 100; *Stamford v. Fisher*, 140 N. Y. 187, 35 N. E. 500. As said by Judge Gray in the latter case: “It is perfectly competent to empower municipal corporations to prescribe regulations for the orderly conduct of business within their limits and upon the public streets.” Therefore, so far as the regulation adopted by the plaintiff forbade trafficking or huckstering in articles of merchandise on the dock, streets, or open places, it was valid. It might also restrain peddling and similar trafficking in the park, for all these things would tend to interfere with the comfort of the residents, and disturb the quiet and good order of the settlement. But the business done by the defendant did not in any way

constitute hawking or peddling. This was so held in *Stamford v. Fisher*, 140 N. Y. 187, 35 N. E. 500. It in no way affected the order or quiet of the community. The defendant took his goods only to those who had previously ordered them, in pursuance of those orders. It is doubtful whether even an act of the legislature restraining such a business could be sustained as a proper exercise of the police power. See *People v. Jarvis*, 19 App. Div. 466, 46 N. Y. Supp. 596; *People ex rel. Tyroler v. Warden of City Prison*, 157 N. Y. 116, 43 L. R. A. 264, 51 N. E. 1006. It was found by the trial court that the price was made for the goods at the time of delivery, and that the sale was not consummated till then. This is immaterial. The defendant did not offer his goods for sale to other persons. If he had assumed to do so, that might have constituted hawking or peddling. This action, however, is not brought on any claim that the defendant has violated any police regulation for the maintenance of order, or for the prevention of nuisances or objectionable callings, but, as already stated, on the theory that his business has interfered with the pecuniary value of the plaintiff's exclusive rights.

Though the plaintiff gained no exclusive privilege from the statute, if it had continued the owner and possessor of the lands in the park it would have had, by virtue of such ownership and possession, an unqualified right to regulate business carried on there in such manner as it might deem proper, and to exclude any person from the premises for any reason. By these means the plaintiff could hold a practical monopoly of all business carried on in the park,—a monopoly subject to no legal condemnation, because it would proceed from no act of the legislature or municipal regulation, but from the ownership of the land. When the plaintiff leased or granted the cottage plots, it might have subjected the leases to such conditions and the tenants to such covenants as it saw fit to impose. If it had been provided in the leases that the tenant or occupant should purchase all his supplies from the plaintiff, or from such shop or market as it might establish, and should obtain no supplies from any other source, I am not prepared to say that such a covenant would not be enforced, or, rather, that damages could not be recovered for its violation. The exclusive privilege reserved by the landlord would fairly be a part of the consideration for the demise of the premises. But to impose such a restriction on the tenant, some condition or covenant to that effect must be found in the lease. Otherwise the dominion of the tenant is as absolute during the demised term as that of the owner previous to the demise. In the leases granted by the plaintiff, certain regulations adopted by it were expressly recited. None of these restricted the right of the tenant to purchase stores and merchandise for consumption in the park where and from whom he pleased.

The lease contained the further condition that the tenant should keep and perform all such conditions or rules and regulations as the landlord should from time to time impose. Thus there was reserved to the landlord the power to subsequently make new regulations. Such power, however, though general in form, was not absolute or unqualified. A new regulation established under this reservation, to be valid, must be reasonable. In this respect the case is entirely analogous to that of a member of a corporation, where power is reserved to the corporation, either by the statute or by its constitution, to modify or repeal by-laws and to enact new ones. "If, then, the power is reserved to alter, amend, or repeal, and that reservation enters into a contract, the power reserved is to pass reasonable by-laws, agreeable to law. But a by-law that will disturb a vested right is not such." *Kent v. Quicksilver Min. Co.* 78 N. Y. 159. See also *Parish v. New York Produce Exchange*, 169 N. Y. 34, 56 L. R. A. 149, 61 N. E. 977. The question, therefore, is whether the regulation forbidding the tenants or occupants to purchase supplies, except at the plaintiff's store, unless they bring those supplies personally upon the grounds, is reasonable. In determining whether the by-law of a corporation is reasonable or not, there should properly be considered the nature of the corporation, and the object for which it is organized. In the present case it was intended to maintain plaintiff's park as a camp-meeting ground. Its purpose was not only to provide a place for recreation, but also for the spiritual and religious edification of its members. It is well known that some religious denominations entertain views as to the propriety of conduct and demeanor of members, their recreations and their modes of life, that seem strict and possibly intolerant to the rest of the community. When a person joins such an association, he must expect to conform to its standards. So here, anyone leasing grounds from the plaintiff, with the reservation in his lease of the right of the plaintiff to establish new regulations, might naturally expect the possibility of new regulations regarding the enjoyment of his property so as to prevent giving scandal or offense to the other tenants. Regulations of this nature, which would be condemned as unwarrantable invasions of private liberty in the case of ordinary companies organized for the improvement, development, and sale of tracts of land, would, in the case of an association like the plaintiff, be properly upheld. The regulation which the plaintiff has sought to import into its leases is not of this character, but solely for the purpose of pecuniary gain. No regulation of the kind, nor on the subject, existed at the time the grounds were leased; and there was no reason why a person renting the lands should expect such a regulation to be enacted by the plaintiff, any more than if he had rented the premises from an ordinary land company. The regulation seems to me of a most arbitrary and unreasonable character. Not only are the

cottagers entitled to purchase where they can buy the cheapest, but in articles of food there is a great difference of individual taste. In the grocery shop established by the plaintiff there are certain brands of flour or coffee, and it may be that, if the question is to be decided by the courts, those brands would be held to be the best. Nevertheless some of the cottagers might like other brands better. Some might prefer their vegetables fresh from the defendant's farm, to those that have stood on the huckster's stand in the market. The articles kept in the plaintiff's stores and shops may be good, and the prices charged therefor reasonable, but the pecuniary means of some of the cottagers may be such as to require them to purchase inferior articles at a lower price. Thus the regulation, if upheld, would seem to establish a uniform standard of taste and a uniform style of living.

The question involved in *Round Lake Asso. v. Kellogg*, 141 N. Y. 348, 36 N. E. 326, and *Chautauqua Assembly v. Alling*, 46 Hun, 582, is essentially different from that before us. In the *Round Lake Case* the action was brought to restrain the defendant, who had acquired a lease of a plot of land, from using the premises as a place for the sale of merchandise, in violation of a regulation adopted by the association forbidding such use. It was held that the regulation was reasonable; the lot not having been leased for the purposes of a shop or store, but to enable persons habitually attending camp meetings to erect cottages or tents thereon. In the *Chautauqua Case* the habendum clause declared that the premises were to be held for a cottage or tent for a private residence, and the defendant attempted to maintain thereon a boarding house. Both the cases involved the use of the demised land for improper or unauthorized purposes. The plaintiff has covered that subject by express provision in its leases that the premises shall not be used for any mercantile or mechanical trade, for a boarding or lodging house, or for any purpose other than a summer residence. Any violation of this covenant would be properly restrained. But limitations or restrictions on the use of property are in no way akin to restrictions or limitations on the right to purchase supplies whereon to subsist. The fact that a restriction on one subject was imposed by the lease gave no intimation that subsequently there might be imposed restrictions on the other subject. It is said that liberty of purchase is still permitted to the tenants and cottagers if they personally bring in the goods purchased. But this is no liberty at all. The tenant ordering goods might be sick or infirm and unable to leave his residence. If it be asserted that he might authorize another to bring in the goods for him, that concession would dispose of the present case, for the defendant acted in pursuance of instructions given by the tenants. If it is a violation of the plaintiff's rights for the defendant to furnish vegetables

to the cottagers on orders from them, it would equally violate those rights for a grocer in Syracuse or Utica to deliver to a cottager a barrel of sugar or a barrel of flour. No such restriction is reasonable.

The judgment appealed from should be re-

versed, and a new trial granted; costs to abide the event.

Parker, Ch. J., and Gray, O'Brien, Martin, and Werner, JJ., concur. Vann, J., not voting.

TENNESSEE SUPREME COURT.

B. M. WEBB, *Appt.*,

v.

T. J. FISHER.

(.....Tenn.....)

A judge of a court of record is not subject to a private action for oppressively, maliciously, and corruptly entering a decree disbarring an attorney.

(February 7, 1908.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Dekalb County in favor of defendant in an action brought to recover damages from defendant for alleged corrupt and malicious acts committed by him as chancellor of the Fifth Chancery Division. *Affirmed.*

The facts are stated in the opinion.

Messrs. Webb & Cantrell, for appellant:

A judge is liable for his corrupt, wicked, oppressive, fraudulent, and malicious conduct.

Cope v. Ramsey, 2 Heisk. 197; *Hoggatt v. Bigley*, 6 Humph. 237.

Messrs. Wade & Robinson for appellee.

McAlister, J., delivered the opinion of the court:

The question presented upon this record is in respect of the liability of a judicial officer for certain official acts which are alleged to have been done oppressively, maliciously, and corruptly. The more specific allegations of the declaration are that the defendant, T. J. Fisher, as chancellor of the fifth chancery division of Tennessee, decided against plaintiff the cause of W. H. Cummings, relator, against B. M. Webb, in the chancery court at Smithville, Tennessee, in which a decree of disbarment was made and entered against plaintiff, a practising attorney and counsel and solicitor in the courts of said state, and that said decree was pronounced corruptly, maliciously, wickedly, and oppressively. There are other allegations in the declaration, which are not necessary to be mentioned, since the statement already made presents the real case as made,

NOTE.—As to liability of judicial officer to civil action for acts of a judicial nature, see also, in this series, *Austin v. Vrooman* (N. Y.) 14 L. R. A. 138, and *note*; *Williamson v. Lacey* (Me.) 25 L. R. A. 506; *Thompson v. Jackson* (Iowa) 27 L. R. A. 92, and *note*; *Scott v. Fishplate* (N. C.) 30 L. R. A. 696; *Glazer v. Hubbard* (Ky.) 39 L. R. A. 210; and *Calhoun v. Little* (Ga.) 43 L. R. A. 630.

stripped of useless verbiage and immaterial recitals. To this declaration defendant filed a plea of not guilty. At the July term, 1902, defendant asked leave of the court to withdraw his plea, and file a demurrer to the declaration, assigning for cause the exemption of a judicial officer from such a suit; but this motion was disallowed. At the November term, 1902, the presiding judge, Hon. Joseph C. Higgins, being of opinion that the declaration stated no cause of action, dismissed the suit. Plaintiff appealed, and has assigned errors.

The precise question with which we are now confronted has not heretofore been decided in this state, so far as we are advised by any reported opinion. The case of *Hoggatt v. Bigley*, 6 Humph. 237, involved the liability of a justice of the peace for acts done in his official capacity. Green, J., in delivering the opinion of the court, said: "The only question is whether the justice of the peace had jurisdiction of the case against the slave, Jim, whom he committed to prison; for it is not contended that a judicial officer is responsible for mere errors of judgment in a case of which he has jurisdiction, and in which, without malice, he honestly pronounces what he believes to be the judgment of the law." It was not contended in that case that the official act was done maliciously or corruptly, but the contrary appeared. The case of *Cope v. Ramsey*, 2 Heisk. 197, was a bill filed by the next friend of a minor against the defendants, as justices of Warren county, to hold them personally liable for a sum of money paid into the hands of the clerk of said court in Confederate money. The bill charged that all the parties defendant combined and confederated together to cheat and defraud said minor in this transaction; but the court found there was no proof to throw suspicion on the defendants. A demurrer was incorporated in the answer, which assigned that defendants were not responsible for acts done in a judicial capacity, and that the bill failed to charge that said acts were done with a corrupt, malicious, or fraudulent purpose. Sneed, J., said: "If they [the justices], in the rendition of the order complained of, have done the complainants wrong by an honest error of judgment, they are not responsible for it, pecuniarily or otherwise. But," continues the court, "if they have acted corruptly, maliciously, and with purpose to defraud the complainant of his rights, then in an appropriate proceeding they are responsible. The bill does not make out such a case. It does not im-

pute to these justices any corrupt or dishonest motive touching this judicial act, and the bill is therefore demurrable." It will be observed that the rule announced in the two cases last cited related to the official liability of justices of the peace, who are held exempt when the act is within the justices' jurisdiction, unless it is inspired by motives of malice and corruption. But with respect to courts of superior and general jurisdiction a different rule has long obtained. It was thus announced in *Randall v. Brigham*, 7 Wall. 523, 19 L. ed. 285, viz., "Now, it is a general principle, applicable to all judicial officers, that they are not liable to a civil action for any judicial act done within their jurisdiction. In reference to judges of limited and inferior authority it has been held that they were protected only when they acted within their jurisdiction. If this be the case with respect to them, no such limitation exists with respect to judges of superior or general authority. They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless, perhaps, where the acts in excess of jurisdiction are done maliciously or corruptly." But in the case of *Bradley v. Fisher*, 13 Wall. 335, 20 L. ed. 646, it was held that the qualifying words were incorrect, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. "A distinction," said the court, "must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority; and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much question for his determination as any other question involved in the case, although upon the correctness of his determination in these particulars the validity of his judgment may depend." It was further stated in that case, viz.: "The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and, if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous rem-

edies, and to those remedies they must in such cases resort. But for malice or corruption in their action, whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed. . . . In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If, in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment, and suspended or removed from office. In some states they may be thus suspended or removed without impeachment by a vote of the two houses of the legislature." As said in *Scott v. Stansfield*, L. R. 3 Exch. 220: "This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Philbrook v. Newman*, 85 Fed. 139. In 17 Am. & Eng. Enc. Law, 2d ed., p. 728, it is said, viz.: "The rule is well established that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly;" citing numerous cases. The only cases cited as holding a contrary doctrine are several cases from Kentucky and two cases from Tennessee. The latter, as we have already seen, lay down the rule with respect to the liability of justices of the peace, namely, *Cope v. Ramsey*, 2 Heisk. 197; *Hoggatt v. Bigley*, 6 Humph. 237. A reason for a different rule with respect to the liability of justices of the peace may be found in the fact that under our Constitution they are not liable to impeachment for crimes and misdemeanors in office, or removal from office for cause by a two-thirds vote of the general assembly. They are made liable to indictment and removal from office by the court upon conviction. Const. 1870, art. 5, § 6; Const. 1834, art. 5, § 5. The rule exempting judges from liability for judicial acts is based upon the consideration that the judge represents the public. If, says Mr. Cooley, the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or an inadequate or an erroneous performance, must be a public, and not an individual, injury, and must be redressed, if at all, in some form of public prosecution. The duty is public, and the end to be accomplished is public. The individual loss results from the proper or improper and imperfect performance of a duty, for which his controversy is only the occasion. The judge performs his duty to the public by

doing justice between individuals, or, if he fails to do justice between individuals, he may be called to account by the state in such form and before such tribunal as the law may have provided: But, as the duty neglected is not a duty to the individual, civil redress, as for a civil injury, is not admissible. This is only one reason for judicial exemption from individual suits. Cooley, Torts, 380, 381. The necessary result of the liability would be to occupy the judge's mind and time with the defense of his own interests. The effect would be to lower the dignity of the court. Said Lord Tenterden, viz.: "In the imperfection of human nature it is better even that an in-

dividual should occasionally suffer a wrong than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it." Quoted in *Williamson v. Lacy*, 86 Me. 80, 25 L. R. A. 506, 29 Atl. 943. These principles we believe to be sound, and apply in the present instance.

The result is the judgment below is affirmed.

NOTE.—The decree of disbarment was reversed by the court of chancery appeals on the facts, and Mr. Webb reinstated as an attorney.

WASHINGTON SUPREME COURT.

Royal C. NELSON, by Guardian *ad Litem*,
Respt.,
v.

F. McLELLAN, Appt.

(.....Wash.....)

1. The storing of dynamite in a partially buried box on a vacant lot to which children are accustomed to resort to play is negligence which will render the one guilty thereof liable for injuries to a child by the explosion of one of the sticks, which was taken from the box by children who had resorted to the lot to play, and ignited by one of them in ignorance of its explosive character.
2. Instructions directing the jury to discriminate against expert testimony are erroneous.

(Anders, J., dissents.)

(March 5, 1903.)

APPEAL by defendant from a judgment of the Superior Court for King County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. Roberts & Leehy, for appellant:

Wrongful acts of independent third persons, not actually intended by the defendant, are not regarded by the law as natural consequences of his wrong; and he is not bound to anticipate the general probability of such acts any more than a particular act by this or that individual.

Burt v. Advertiser Newspaper Co. 154 Mass. 247, 13 L. R. A. 97, 28 N. E. 1; *Curtin*

NOTE.—As to liability for injury to child by explosion of torpedo on railroad track, see, in this series, *Pittsburgh, C. & St. L. R. Co. v. Shields* (Ohio) 8 L. R. A. 464, and *Cleveland Terminal & Valley R. Co. v. Marsh* (Ohio) 52 L. R. A. 142.

As to liability for maintaining on premises dangerous attractions for children generally, see, in this series, *Brinkley Car Works Mfg. Co. v. Cooper* (Ark.) 57 L. R. A. 724, and footnote thereto; also *Chicago, B. & Q. R. Co. v. Krayenbuhl* (Neb.) 59 L. R. A. 920. 60 L. R. A.

v. Somerset, 140 Pa. 70, 12 L. R. A. 322, 21 Atl. 244; *Bunting v. Hogsett*, 139 Pa. 363, 12 L. R. A. 268, 21 Atl. 31, 33, 34; *Shepherd v. Chelsea*, 4 Allen, 113; *Loftus v. Dechail*, 133 Cal. 214, 65 Pac. 379.

Plaintiff knew that both fire crackers and dynamite were dangerous, and, in addition, testified that he had been warned to keep away from there.

Chaddock v. Plummer, 88 Mich. 225, 14 L. R. A. 675, 50 N. W. 135; *Harris v. Cameron*, 81 Wis. 239, 51 N. W. 437; *Missouri P. R. Co. v. Columbia*, 65 Kan. 390, 58 L. R. A. 399, 69 Pac. 338; *Mangan v. Atterton*, L. R. 1 Exch. 239; *Central Branch U. P. R. Co. v. Henigh*, 23 Kan. 348, 33 Am. Rep. 167; 1 Thomp. Neg. § 47; *Galveston, H. & S. A. R. Co. v. Chambers*, 73 Tex. 296, 11 S. W. 279; *Goodlander Mill Co. v. Standard Oil Co.* 27 L. R. A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 405.

The law does not require that even a wrongdoer shall anticipate and provide against the unusual.

Mayne v. Chicago, R. I. & P. R. Co. (Okla.) 69 Pac. 935; *South Side Pass. R. Co. v. Trich*, 117 Pa. 390, 11 Atl. 627; *Herr v. Lebanon*, 149 Pa. 222, 16 L. R. A. 106, 24 Atl. 207.

When the owner of property has exercised reasonable care with regard to its management, and a stranger comes upon the property, and, without the knowledge or authority of the owner, does something that causes injury to a third party, the injured party cannot recover.

Shearm. & Redf. Neg. 5th ed. § 705.

The owner or occupier of land is not bound to take pains to prepare his premises in any particular way, to the end of promoting the safety of children who may come thereon as trespassers, or as bare licensees.

Thomp. Neg. § 1025; *Clark v. Northern P. R. Co.* 29 Wash. 139, 59 L. R. A. 508, 69 Pac. 638.

A railroad company is not liable for the death of one who, while walking on its tracks without right, intermeddled with a torpedo which had been placed there as a danger signal, and was killed by its explosion.

Hughes v. Boston & M. R. Co. 71 N. H.

279, 51 Atl. 1070; *Carter v. Columbia & G. R. Co.* 19 S. C. 20, 45 Am. Rep. 754; *Oregon R. & Nav. Co. v. Egley*, 2 Wash. 409, 26 Pac. 973; *Robinson v. Oregon Short Line & U. N. R. Co.* 7 Utah, 493, 13 L. R. A. 765, 27 Pac. 689; *Cooper v. Overton*, 102 Tenn. 211, 45 L. R. A. 591, 52 S. W. 183; *Ratte v. Dawson*, 50 Minn. 450, 52 N. W. 965; *Holbrook v. Aldrich*, 168 Mass. 15, 36 L. R. A. 493, 46 N. E. 115; *Central Branch U. P. R. Co. v. Henigh*, 23 Kan. 348, 33 Am. Rep. 167; *Matson v. Port Townsend Southern R. Co.* 9 Wash. 449, 37 Pac. 705, 707; *Morrissey v. Eastern R. Co.* 126 Mass. 377, 30 Am. Rep. 686; *Cawley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *Moran v. Pullman Palace Car Co.* 134 Mo. 641, 33 L. R. A. 755, 36 S. W. 659; *Overholt v. Vieths*. 93 Mo. 422, 6 S. W. 74; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Bates v. Nashville, C. & St. L. R. Co.* 90 Tenn. 36, 15 S. W. 1069.

The evidence of plaintiff showed no violation of any law, no wanton or wilful wrong.

Paolino v. McKendall (R. I.) 60 L. R. A. 133, 53 Atl. 268; *Clark v. Northern P. R. Co.* 29 Wash. 139, 59 L. R. A. 508, 69 Pac. 638; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L. R. A. 831, 40 Atl. 682.

Messrs. Preston, Carr, & Gilman, and J. W. Rayburn, for respondent:

The action was maintainable.

Iluaco R. & Nav. Co. v. Hedrick, 1 Wash. 446, 25 Pac. 335; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451; *Birford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; *Pastene v. Adams*, 49 Cal. 87; *Lynch v. Nurdin*, 1 Q. B. 29; *Barnes v. Shreveport City R. Co.* 47 La. Ann. 1218, 17 So. 782; *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64.

Opinion cannot prevail over actual facts; and, when facts are shown, to the satisfaction of the jury, to exist, they must act upon them in preference to the opinion of experts.

Laughlin v. Street R. Co. 62 Mich. 220, 28 N. W. 873; *People v. Vanderhoof*, 71 Mich. 158, 39 N. W. 28; *Stone v. Chicago & W. M. R. Co.* 66 Mich. 76, 33 N. W. 24; *Kelley v. Cable Co.* 8 Mont. 440, 20 Pac. 669; *Hull v. St. Louis*, 138 Mo. 618, 42 L. R. A. 753, 40 S. W. 89; *Bruner v. Wadco*, 84 Iowa, 698, 51 N. W. 251; *Jackson v. Adams*, 100 Iowa, 163, 69 N. W. 427.

Dunbar, J., delivered the opinion of the court:

The respondent, in company with another boy, was playing on some vacant lots in the city of Seattle, and, observing a box which was not altogether covered, investigated the same, and found in it some sticks of explosive powder known as "Judson Dynamite No. 2." According to the testimony of the boys, these sticks of dynamite were already prepared for explosion. They took one of them (thinking it was a large firecracker, it being about 6 inches long) to a stump, lit a match, and applied it to the fuse. The dynamite exploded, and the re-

spondent was injured thereby, losing one of his eyes. The dynamite was exploded by the boy who was playing with the respondent. It was on the Fourth of July and they were out on the lots aforesaid exploding firecrackers. Action was brought for damages, and a judgment of \$3,000 obtained. From such judgment this appeal is taken.

The complaint alleges, among other things, that the defendant was under contract with the city of Seattle to improve Denny way, and other ways, avenues, and streets of the city; that, while engaged in the prosecution of the work, he used an explosive powder known as "Judson Dynamite No. 2" (setting forth the character of the powder, and the care and skill necessary to handle it); that, without the knowledge or consent of the plaintiff or the parents of the plaintiff, and without leave or license from the owner of the premises on which the powder was stored, he wrongfully, carelessly, negligently, and improperly did store more than 20 sticks of said powder, and did suffer it to be and remain, on said premises on the 4th day of July, 1899, badly, insufficiently, and deficiently covered, and in such position as to be readily discovered and easily tampered with by children playing upon or passing over said lot; that the plaintiff and his companion were boys of tender years, and wholly ignorant of the dangerous properties of said powder; that, while playing upon said lot, they found and discovered a box placed with its contents upon said lot by the defendant, containing a quantity of dynamite aforesaid, said box having been there placed by the defendant negligently, insufficiently, and deficiently covered; that the said children, having found the box as aforesaid, prompted by childish curiosity, opened the same and found therein the said sticks of powder; that thereupon the said William Kiger (the boy who was accompanying respondent), without fault or negligence on his part, and without fault or negligence of this plaintiff, took from said box, in plaintiff's immediate presence, one of the sticks of powder aforesaid, and, supposing it to be some kind of a firecracker, such as that in common use on that anniversary, ignited the fuse attached thereto, whereupon the said stick of powder exploded with great force, and by the explosion thereof the injury set forth in detail was caused. Damages were claimed in the sum of \$20,000. The complaint contains the other ordinary allegations in such cases. A demurrer was interposed to this complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled, and the overruling of the same is appellant's first assignment of error.

We think, if the powder was placed on vacant city lots, upon which children are accustomed to play, in the manner described by the complaint, that it is negligence on the part of the person so depositing it, and, in the absence of contributory negligence—which does not appear from the complaint—responsibility for damages will attach. There is a great diversity of decision upon

cases of this character, the particular circumstances of each case generally controlling. But, without entering into an analysis of the many cases which might be cited, we think the cases cited by the respondent sustain the complaint in this case. *Harri-man v. Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11, 12 N. E. 451, it seems to us, is a parallel case. There the defendant, or its servants, negligently placed and left on the track an unexploded signal torpedo, at a place which had been used as a crossing. The torpedo was picked up by a boy of nine years of age, and carried by him into a crowd of boys near by. Being ignorant of its explosive character, he attempted to open it, the torpedo exploded, and the plaintiff, a boy of ten years of age, was injured by the explosion. It was held under this state of facts that the negligence of the company's servants was the proximate cause of plaintiff's injury. The only difference between that case and this is that in this case there had been an attempt to conceal the powder by burying it out of sight. But if the testimony of the respondent and the witness Willie Kiger is true, the box was not completely buried, and nothing would appeal more strongly to the natural curiosity of a boy seven years old than a box in such a place partly disclosed. We think the complaint stated a cause of action, and there was no error committed in overruling the demurrer to the same.

It is strongly contended that the court erred in denying defendant's motion for a nonsuit, in denying the challenge of defendant to the sufficiency of the evidence, and in refusing to render judgment in favor of defendant against plaintiff upon the evidence. The evidence was contradictory, and, if the jury believed the testimony of the witnesses for the respondent,—and the credibility of the witnesses was for the jury alone to determine,—there was a sufficient testimony to sustain the judgment.

The same may be said of the fourth assignment, that the court erred in holding that the evidence showed that the powder was stored and kept in such a manner as to be rendered particularly attractive to children. We think that the instructions of the court generally stated the law fairly, and as favorably to the appellant as it was entitled to, both in relation to the independent

agency of William Kiger, the boy who exploded the powder, and in every other particular, except instruction 28, which we will hereafter notice, and that no error was committed by the court in refusing instructions offered by the defendant, as such instructions, so far as they were justified by the law, had already been given by the court in its direct instructions. But the court instructed the jury as follows:

"I charge you, further, that the testimony of expert witnesses is proper evidence to be received and considered by you, and is entitled to such weight with you as in your judgment as fair-minded men it is entitled to, but it is not of as high grade as evidence, —is not as good evidence of a fact as the testimony of a credible witness or witnesses who testify to having seen the fact itself occur. In other words, the testimony of an eyewitness to an occurrence, whom you find to be a credible witness, is entitled to more weight with you than that of an expert witness who did not see the occurrence, but testifies only to his opinion in the matter."

The giving of this instruction is assigned as error, and, while it is contended by the respondent that such instruction embodies a proper statement of the law, and some cases are cited to sustain that view, yet this court has decided that expert testimony, being competent testimony under the law, must go to the jury as any other testimony in the case goes, and that the jury is the sole judge of the weight of such testimony, and that the court errs when by its instruction to the jury it discriminates in any way against the weight of such testimony. Such was the ruling of this court in *Gustafson v. Seattle Traction Co.* 28 Wash. 227, 68 Pac. 721, and in *Re Blake*, 136 Cal. 306, 68 Pac. 827.

For this error, the judgment will be reversed, and the cause remanded for a new trial.

Fullerton, Ch. J., and Hadley, J., concur. Mount, J., concurs in the result.

Anders, J., dissenting:

While I have no doubt that the instruction of the court, as set forth in the foregoing opinion, was erroneous, I am also of the opinion that appellant's motion for a nonsuit and for judgment should have been sustained on the ground that the evidence failed to show negligence on the part of appellant.

WEST VIRGINIA SUPREME COURT OF APPEALS.

John J. WILLIAMS *et al.*, *Appts.*,
v.
SOUTH PENN OIL COMPANY *et al.*
(.....W. Va.....)

*1. The word "surface," when specifically

*Headnotes by MCWHORTER, J.

NOTE.—As to separate ownership of surface of land and minerals therein, see also, in this series, *Kincaid v. McGowan* (Ky.) 13 L. R. A. 289, and *Lillibridge v. Lackawanna Coal Co.* (Pa.) 13 L. R. A. 627, and *note*, 60 L. R. A.

used as a subject of conveyance, has a definite and certain meaning, and means that portion of the land which is or may be used for agricultural purposes.

2. M. and D. jointly owned in fee simple a tract of 180 acres of land. M. conveyed to W. "all the coal in, on, or underlying the undivided one half" of the tract, and granted to W. the right to make and maintain on said tract of land such openings as might be necessary for ventilation, for drainage, and for taking out all of the coal, without any liability for injury to the surface of said land, or anything thereon, by reason of

the mining of said coal, and the right to remove same, with rights of way, etc. D. conveyed to W. his undivided one half of the tract in fee. W. conveyed to M. "all the surface of the 180 acres, undivided, that was so conveyed to him by said D.," retaining the right to make and maintain on said tract of land such openings as might be necessary for ventilation, for drainage, and for the taking out of all the coal, without any liability for injury to the surface of the land, or anything thereon, by reason of the mining of said coal, and the right to remove same, and rights of way, etc. Held, the said last conveyance from W. to M. was an express grant of the surface only, and severed it from all underlying strata.

3. The oil and gas in and under the said tract of 180 acres of land is the joint property of W. and M., or their heirs, assigns, or grantees.
4. It is the safest and best mode of construction to give words free from ambiguity their plain and ordinary meaning.

(Dent, P., dissents.)

(January 14, 1903.)

APPPEAL by plaintiffs from a judgment of the Circuit Court for Harrison County in favor of defendants in a suit to determine title to certain real estate. *Affirmed.*

The facts are stated in the opinion.

Mr. Millard F. Snider, for appellants:

The term "land" is the word most commonly used in referring to real estate, and it includes the surface of the earth, embracing any ground, soil, or earth whatsoever, as arable lands, meadows, woods, waters, and marshes.

2 Bl. Com. 17; 2 Minor Inst. 4.

The grant of a well carries the land which it occupies.

3 Washb. Real Prop. p. 389.

The term "house" or "cottage" or "wharf" or "town pound," when granted and used as a general term of description, carries the land which is thereby occupied. Such would be the case with the grant of a "pool" or a "pit;" it would pass the land as well as the water in it. Then why does not the grant of the "surface" of 180 acres grant the land?

Webster v. Potter, 105 Mass. 414; 3 Washb. Real Prop. p. 389.

It has also been questioned as to whether "a piece of timber" conveys the land.

Golden v. Coonan, 107 Iowa, 209, 77 N. W. 852.

In construing a deed the court should, as nearly as possible, assume the position of the parties to the deed, and consider their situation and surroundings.

Jones, Real Prop. § 52.

The language used is to be taken most strongly against the grantor.

Turk v. Skiles, 45 W. Va. 34, 30 S. E. 234; 2 Minor, Inst. 1066.

The whole deed must be taken together.

2 Minor, Inst. 1064.

Land has in its legal signification an indefinite extent, upwards as well as downwards.

2 Bl. Com. p. 18.

Whatever is in a direct line between the 60 L. R. A.

surface of any land and the center of the earth belongs to the owner of the "surface."

Hague v. Wheeler, 157 Pa. 324, 22 L. R. A. 141, 27 Atl. 714; *Barringer & Adams, Mines & Mining*, pp. 33, 34; *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436; *Delaware & H. Canal Co. v. Hughes*, 183 Pa. 66, 38 L. R. A. 826, 38 Atl. 568; *Sanderson v. Scranton*, 105 Pa. 469; *Moreland v. H. C. Frick Cokes Co.* 170 Pa. 33, 32 Atl. 634; *Bryan, Petroleum & Natural Gas*, pp. 49-52.

If the courts and law-book writers, and the people generally, call it surface, would not the grantor, who makes the deed and conveys all the surface, excepting the coal, be held to convey everything included in the land, that he did not except?

Jones, Real Prop. § 537.

Messrs. Davis & Davis, for appellees:

The effect of this deed to Monroe was to divest Wilson of all interest in the surface or agricultural portion of the land, leaving him the owner of all the coal and an undivided one-half interest in and to all of the oil, gas, or other minerals and subjacent strata underlying said surface.

Lillibridge v. Lackawanna Coal Co. 143 Pa. 293, 13 L. R. A. 627, 22 Atl. 1035; *Knight v. Indiana Coal & I. Co.* 47 Ind. 105, 17 Am. Rep. 695; *Bryan, Petroleum & Natural Gas*, § 29; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436; *Williams v. Gibson*, 84 Ala. 228, 4 So. 350; *Anderson*, Law Dict. p. 677.

The word "surface" is universally used in all the judicial opinions as a synonym for the agricultural portion of the land, or the superincumbent soil.

Barringer & Adams, Mines & Mining, pp. 36 et seq.; *Marvin v. Breuster Iron Min. Co.* 55 N. Y. 538, 14 Am. Rep. 322; *Wilms v. Jess*, 94 Ill. 464, 34 Am. Rep. 242; *Williamson v. Jones*, 39 W. Va. 247, 25 L. R. A. 222, 19 S. E. 436; *Lewey v. H. O. Fricks Coke Co.* 166 Pa. 536, 28 L. R. A. 283, 31 Atl. 261; *Murray v. Alfred*, 100 Tenn. 100, 39 L. R. A. 251, 43 S. W. 355.

The cannon of construction that the language used in a deed is to be taken most strongly against the grantor is being repudiated.

Taylor v. St. Helens, L. R. 6 Ch. Div. 270; *Gray v. Pearson*, 6 H. L. Cas. 61; *Roddy v. Fitzgerald*, 6 H. L. Cas. 823; *Abbott v. Middleton*, 7 H. L. Cas. 78; 2 Devlin, Deeds, § 848.

Messrs. Fleming & Fleming and O. W. Russell also for appellees.

McWhorter, J., delivered the opinion of the court:

By decree of the circuit court of Harrison county entered on the 27th day of May, 1890, in the case of W. J. Deison and John W. Monroe against Cruger W. Smith and others for the partition of 397 acres of land, there was assigned to said Deison and Monroe, the plaintiffs, in fee simple and in severalty a tract of 180 acres, known as "Lot No. 1" in the partition. On the 20th day of August, 1891, John W. Monroe and wife, in consid-

eration of \$1,200, conveyed with general warranty to Benjamin Wilson "all the coal in, on, or underlying the undivided one half of a certain tract of land situated in said county, containing 180 acres," and granting also to said Wilson the right to make and maintain on said tract of land such openings as might be necessary for ventilation, for drainage, and for the taking out of all the coal, without any liability for injury to the surface of said tract of land, or anything thereon, by reason of mining and removing the coal, and all rights of way and privileges necessary to the proper mining and removing of the coal; and on the 11th day of September, 1891, William J. Deison and wife, in consideration of \$1,200, conveyed with covenants of special warranty to said Wilson their undivided one half in fee simple of said 180 acres of land. On the 28th day of September, 1891, said Benjamin Wilson conveyed to John W. Monroe the surface of the said 180 acres, undivided, which was conveyed to him by said Deison, in the following words: "Now this deed further witnesseth that Wilson does hereby grant to the said John W. Monroe all the surface of the said one hundred and eighty acres, undivided, that was so conveyed to him by said Deison. This conveyance is for a valuable consideration, but the said Wilson retains the right to make and maintain on said tract of land such openings as may be necessary for ventilation, for drainage, and for taking out of all the coal, without any liability for injury to the surface of said tract of land, or anything thereon, by reason of the mining of said coal, and the right to remove same, and the right to him and his heirs and assigns, and to all persons claiming by, through, and under them, to enter in, upon, and under said tract of land for the purpose of mining and removing the coal from said land, the right to make and maintain such openings thereon, and the right to pass over, through, or under said tract of land, by railway or otherwise, to reach any other lands belonging to him or his heirs or assigns, and all persons claiming by, through, or under him. This conveyance and six hundred dollars cash paid by Wilson to Monroe makes up the consideration paid by Wilson for Monroe's undivided one-half interest in the coal underlying the one hundred and eighty (180) acres aforesaid, which said Monroe has conveyed to Wilson, with certain privileges in his deed specified, and above referred to." On the 7th of April, 1893, John W. Monroe and his wife conveyed the said 180 acres of land to John J. Williams an undivided two-thirds interest and to William T. Williams undivided one-third interest, excepting and reserving therefrom the "coal in and under the same as fully as the same has been heretofore conveyed, together with all mining rights and privileges granted and reserved in said deeds from Monroe to Wilson and from Wilson to Monroe, respectively, to all which deeds references are here made." On the 12th day of June, 1899, Benjamin Wilson and others leased to the South Penn Oil Company, its successors or assigns, "for

the sole and only purpose of mining and operating for oil and gas and of laying pipe lines, building tanks," etc., four several tracts of land, containing in the aggregate about 500 acres, including the tract of 180 acres; the lessee to deliver to the credit of the lessors, their heirs or assigns, free of cost, in the pipe lines, the equal one-eighth part of all the oil produced and saved from the leased premises, and to pay \$200 per year for the gas from each and every gas well drilled on the premises the product from which should be marketed and used off the premises. On the 21st day of June, 1899, John J. Williams and W. T. Williams leased for the same purposes to the said South Penn Oil Company the said tract of 180 acres of land, the lessee covenanting "to deliver to the credit of the first parties, their heirs or assigns, free of cost, in the pipe line to which it may connect its wells, their proportionate share of the equal one-eighth part of all oil produced and saved from the leased premises," and "to pay their proportionate share of \$200 per year for the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises." At the November rules, 1900, John J. Williams and William T. Williams filed their bill against the South Penn Oil Company, the Eureka Pipe Line Company, Benjamin Wilson, and others, in the circuit court of Harrison county, claiming to be the sole owners of the one-eighth royalty of the oil and gas in the 180 acres, and praying that it might be so decreed to them, and that, there being no contention or controversy as to their being entitled to the one half of said royalty, that the defendant South Penn Oil Company be required to deliver up to them the one half of royalty, or one sixteenth of the oil. The defendant South Penn Oil Company filed its answer, denying the allegation of the bill that it entered upon the said tract of land exclusively under the lease made by the plaintiffs, but that it entered under the said lease and also under the Wilson lease; denied that it had failed or refused to sign the division order or orders under which the Eureka Pipe Line Company could and would have delivered the one eighth of royalty oil of all produced and being produced from the leased premises; but it was the truth that it had refused to sign such order, as demanded by plaintiffs, under which they would have received the whole of the one-eighth royalty; and denied that it had covenanted in its lease to deliver the one-eighth royalty to plaintiffs; that it did not pretend to decide and say that plaintiffs might not be entitled to some part of said oil, but, if they had title to some part thereof, that such part, if anything, was less than the amount or part claimed by them in their bill, and asked that plaintiffs be required to show to the court what interest they had in the royalty in the oil, as well as their proportionate share of \$200 per year for the gas wells; and expressed their readiness to deliver the one-eighth

royalty as the court might direct it to be distributed among the persons entitled to the same. Defendant Benjamin Wilson filed his separate demurrer and answer to the bill, claiming to be entitled, with his colessors, to one half the royalty and price of the gas produced from said 180 acres, and denied that he had conveyed to the said Monroe anything more than the surface of the one equal undivided moiety of said 180 acres. On the 7th of February, the answers of the several defendants were filed, to which plaintiffs replied generally, and joined in the demurrers, and, there being no adverse claim to one half of the royalty of the oil and one half of the gas rental claimed by plaintiffs, it was ordered to be delivered to them, and the residue of the oil was directed to remain in the pipe lines until further orders from the court. On the 23d of May the death of defendant Benjamin Wilson was suggested, and the cause revived in the name of his heirs at law, and on the 2d of October, 1901, the cause was finally heard, and the court overruled the demurrer, and divided the one half of the royalty oil—being one sixteenth—and the gas rental among the defendants in the proportions to which they were entitled, and, being of opinion that the plaintiffs were not entitled to the relief prayed for in their bill, the same was dismissed, and judgment was entered against the plaintiffs for costs; from which decree plaintiffs appealed.

The question involved in the case seems to turn upon what was conveyed by the deed of September 28, 1891, from Benjamin Wilson to John W. Monroe. After the deed from Deison to Wilson, the latter was the owner of all the coal and the one undivided half of the residue of the whole tract in fee. Wilson, by his deed of September 28, 1891, conveyed to John W. Monroe "all the surface of the said 180 acres, undivided, that was so conveyed to him by said Deison." Counsel for the appellants insists that the word "surface," or a conveyance of the surface of the land, carries with it every part of the land not specifically excepted and files a very ingenious, as well as able, brief in support of his position; but it is well settled that the different materials which go to make up land may be severed by reservation or express grant; after severance or express grant. In Anderson, Dictionary of Law, at page 677, it is said: "The law recognizes horizontal divisions of land. A severance of the surface from the underlying strata may be created either by reservation or express grant; after severance, a mineral right is an independent interest. Thus, one person may own the iron ore, another the coal, another the limestone, and another the petroleum, and another the surface." *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436. The very fact of conveying the surface specifically carries with it the idea of an express grant alone of the surface, and severs it from every other material composing the land. A conveyance of any specified interest in the land, such as the coal, or the limestone, or the iron

ore, or the surface, is an express grant, and severs such interest from every other part of the land; and the title to all the residue remains in the grantor, just as any part of the land would, if reserved specifically in a deed conveying the land. In *Knight v. Indiana Coal & I. Co.* 47 Ind. 105, 17 Am. Rep. 692, and at page 695, 17 Am. Rep., it is said in the opinion: "The owner in fee simple has the power to sell and convey his mines or any stratum by deed or grant so as to create one freehold in the soil and another in the mines; and, as a conclusion from the premises, a freeholder of an estate of inheritance may by deed create as many freeholds beneath the surface as he can properly designate. Thus, one person may own the surface, another may be entitled, by conveyance, to the iron, another to the limestone, and still another to a stratum of coal; for coal and minerals in place are land, and are subject to a conveyance as such and the owner of the mineral right has a corporeal hereditament distinct from the surface,"—and cites *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Harlan v. Lehigh Coal & Nav. Co.* 35 Pa. 287; *Bainbridge Mines*, 7-10; *Armstrong v. Caldwell*, 53 Pa. 284; *Addison Torts*, 116; *Whitaker v. Brown*, 46 Pa. 197; *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436; and *Barnes v. Mawson*, 1 Mees. & S. 77. Section 29, Bryan, Petroleum & Natural Gas, says: "In mineral lands the surface or soil as adapted to cultivation may be separated from the mineral right, or the right to dig under the surface for, and one person may own one of these rights and another person the other;" citing *Delaware, L. & W. R. Co. v. Sanderson*, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394; *Suvin v. McCalmont Oil Co.* 184 Pa. 202, 38 Atl. 1021. See also § 30, Bryan, Petroleum & Natural Gas. In *Chartiers Block Coal Co. v. Mellon*, 152 Pa. 286, 18 L. R. A. 702, 25 Atl. 597, Chief Justice Paxson, in delivering the opinion of the court, at page 295, 152 Pa., page 706, 18 L. R. A., page 598, 25 Atl., says: "The mining of coal and other minerals is constantly developing new questions. Formerly a man who owned the surface owned it to the center of the earth. Now the surface of the land may be separated from the different strata underneath it, and there may be as many different owners as there are strata. *Lilli-bridge v. Lackawanna Coal Co.* 143 Pa. 293, 13 L. R. A. 627, 22 Atl. 1035. The difficulty is to so apply the law as to give each owner the right of enjoyment of his property or strata without impinging upon the right of other owners, where the owner of the surface has neglected to guard his own rights in the deed by which he granted the lower strata to other owners." Justice Paxson further says: "In the earlier days of the common law the attention of buyers and sellers, and therefore the attention of the courts, was fixed upon the surface. He who owned the surface owned all that grew upon it and all that was buried beneath it. His title extended upward to the clouds and

downward to the earth's center. The value of his estate lay, however, in the arable qualities of the surface, and, with rare exceptions, the income derived from it was the result of agriculture. The comparatively recent development of the sciences of geology and mineralogy, and the multiplication of mechanical devices for penetrating the earth's crust, have greatly changed the uses and the values of lands. The tracts that were absolutely valueless, so far as the surface was concerned, have come to be worth many times as much per acre as the best farming lands in the commonwealth, because of the rich deposits of coal, or iron, or oil, or gas known to underlie them at various depths. These deposits are sometimes found, however, beneath well-cultivated farms, so that the surface has a large market value apart from the value of the deposits of coal or other minerals under it. In such cases the owner is rarely able to utilize the lower stores of wealth to which he has title by mining operations conducted by himself, and for this reason he sells them to some person or corporation to be mined and to be moved. So, it often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another, giving to each purchaser a deed or conveyance in fee simple for his particular deposit or stratum, while he retains the surface for settlement and cultivation precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers or strata becomes a subject of taxation, of encumbrance, levy, and sale, precisely like the surface. As against the owner of the surface, each of the several purchasers would have the right, without any express words of grant for that purpose, to go upon the surface to open a way by shaft, or drift, or well to his underlying estate, and to occupy so much of the surface beyond the limits of his shaft, drift, or well as might be necessary to operate his estate, and to remove the product thereof. This is a right to be exercised with due regard to the owner of the surface, and its exercise will be restrained, within proper limits, by a court of equity, if this becomes necessary; but, subject to this limitation, it is a right growing out of the contract of sale, the position of the stratum sold, and the impossibility of reaching it in any other manner." In *Murray v. Allred*, 100 Tenn. 100, 39 L. R. A. 249, 43 S. W. 355, at page 251, 39 L. R. A., the court quoted from 2 *Rapalje & L. Law Dict.* p. 821: "In the most general sense of the term, minerals are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit. The term therefore includes coal, metal, ores of all kind, clay, stone, slate, and coprolites. 'Surface' means that part of the land which is capable of being used for agricultural purposes,"—and cites *Midland R. Co. v. Checkley*, L. R. 4 Eq. 19; *Hext v. Gill*, L. R. 7 Ch. 699; *Atty. Gen. v. Tomline*, L. R. 5 Ch. Div. 762. There can be no question but that the word "surface" has a definite,

certain meaning; that it is that portion of the land which is or may be used for agricultural purposes, for plowing, grazing, etc., and that a conveyance of the surface of a tract of land as completely severs the surface from the various strata beneath it as the conveyance of the coal, iron, limestone, or any other specified stratum or interest in the land conveys a separate estate. It is claimed by appellants that the language used in the deed is to be taken most strictly against the grantor, and cites *Jones, Real Prop.* § 52; *Turk v. Skiles*, 45 W. Va. 84, 30 S. E. 234; 2 *Minor, Inst.* 1066; but this can only apply where the language of the deed is ambiguous, or will admit of two constructions. In § 848, *Devlin, Deeds*, it is said: "It is an old principle of law that exceptions in a deed and every uncertainty are to be taken favorably for the grantee." But this rule is not applicable to any case but one of strict equivocation,—cases where the language of the deed is susceptible of two interpretations. . . . But a construction should, if possible, be adopted that will render all parts of the deed operative. * * * This rule is often misunderstood. It does not mean that the words are to be twisted out of their proper meanings, but only that where the words may properly bear two meanings, and where, after we have applied evidence, whether extrinsic or intrinsic, admissible under the foregoing rules, we are still unable to determine in which of these meanings they were used, we must take them in the meaning most disadvantageous to the person who used them, unless the adoption of that meaning would work wrong." The defect in the argument of counsel for appellant is that he assumes that the meaning of the grantor, Wilson, is uncertain as to what he conveys to Monroe. He says that Wilson makes almost exactly the same reservations in his deed as to the coal privileges as he had Monroe to grant to him when Monroe conveys his interest in the coal to Wilson. I see nothing in this inconsistent with the view that he is conveying alone the surface or agricultural part of the land to Monroe. The reservation of the right of way, and to make and maintain openings for mining purposes, refers to the surface, and the rights and privileges therein, the same in one case as in the other. A careful examination of the deed from Wilson to Monroe will show that the grant to Monroe was of "all of the surface of the 180 acres, undivided, that was so conveyed to him by said Deison." This is the whole granting clause, and is complete in itself, and mentions specifically the surface of the undivided moiety. The grantor does not specifically reserve the coal in the said Deison interest, but "retains the right to make and maintain on said tract of land such openings as may be necessary for ventilation, for drainage, and for taking out all of the coal, without any liability for injury to the surface of said tract of land, or anything thereon, by reason of the mining of said coal, and the right to remove the same,"

etc. The grantor was the owner in fee of the one undivided half of the coal before conveyed to him by Monroe, and this retention of the privileges of mining the coal could, with propriety, be applied to his said undivided interest in the coal derived from Monroe; and could not the appellees with the same propriety claim that the granting of the surface of the one half of the Deison undivided half interest carried with it the coal, as well as the oil and gas, or any other interest therein? In *Buchanan v. Andrew*, L. R. 2 H. L. Sc. App. Cas. 286: "It is the safest and best mode of construction upon all occasions to give to words free from ambiguity their plain and ordinary meaning." Counsel for appellants says that Monroe understood this deed to convey to him everything but the coal, as will appear from his deed of general warranty to John J. and William T. Williams, where, "after reciting that Deison and Monroe owned the land, and Monroe had sold the coal under his undivided half to Wilson, and Deison had sold his undivided one-half interest in said tract of land in fee to Wilson, and Wilson had sold all the surface of his undivided half interest in said tract of the land to Monroe, reserving the coal underlying the same with mining and other privileges therein named," it does not appear that plaintiffs so understood it. In making their lease to the defendant South Penn Oil Company for their interest in said oil and gas, it is provided that the lessee shall "deliver to the credit of the first parties [plaintiffs], their heirs or assigns, free of cost, in the pipe line to which it may connect its wells, their proportionate share of the equal one-eighth part of all oil produced and saved from the leased premises." And a similar provision in relation to the gas rental. Thus it is seen that they were not entitled, under the lease, to all the royalty oil and gas. It is claimed by appellees, and not denied, that this provision as to their "proportionate share" of the royalty was interlined in the lease, and written in with a pen; but it is claimed by counsel for appellants that this provision for the payment to them of the proportionate share of the royalty and rental as referred to here means a distribution between the lessors in said lease as between themselves. On the 12th of June—a few days before the date of their lease—the South Penn Oil Company had taken a lease from Wilson of the same character for the same property, with an agreement or provision to deliver to the lessors the equal one-eighth part of the oil produced from the premises, and it appearing that the appellants had an interest in the oil, it was necessary to take from them a lease as well, to enable it to take possession and drill for oil. The lease made by the appellants was a joint lease, and their "proportionate share" was a joint share, and evidently so recognized in 60 L. R. A.

the provision for its payment. If it had been intended to distribute the proportionate share to the lessors, respectively, as between themselves, it would have so provided; but the language of the lease clearly indicates that these lessors were not entitled to the royalty, except to their joint proportionate share of the one eighth of oil and their share of the gas rental. Under the lease they were entitled to receive their share together as one share, the proportion to which they were entitled as between them and the other lessors.

There is no error in said decree, and *the same will be affirmed.*

Dent, P., dissenting:

I cannot concur in the decision in this case, for the reason that the effect of it is to render the plaintiff's estate voidable at the instance of those who are held to own all the strata underneath the surface, with the implied right to enter and remove the same, including rock, fire clay, limestone, and all other formations to the center of the earth, leaving nothing whatever to support the surface. This was plainly not the intention of the parties, and, if the deed so reads, it should be so reformed to meet that intention. The grantor having set forth in his conveyance what rights he was to have in so far as the surface is concerned,—and this was to enter and remove the coal alone,—precludes any implied rights for any other purpose. So he has no implied right to enter and remove the oil and gas. They being of such volatile character as not to be the subject of separate property in place, but only when reduced to occupancy, the owner of the surface, who has the exclusive right thereto, except as to the removal of the coal, alone has the right to control the production of such oil and gas. If the life tenant is entitled to the interest on the oil produced until the expiration of the tenancy (*Eakin v. Hawkins* [W. Va.] 43 S. E. 211), the owner of the soil in fee should be entitled to such interest during the continuance of his estate,—that is, perpetually,—which takes the whole thereof absolutely; otherwise the owner of the soil in fee has a less estate than the life tenant. The surface, when reduced to its ordinary meaning in common acceptance, includes only the face of the land and does not even cover the tillable soil. So that even the clay could be taken for the manufacture of brick and pottery. In this deed it was clearly the intention of the parties that the surface meant, not only the face of the land, but all that was necessary to support it down even to the center of the earth, except the coal, which was impliedly reserved, along with the coal privileges expressly reserved.

The case should be reversed, and justice done between the parties.

SOUTH CAROLINA SUPREME COURT.

STATE of South Carolina, *Respt.*,
v.Nelson J. SHAW, *Appt.*

(64 S. C. 566.)

1. An appellate court may grant a new trial when there is no evidence to support the verdict.
2. A master may be found guilty of murder for whipping a servant so that he dies, although he has a right to inflict the punishment, and the instrument is proper, if the punishment is so prolonged and barbarous as to indicate malice.

(December 13, 1902.)

NORM.—Homicide by excessive or improper chastisement.

- I. The general rule, 801.
- II. Parent and child, 801.
- III. Persons in loco parentis, 802.
- IV. Schoolmaster and pupil, 803.
- V. Husband and wife, 803.
- VI. Master and servant, slave, or apprentice, 804.
- VII. Conclusion, 804.

I. The general rule.

Parents, masters, and other persons, having authority *in foro domestico*, may give reasonable correction to those under their care, and, if death ensue without their fault, it will be no more than an accidental death; but, if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter according to the circumstances of the case. *State v. Harris*, 63 N. C. 1.

If a father, master, or schoolmaster correct his child, servant, or scholar, he must do it with a fit instrument for correction, and not with such an instrument as is liable to kill him; and, if he uses such an instrument, he is criminally liable therefor. *Grey's Case*, J. Kelyng, 64, 1 East P. C. 261.

And as a general rule a beating from which death results will be regarded as excessive, so as to render the person inflicting it guilty of manslaughter. *Reg. v. Hopley*, 2 Fort. & F. 202.

II. Parent and child.

A parent cannot be permitted deliberately to inflict such punishment on his child as will be likely to produce death, and yet escape criminal responsibility under the cover of parental authority to correct in moderation. *Powell v. State*, 67 Miss. 119, 6 So. 646.

And where it appears that a father, in punishing his child, used a weapon likely to produce death in an unlawful, improper, and cruel manner, and committed such an act as, in its consequence, naturally tended to destroy the life of the child; and that the child died therefrom,—he is guilty of murder, although he may not have intended to kill him. *Williams v. State*, 57 Ga. 478.

Where, in the chastisement of a child, the instrument used is a deadly weapon, or equivalent thereto, and death results, it is murder; and where the correction inflicted with an instrument improper for the purpose, but not deadly, or with a proper instrument to an im-

A PPEAL by defendant from a judgment of the General Sessions Circuit Court for Sumter County convicting him of murder. *Affirmed.*

The facts are stated in the opinion.

Messrs. Lee & Moise, for appellant:

The facts show absolutely no evidence of murder, but only a case of manslaughter. Appellant stood towards the deceased *in loco parentis*, with the lawful right to administer chastisement with a proper instrument for that purpose, and, if chastisement was moderate and death ensued, it was, as matter of law, excusable homicide. If it was immoderate and excessive, and death ensued, it was, as matter of law, manslaughter, and

proper degree, and death results, it is manslaughter; and where, in such case, the proof is wholly circumstantial, and such that it might be inferred that the father killed the child intentionally to get insurance on her life, or that she died from a blow on her head with a broom handle, which was struck before the insurance policy was taken out, and that she was not struck for the purpose of killing her, but that the injury was inflicted through his rough way of treating her,—the jury should be instructed as to voluntary manslaughter. *Montgomery v. Com.* 28 Ky. L. Rep. 732, 63 S. W. 747.

So, where a father stripped his young son, eight years old, naked, threw him on the floor, and savagely beat him from head to foot for about half an hour with a piece of rubber pipe, for some trifling offense, and death resulted therefrom within a few minutes, an instruction in a prosecution therefor that if such immoderate correction was intentionally inflicted without just cause or excuse, and, considering the manner and degree of infliction, and the age and strength of the child, that such correction was evidently dangerous and likely to kill or produce great bodily harm, the accused is guilty of murder, is proper, though he may not have intended to kill the child. *Powell v. State*, 67 Miss. 119, 6 So. 646.

And the act of a mother, being angry with one of her children, in taking up a small piece of iron used as a poker and throwing it at him, as he was running to the door which was open, is unlawful and improper as a mode of correction; and, where the iron struck another child just then entering at the door, causing its death, she is guilty of manslaughter, although she had no intention of hitting the child, with whom she was angry, intending only to frighten him. *Rex v. Conner*, 7 Car. & P. 438.

And where a father beats his helpless child to death without cause, and concludes by saying to his expiring victim: "Die, God damn you!" inquiry as to the motive is unnecessary; and an instruction in a prosecution therefor, that, if a motive on the part of the defendant to commit the crime has not been shown, then the jury ought to consider that as a circumstance favorable to the accused, is properly refused. *Powell v. State*, 67 Miss. 119, 6 So. 646.

And the right of a parent to correct a child has reference only to such children as are capable of correction and of appreciating it, and not to an infant two and one half years old; and while a slight slap might be lawfully given to such an infant by its mother, more violent treatment by its father would not be justifiable; and where the father of such an infant whips it with a strap 1 inch wide and 18 inches long for some childish fault, giving it from

could not, under that state of facts, be murder.

State v. Johnson, 45 S. C. 483, 23 S. E. 619; *State v. Howard*, 64 S. C. 344, 58 L. R. A. 685, 42 S. E. 173; 2 Bishop, Crim. Law, § 685; 3 Greenl. Ev. 134; 2 Wharton, Crim. Law, § 1014; 1 Russell, Crimes, p. 670.

Mr. John S. Wilson for respondent.

Gary, A. J., delivered the opinion of the court:

The record contains the following statement of facts: "The defendant (appellant) was indicted for the murder of Nathaniel Williams, a boy in his employ as a servant, whose death he caused by whipping him. He was tried before his honor Judge J. C. Klugh and a jury, at Sumter, at the June term, 1902, of the court of general sessions.

six to twelve strokes, and the child dies, the question for the jury on a prosecution for the homicide is whether the child's death was accelerated or caused by the blows inflicted by the father. *Reg. v. Griffin*, 11 Cox C. C. 402.

Though a father kills his child in correcting him, without legal excuse or justifiable cause, however, before convicting him of murder, the jury must believe from the evidence, beyond a reasonable doubt, that the correction was excessive, cruel, unusual, evidently dangerous, and likely to kill or produce great bodily harm. *Powell v. State*, 67 Miss. 119, 6 So. 646.

And where it appears that a father had whipped his child with a little switch, not intending to kill him, but simply to chastise him reasonably and properly, and the child, by some mischance or accident died in consequence thereof, the father can be guilty of nothing more than involuntary manslaughter. *Williams v. State*, 57 Ga. 478.

And an instruction in a prosecution against a father for homicide, in whipping his child to death, that, if the defendant killed the child without any legal excuse or justification; and that, if the strap used by him in chastising the child was not a deadly weapon; and that, if the chastisement was not evidently dangerous and likely to kill or produce great bodily harm,—then he should be found guilty of manslaughter only, fairly represents the law of manslaughter as applicable to the facts of the case, and is quite as favorable to the accused as is warranted. *Powell v. State*, 67 Miss. 119, 6 So. 646.

And an instruction in a prosecution for murder of a child by whipping and beating it, in which there is evidence from which it might be inferred that the accused was not actuated by an intention to kill, or by an evil or cruel disposition, in which case the killing cannot be murder,—should present the alternative proposition as to the law where there was no intention to kill, as provided under Texas Code, art. 614, as well as where the intention evidently appeared in cases arising under the provisions of arts. 612, 613, and 615 thereof. *Hill v. State*, 11 Tex. App. 456.

III. *Persons in loco parentis.*

While the law allows a person *in loco parentis* the broadest latitude in governing another, it is not necessary to prove express malice on his part to convict him of murder when he caused death by whipping with such cruelty and inhumanity as to exclude the idea of passion. *State v. Harris*, 63 N. C. 1; and see *State v. Shaw*, 60 L. R. A.

The state put in evidence the small leather strap with which the whipping was done,—a proper instrument for chastisement; but the contention on the part of the state was that the whipping was cruel, immoderate, and excessive, causing the death of the boy, and hence that the defendant was guilty of murder. The deceased was a stout-built boy, aged about twelve or thirteen years, bright and intelligent, and in good health. He was at the time of his death, and had been for four or five years prior thereto, in the employ and service of the defendant, working for and waiting upon him about his dwelling and store, and clerking for him occasionally. The whipping occurred on Saturday, November 9, 1901, for a petty theft committed on the previous Thursday. The defendant's defense was the plea of not guilty; that the chastisement was moderate

And where a child was stripped naked by a person with whom he lived, and placed on his back with his feet tied up, and kept there from morning till night every day for a week, and repeatedly whipped each day while in that position with a heavy leather strap, a knitted cord, and an iron ramrod until he died, the provocation being small, deliberation and malice are shown, warranting a conviction for murder. *State v. Harris*, 63 N. C. 1.

And where a mother-in-law, perceiving a fault committed by her daughter-in-law in some work she was doing, threw a child's stool at her, which hit and killed her, and afterwards she concealed the death and hid the body, it is either murder or manslaughter. *King v. Hazel*, 1 Leach C. C. 368.

So, where a man beat a boy between five and six years of age with a piece of sycamore fishing pole, about 3 feet long and 1½ inches in diameter for some minutes, and afterwards procured a piece of grape vine about 1¼ inches in diameter, and resumed the beating, which lasted in all about fifteen minutes, and the child died from injuries received, an instruction, in a prosecution for the homicide, as to the law of murder in the first degree on the theory of a wilful, deliberate, and premeditated killing, and also as to the law of manslaughter in the fourth degree, is proper. *State v. Shock*, 68 Mo. 552.

And one who strikes a little girl about five years of age for disobedience in an unimportant matter, several times with an iron poker, knocking her down, and then stamps upon her, inflicting injuries resulting in death, is guilty, at least, of manslaughter; since the punishment is inflicted in a cruel and unusual manner, and the deed is done while committing a misdemeanor. *People v. De Garmo*, 73 App. Div. 46, 76 N. Y. Supp. 477.

And evidence of a course of brutal treatment by a stepfather towards his stepchild through a period of several months, and that she was found lying on the hearth dead with evidences on her body that her death was occasioned by burning, and that the accused was guilty of causing it, is sufficient to warrant a verdict, in the prosecution thereof, of wilful, malicious, premeditated, and deliberate murder. *State v. Mahly*, 68 Mo. 315.

And evidence, in a prosecution against a stepfather for killing a stepdaughter by beating her to death, that the child was beaten in a cruel and unmerciful manner; and that no one was present at the time of the chastisement except the accused, the child beaten to death, and her mother; and that the punishment was inflicted with a heavy rope, and that the rope was found

and proper, and that the boy's death was wholly unintentional, and through misfortune; that at most it was a case of manslaughter. The jury found the prisoner guilty of murder, with a recommendation to mercy. Defendant's counsel moved before his honor upon the minutes for a new trial upon the ground that the verdict of the jury was not warranted by the evidence; that there was absolutely no evidence of murder or malicious homicide in the case to sustain the verdict; that, the defendant having the lawful right to inflict moderate chastisement, if he inflicted the same, and death ensued, it was at most manslaughter, and not murder; and hence that the conviction was illegal, and the verdict should be set aside. After hearing argument from the defendant's counsel, the presiding judge overruled the motion, and sentenced the

prisoner to imprisonment for life in the state penitentiary. Due and timely notice of intention to appeal to the supreme court was served upon the solicitor."

The following are the appellant's exceptions: "(1) For that his honor the presiding judge erred, as matter of law, it is respectfully submitted, in refusing defendant's motion for a new trial, when there was no testimony whatever in the case to sustain the conviction of the prisoner of the crime of murder. (2) For that his honor the presiding judge erred, as matter of law, it is respectfully submitted, in refusing defendant's motion for a new trial, when the evidence in the case went no further than to make out at most a case of manslaughter."

The first question argued by the appellant's attorneys was whether this court had

wet from a recent washing, with blood remaining in the interstices; and that the child's hands were broken: and that there were lacerations and bruises on different parts of her body. — Justifies a verdict of murder in the second degree. *Taylor v. State* (Tex. Crim. App.) 57 S. W. 812.

The act of a person standing in the relation of a parent to a ten-year-old boy, however, who was disobedient and ran away, of tying him in a grain sack, having two holes in it, and then engaging with acquaintances in drinking whisky, and forgetting the boy, and allowing him to remain in the sack for several hours, when he was found to be dead, is not wilful, deliberate, and premeditated murder, but manslaughter. *State v. Fields*, 70 Iowa, 196, 30 N. W. 480.

And a person *in loco parentis*, who inflicts corporal punishment on a child, and compels it to work for an unreasonable number of hours and beyond its strength, after which the child dies of consumption, its death having been hastened by ill treatment, is not guilty of murder, but only of manslaughter, although the punishment was cruel and excessive and accompanied by violence and threatening language, where he believed that the child was shamming illness, and really able to do the work required. *Rex v. Cheeseman*, 7 Car. & P. 455.

IV. Schoolmaster and pupil.

A schoolmaster represents the parents of a pupil, and has parental authority delegated to him for the time being, and may, for the purpose of correcting a child, inflict moderate and reasonable corporal punishment; but, if it be administered to gratify passion, or if it be excessive or immoderate in nature or degree, or if protracted beyond the child's powers of endurance, and with an instrument unfitted for the purpose and calculated to produce danger to life or limb, the violence is unlawful; and, if death ensues, the person inflicting it is guilty of manslaughter. *Reg. v. Hopley*, 2 Fost. & F. 202.

While a father may authorize the chastisement of his child, he cannot authorize an excessive chastisement which will justify a schoolmaster in inflicting such chastisement as will cause death, whatever his motives may have been. *Ibid.*

And a schoolmaster who wrote to the parent of a pupil proposing to beat the pupil severely to subdue his obstinacy, and, on receiving the parent's reply assenting to his proposition, beat the boy for two hours and a half secretly in the night with a thick stick until he died, is guilty of manslaughter. *Ibid.*

60 L. R. A.

V. Husband and wife.

Though a husband has a right to correct his wife on words between them, a pestle is an improper instrument with which to do it; and if, in such case, a husband uses a pestle to correct his wife, and kills her with it, he is guilty of murder. *Grey's Case*, J. Kelyng, 64, 1 East P. C. 261, Citing Dalton, Justice of Peace, 218.

And beating or striking a wife violently, though with the open hand, is not one of the rights conferred on a husband by marriage, even if the wife is drunk and insolent; and, such blows being illegal, if they cause the death of the wife, the husband is at least guilty of manslaughter. *Com. v. McAfee*, 108 Mass. 458, 11 Am. Rep. 383.

And the death of a wife, caused by her husband stamping and jumping upon her prostrate person, and by blows and kicks inflicted with great violence, and repeated during an afternoon and evening, is a murder committed with extreme atrocity and cruelty, within the meaning of the Massachusetts statute making such killing murder in the first degree. *Com. v. Devlin*, 126 Mass. 253.

And an allegation, in an indictment against a husband for the homicide of his wife, that he struck, kicked, beat, bruised, and wounded her upon her head and body, and threw her upon the floor, causing her death, sets forth the killing with sufficient particularity, though the proof is that he struck her with his open hand upon her cheek and about the temple, and she fell to the floor, and medical evidence attributed her death to falling on a chair, causing concussion of the brain. *Com. v. McAfee*, 108 Mass. 458, 11 Am. Rep. 383.

But an instruction, in a prosecution against a husband for the homicide of his wife, that, if he used such force and violence towards her as to cause her to leave his house from fear of death or great bodily harm at his hands, and her death was produced from exposure to cold, he is guilty of manslaughter, is improper, in the absence of an instruction that such fear of death or great bodily harm must have been well grounded or reasonable, and that her death by freezing was the natural and probable consequence of leaving the house at the time and under the circumstances; where it appears that the husband was a cripple, and had but one arm which he could use, and she was a high-tempered woman, and there was evidence that she could whip him. *Hendrickson v. Com.* 85 Ky. 281, 3 S. W. 166.

So, the unlawful beating by a husband of his

the power to grant a new trial on the ground mentioned in the exceptions. Whatever doubts may heretofore have existed as to the power of the supreme court to grant a new trial when there is no evidence to support the verdict, the rule is now well established by recent cases that it has such power. The reason for the rule is that it is error of law for the circuit court to refuse to set aside a verdict without any evidence to support it.

We will next consider whether there was any testimony whatever from which the jury had the right to infer malice on the part of the prisoner in causing the death of the boy, who died immediately after the whipping. We have never seen a case where the circumstances attending the homicide were more harrowing and revolting. There was testimony that the boy was stripped naked, and whipped for one or more hours, with a leather strap having a knot at one end; that there were more than a hundred welts

raised upon him, which covered his body from his head to his feet; that, after blisters were raised over his body, they were burst by strokes from the strap; that the appellant resumed the whipping after being interrupted for a while by a visit from a person who had called to see him; that the boy's privates were most horribly mutilated, and that his pitiful appeals for mercy were disregarded. The appellant's attorneys, in their argument, contended that the jury could not find the prisoner guilty of murder, "because the appellant here stood towards the deceased *in loco parentis*, with the lawful right to administer chastisement with a proper instrument for that purpose; and, if the chastisement was moderate, and death ensued, it was, as a matter of law, excusable homicide, as contended by the appellant; but if, on the other hand, it was immoderate and excessive, as contended by the state, and death ensued, it was, as matter of law, manslaughter, and could not,

wife, causing death after birth, of a child subsequently born, is not manslaughter, but murder in the second degree. *Clarke v. State*, 117 Ala. 1, 23 So. 671.

VI. Master and servant, slave, or apprentice.

Every master has a right moderately to chastise his servant, but the chastisement must be on just grounds and with an instrument properly adapted to the purposes of correction. The using of a weapon from which death is liable to ensue imports a mischievous disposition, and the law implies that degree of malice, if death actually does ensue, which will make it murder. *King v. Wiggs*, 1 Leach C. C. 378, note; and see *State v. Shaw*.

And a master who used his sword to correct his servant, causing his death, is guilty of murder, the sword being an improper instrument for that purpose. *Rex v. Kette*, 1 Ld. Raym. 140.

And a master, whose servant negligently permitted some of his sheep to escape, who, on seeing them go, seized a stake and threw it at the boy, hitting him on the head with it, fracturing his skull and killing him, is guilty of manslaughter. *King v. Wiggs*, 1 Leach C. C. 378, note.

So, where a slave is killed by his master or overseer, or either of them, in inflicting punishment upon him, the rules of the common law upon the subject of murder regulate the character of the offense; and at common law masters were allowed to punish their servants with moderation; and what was moderation, and what was a cruel and unusual punishment, was a question of fact for the jury. *Kelly v. State*, 3 Smedes & M. 518.

And where a master punishes a slave barbarously, unreasonably, immoderately, and accompanies the punishment by hard usage and the withholding of food, clothing, and rest, the punishment loses its character of correction, and denotes a contemplation of a fatal result; and, in case of the death of the slave, the master is guilty of murder. *State v. Hoover*, 20 N. C. (4 Dev. & B. L.) 365, 34 Am. Dec. 383; *Wilson v. State*, 29 Tex. 240.

And, in case of such punishment, so severe as to cause death, the lesser offense provided for in Tex. Penal Code, art. 674, of the abuse or cruel treatment of a slave, is merged in the greater offense. *Wilson v. State*, 29 Tex. 240.

And the act of a master of a slave in wilfully

and excessively whipping him so as to cause his death is murder in the first degree, though it was not done with the purpose and intention of killing him. *Souther v. Com.* 7 Gratt. 673.

But, under an indictment for the homicide of a slave by cruelly whipping, or other cruel and inhuman treatment, framed under Ala. Code, § 3296, providing that any owner, overseer, or other person having the right to correct any slave, who causes the death of such slave by cruelly whipping or beating, or by any other cruel or inhuman treatment, or by the use of any instrument in its nature calculated to produce death, though without any intention to kill, is guilty of murder in the second degree, and may be guilty of murder in the first degree, —the accused cannot be convicted of a higher offense than murder in the second degree. *Es parte Howard*, 30 Ala. 43.

In *Grey's Case*, J. Kelyng, 64, 1 East P. C. 261, however, it was said that, "if a master correct his servant, or lord his villain, and by force of that correction he dieth, although he did not intend to kill him, yet this is felony, because they ought to govern themselves in their correction in such ways that such a misadventure might not happen."

So, a master who, by premeditated negligence or harsh usage, causes the death of an apprentice, is guilty of murder. *Rex v. Self*, 1 Leach C. C. 137, 1 East P. C. 226.

And a master who, upon the disobedience of his apprentice and refusal to serve him, struck him with a bar of iron, breaking his skull and killing him, is guilty of murder. *Grey's Case*, J. Kelyng, 64, 1 East P. C. 261.

VII. Conclusion.

The question as to criminal responsibility for causing death in inflicting chastisement when the right to inflict it exists seems to depend entirely upon the reasonableness of the chastisement. If it is reasonable in extent and severity, and is inflicted with a proper instrument, and death happens to ensue, no criminal responsibility attaches; but, if it is unreasonably severe, or if it is inflicted with an improper instrument, and death results therefrom, it is manslaughter; and, if the severity is such as to be likely to cause death, or if it is inflicted with an instrument likely to cause death, showing a depraved mind and a reckless disregard for human life, from which malice might be inferred, it is murder.

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under that state of facts, be murder. Hence his conviction of the crime of murder was illegal, and the refusal by the court of his motion for a new trial was error of law." The general proposition for which they contend is amply sustained by the authorities cited in their argument. The jury, however, in the cases mentioned, must be satisfied that the chastisement was inflicted for the purpose of correction, and not for the purpose of destroying the life of the person upon whom the punishment is inflicted. In the note at page 658 of 1 Archbold, Crim. Pr. & PL, it is said: "If death ensues from a master's chastisement of his slave, inflicted apparently with a good intent for reformation or example, and with no purpose to take life or put it in jeopardy, the law would doubtless tenderly regard every circumstance, which, judging from the conduct generally of masters towards slaves, might reasonably be supposed to have led the party into excess. But where the punishment is barbarously immoderate, and unreasonable in the measure, the continuance,

and the instruments, accompanied by other harsh usage and painful privations of food, clothing, and rest, it loses all character of correction *in foro domestico*, and denotes plainly that the master must have contemplated a fatal termination of his barbarous cruelties; and in such case, if death ensue, he is guilty of murder,"—citing *State v. Hoover*, 20 N. C. (4 Dev. & B. L.) 365, 34 Am. Dec. 383. The facts and circumstances surrounding the homicide were such as to warrant the jury in drawing the inference that the purpose and intention of the prisoner was to take the life of the boy. If such was the case, the jury had the right to infer malice, and to find the prisoner guilty of murder. There being, therefore, some evidence proper to be submitted to the jury upon the question of malice, it was not error of law to refuse the motion for a new trial. The exceptions must, therefore, be overruled.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

NATIONAL TELEGRAPH NEWS COMPANY *et al.*, Appts.,
v.

WESTERN UNION TELEGRAPH COMPANY.

(119 Fed. 294.)

1. The market quotations and sporting news gathered by a telegraph company, and delivered to its patrons by means of tickers, are not, as so delivered, within the protection of the United States copyright laws.
2. The news of market quotations and sporting items gathered and furnished by a telegraph company to patrons by means of tickers is property, which will be protected by equity against appropriation by rival companies who intend to furnish it to their patrons in competition with complainant, to the injury or destruction of the service.

(October 28, 1902.)

A PPEAL by defendants from an order of the Circuit Court of the United States for the Northern Division of the Northern District of Illinois, restraining them from utilizing, for the purpose of reselling, news which was furnished by plaintiff's instruments. *Affirmed.*

The facts are stated in the opinion.

Argued before *Jenkins* and *Grosscup*, Circuit Judges, and *Bunn*, District Judge.

NOTE.—The question decided in the above case is one of great importance, upon which there is little authority, but see the following case, and the few authorities cited in the opinion thereof.

For a case in this series holding that one who invents a secret code showing the cost and 60 L. R. A.

Messrs. Wing & Chadbourne and *Charles S. Holt* for appellants.

Messrs. Frank O. Lowden, Henry D. Estabrook, and Herbert J. Davis, for appellee:

Property is simply a right; it is the right in or to a thing. The corpus, or *res*, or thing, is simply the subject of property.

Eton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 147.

A partial disposition, by the true proprietor, of a thing that is his, is not to be carried beyond the intent and measure of his assent and approbation in that behalf, whether it be the case of borrowing, hiring, or a compact of any other sort.

Millar v. Taylor, 4 Burr. 2303.

When a person, at the cost of effort and money, obtains information, formulates it in words, and commits it to writing, he has a property therein.

The reports of passing events, sent over appellee's tickers to saloons, hotels, and brokers' offices, is not, properly speaking, literature; it does not come within the purview of the copyright statutes.

Clayton v. Stone, 2 Paine, 382, Fed. Cas. No. 2,872.

But appellee's news report is akin to literary property. It may appropriately be called quasi—or pseudo—literary property; not within the purview of the copyright statutes, to be sure; not affected, therefore,

selling prices of his wares and merchandise. for use by his travelling salesman, has a property right therein which may be protected by injunction, see *Simmons Hardware Co. v. Walbel* (S. D.) 11 L. R. A. 267, with note on what products of skill and labor are entitled to protection.

by any of the provisions of those statutes, but finding its protection, if at all, in the principles of the common law.

A telegraph message, together with the contents thereof, is the subject of property. If the message and its contents are appellee's property before publication, then it must be admitted that the news report is appellee's exclusive property, to do with as it sees fit.

How does the publication of a manuscript, not within the purview of the copyright statutes, warrant the presumption of an abandonment or dedication to the general public? Publication is but one method of using his property,—the only method which could make his property of profit to himself or of value to the public.

Millar v. Taylor, 4 Burr. 2341.

The question simmers itself down to one of intention. Intention is a question of fact, evidenced by a person's word, or act, or omission to act.

At common law an author of any book or literary composition had the sole right of first printing, and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent. Such right was not taken away upon his printing and publishing such book or literary composition, but the author had the exclusive right of copy in perpetuity.

Ibid.

Where literary, or quasi literary, property, such as here involved, is not subject to statutory copyright, the facts, or acts, or circumstances evidencing an intention to donate the owner's right of copy to the general public, should be even more unequivocal than where the property is a drama, or lecture, or musical composition, privileged to statutory protection.

An uncopyrighted drama or lecture is not generally dedicated to the public by presentation, so that one in the audience would be permitted to take the words uttered by the actors in shorthand and reproduce them.

Keene v. Kimball, 16 Gray, 545, 77 Am. Dec. 426; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *Bartlett v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082; *Macklin v. Richardson*, 2 Ambl. 694; *Abernethy v. Hutchinson*, 1 Hall & T. 28, 3 L. J. Ch.209; *Turner v. Robinson*, 10 Ir. Ch. Rep. 121; *Nicols v. Pitman*, L. R. 26 Ch. Div. 374; *Caird v. Sime*, 57 L. T. N. S. 634; *Cooper v. Stephens* [1895] 1 Ch. 567; *Boucicault v. Fox*, 5 Blatchf. 87, Fed. Cas. No. 1,691; *Hammer v. Burnes*, 26 How. Pr. 174; *Oertel v. Wood*, 40 How. Pr. 10; *Palmer v. DeWitt*, 47 N. Y. 532, 7 Am. Rep. 480; *Gilbert v. Baehner*, 9 W. N. C. 14; *Drummond v. Altemus*, 60 Fed. 338.

It would be difficult to imagine a more limited publication than is the ticker report. It is a single copy, sent to the particular subscriber, to be read under a glass case. It is not even separated from the machine which produces it. It is literally a part of the machine, and the only part which gives value to the apparatus.
60 L. R. A.

Kiernan v. Manhattan Quotation Teleg. Co. 50 How. Pr. 194; *Exchange Teleg. Co. v. Gregory* [1896] 1 Q. B. 147.

The publication by appellee of its news report on any particular day would not, in legal contemplation, have been completed until the last moment of that day, and the rights of the public, therefore, could not attach until the day succeeding.

Warren v. Slade, 23 Mich. 3, 9 Am. Rep. 70; *Lester v. Garland*, 15 Ves. Jr. 248; *Long's Appeal*, 23 Pa. 297; *Boyer's Estate*, 51 Pa. 437, 91 Am. Dec. 129.

Even if appellee may be presumed to have condoned past offenses, it certainly is not obliged to suffer its property to be appropriated for all time to come, and as fast as acquired.

Marcell v. Somerton, 30 L. T. N. S. 11.

The competition of appellants is intrinsically unfair. It is the policy of the law to encourage enterprise. It is a principle of law that a man is entitled to the fruits of his enterprise; he is not obliged to contribute his effort to the support of a stranger and a rival in business.

Nashville, C. & St. L. R. Co. v. McConnell, 82 Fed. 65.

Grosscup, Circuit Judge, delivered the opinion of the court:

The appellee, the Western Union Telegraph Company, does a general telegraphing business, having offices in every state, village, hamlet, and railroad station in the country, and wires connecting the same with central offices through the country.

About 1881 there was invented an instrument which, by means of a type wheel, actuated by electrical impulse, automatically prints in plain, ordinary type, upon a strip of paper, messages transmitted electrically from a distance. The instrument is now generally known as the "ticker," and is commonly found in the offices of brokers, bankers, and other persons interested in the current price of securities, and in hotels, saloons, and other places where people who are interested in the happenings of the race tracks, athletic clubs, baseball associations, and in pending events generally, are in the habit of gathering. Upon the perfecting of this instrument appellee entered, in addition to its general telegraph business, upon a business heretofore new to it. It collected at various points, where it had offices, news relating to events there transpiring; and, after accumulating in its central offices such product by means of its wires, re-distributed to its tickers, in the offices and places of its patrons, by means of local wires, what was deemed of sufficient interest. The news thus gathered and printed upon strips of paper is open to the inspection of all persons who may come within these places.

The appellants, The National Telegraph News Company, and F. E. Crawford and A. K. Brown, its officers, own and control within the city of Chicago, a system of wires, connecting their operating office with tickers of their own, in the offices and places

of patrons of their own. The evidence in the record before us shows that they have been appropriating *vi et armis* the news appearing upon the appellee's tape; and thereupon, with the loss of a few moments only, redistributing such news over their own wires and tickers to their own patrons. Such appropriation is not denied; but is defended as appellants' lawful right, upon the ground, chiefly, that, upon the appearance of the printed tape upon the appellee's tickers, in the places of appellee's patrons, there is such a publication as, within the meaning of the law, dedicates the contents of the tape to the public, and deprives appellee of any further monopoly therein.

The contention is grounded, chiefly, upon the assumption that the matter thus printed is, unless the subject-matter of copyright, unprotected against appropriation by the public; and, if the subject-matter of copyright, comes under § 4956 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3407), which provides that no person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the librarian of Congress, or deposit in the mail addressed to the librarian of Congress at Washington, a printed copy of the title of the book, or other article, or a description of the painting, drawing, chromo, statue, statuary, or a model or design for a work of the fine arts, for which he desires copyright.

It is obvious, at a single glance, that the appellee is at great expense in gathering and transmitting the news, and in maintaining the instrumentalities, the offices, and the wires, through which its work, in this respect, is accomplished. At every initial point there must be one who is on the lookout,—eyes trained to see, and a judgment trained to discriminate,—and in every central office there must be minds fitted by native wit and acquired knowledge to winnow the wheat from the chaff. Added to this is the increased cost of despatchers, instruments, wires, and plant made necessary by this special department of appellee's business.

It is obvious, also, that if appellants may lawfully appropriate the product thus expensively put upon the appellee's tape, and distribute the same instantaneously to their own patrons, as their own product, thus escaping any expense of collection, but one result could follow—the gathering and distributing of news, as a business enterprise, would cease altogether. Appellee could not, in the nature of things, procure copyright under the act of Congress upon its printed tape; and it could not, against such unfair conditions, without some measure of protection, compete with appellants upon prices to be charged their respective patrons. And in the withdrawal of appellee from this business, there would come death to the business of appellants as well; for, without the use of appellee's tape, appellants would have nothing to distribute. The parasite that killed, would itself be killed, and the 60 L. R. A.

public would be left without any service at any price.

The general question raised by appellants' contention, then, is this: Is the printed tape, coming out of appellee's tickers, a book or article within the meaning of the copyright laws of the United States, and especially of U. S. Rev. Stat. § 4956 (U. S. Comp. Stat. 1901, p. 3407), and, if not a book or article within the meaning of the copyright law, is there any remedy that will protect this feature of appellee's business against the kind of piracy shown?

We are of the opinion that the printed tape would not be copyrightable, even if the practical difficulties were out of the way. When the Federal Constitution was adopted the right of property in literary production had been already securely established in English law. Its source, whether, in natural right, or in the statute of Anne, was still in doubt; but that an author had ownership of some species over the production of his brain,—an ownership as distinctive as that of the creator of corporeal property,—was conceded by all. Indeed, it could not be otherwise in a civil polity that recognizes the individual, and his right to enjoy what he creates, as the unit of organized society.

But when the Federal Constitution was adopted, the application of this right to productions other than those strictly literary had not yet been mooted. The great case of *Donaldson v. Beckett*, 2 Bro. P. C. 129, had been decided only thirteen years previously. The business world, that in this day permits nothing to escape as a means for its exploitation, had not yet pressed into her service art and books. Business catalogues, circulars containing market quotations, sheets, such as Dun's and Bradstreet's, directories,—the whole staff of aides-de-camp to commerce, now familiar to all,—were then practically unknown. In the public mind, the publication of a book meant that literature, as literature, had received an accession.

Unquestionably, the framers of the Constitution, in vesting Congress with "power to promote the progress of science and the useful arts, by securing for limited times to authors and inventors exclusive right to their respective writings and discoveries," had this kind of authorship in mind; and were the intention of the framers of the Constitution to give boundary to the constitutional grant, many writings, to which copyright has since been extended, would have been excluded. But, here as elsewhere, the Constitution, under judicial construction, has expanded to new conditions as they arose. Little by little copyright has been extended to the literature of commerce, so that it now includes books that the old guild of authors would have disdained; catalogues, mathematical tables, statistics, designs, guide-books, directories, and other works of similar character. Nothing, it would seem, evincing, in its makeup, that there has been underneath it, in some substantial way, the mind of a creator or orig-

inator, is now excluded. A belief that in no other way can the labor of the brain, in these useful departments of life, be adequately protected, is doubtless responsible for this wide departure from what was unquestionably the original purpose of the Constitution.

But, obviously, there is a point at which this process of expansion must cease. It would be both inequitable and impracticable to give copyright to every printed article. Much of current publication—in fact the greater portion—is nothing beyond the mere notation of events, transpiring, which, if transpiring at all, are accessible by all. It is inconceivable that the copyright grant of the Constitution, and the statutes in pursuance thereof, were meant to give a monopoly of narrative to him, who, putting the bare recital of events in print, went through the routine formulæ of the copyright statutes.

It would be difficult to define, comprehensively, what character of writing is copyrightable, and what is not. But, for the purposes of this case, we may fix the confines at the point where authorship proper ends, and mere annals begin. Nor is this line easily drawn. Generally speaking, authorship implies that there has been put into the production something meritorious from the author's own mind; that the product embodies the thought of the author, as well as the thought of others; and would not have found existence in the form presented, but for the distinctive individuality of mind from which it sprang. A mere annal, on the contrary, is the reduction to copy of an event that others, in a like situation, would have observed; and its statement in the substantial form that people generally would have adopted. A catalogue, or a table of statistics, or business publications generally, may thus belong to either one or the other of these classes. If, in their makeup, there is evinced some peculiar mental endowment,—the grasp of mind, say, in a table of statistics, that can gather in all that is needful, the discrimination that adjusts their proportions,—there may be authorship within the meaning of the copyright grant as interpreted by the courts. But if, on the contrary, such writings are a mere notation of the figures at which stocks or cereals have sold, or of the result of a horse race, or base-ball game, they cannot be said to bear the impress of individuality, and fail, therefore, to rise to the plane of authorship. In authorship, the product has some likeness to the mind underneath it; in a work of mere notation, the mind is guide only to the fingers that make the notation. One is the product of originality; the other the product of opportunity.

Judged by a test like this, the printed matter on the tape in question is in no sense copyrightable. It is, at most, the mere annal of events transpiring. True, the happenings of a race track, or the incidents of a college boat race, may be put in narrative, involving creative imagination; or the doings of a board of trade become the basis

of a useful book or article evincing originality. But the printed tape under consideration is no such book or article, and affects no such dignity. It is, in its totality, nothing more nor less than the transmission by electricity, over long distances, of what a spectator of the event, occupying a fortunate position to see or hear, would have communicated, by word of mouth, to his less fortunate neighbor. It is an exchange merely, over wider area, of ordinary sightseeing; and the exchange is in the language of the ordinary sightseer. Matter of this character is not, within the meaning of the copyright law, the fruit of intellectual labor, and would not, if actually copyrighted, be protected by the courts. *J. L. Mott Iron Works v. Clair*, 27 C. C. A. 250, 53 U. S. App. 461, 82 Fed. 316.

Indeed, the printed tape under consideration has no value at all as a book or article. It lasts literally for an hour, and is in the waste basket when the hour has passed. It is not desired by the patron for the intrinsic value of the happening recorded,—the happening, as an happening, may have no value. The value of the tape to the patron is almost wholly in the fact that the knowledge thus communicated is earlier, in point of time, than knowledge communicated through other means, or to persons other than those having a like service. In just this quality—to coin a word, the pre-communicatedness of the information—is the essence of appellee's service; the quality that wins from the patron his patronage.

Now, in virtue of this quality, and of this quality alone, the printed tape has acquired a commercial value. It is, when thus looked at, a distinct commercial product, as much so as any other output relating to business, and brought about by the joint agency of capital and business ability. In no accurate view can appellee be said to be a publisher or author. Its place, in the classification of the law, is that of a carrier of news; the contents of the tape being an implement only, in the hands of such carrier, in its engagement for quick transmission. This is service; not authorship, nor the work of the publisher.

This, then, brings us to the second inquiry: Is there any remedy that will protect appellee, in this feature of its business, against the piracy of outsiders? Has appellee in the performance of this service, no appeal to the law?

It will be noted, first, that the business is, as an entirety, a lawful one. It meets a distinctive commercial want, and in some of its branches, at least, adds to the facilities of the business world. Indeed, no argument against its lawfulness has been advanced.

The business involves, also, the use of property. This consideration brings it at once, in a general way, within the protecting care of courts of equity. At first glance the immediate act restrained in the order below—the use of the information by a rival enterprise until after sixty minutes—may not appear as a trespass upon, or injury to,

property, other than to the extent that there may be property in the printed matter. But such a view falls short of looking far enough. Property, even as distinguished from property in intellectual production, is not, in its modern sense, confined to that which may be touched by the hand, or seen by the eye. What is called tangible property has come to be, in most great enterprises, but the embodiment, physically, of an underlying life,—a life that, in its contribution to success, is immeasurably more effective than the mere physical embodiment. Such, for example, are properties built upon franchises, on grants of government, on good will, or on trade names, and the like. It is needless to say, that to every ingredient of property thus made up,—the intangible as well as the tangible; that which is discernible to mind only, as well as that susceptible to physical touch,—equity extends appropriate protection. Otherwise courts of equity would be unequal to their supposed great purposes; and every day, as business life grows more complicated, such inadequacy would be increasingly felt.

Nowhere is this recognition by courts of equity of the intangible side of property better exemplified than in the remedies recently developed against unfair competition in trade. An unregistered trade name or mark is, in essence, nothing more than a symbol, conveying to eye and ear information respecting origin and identity; as if the manufacturer, present in person, and pointing to the article, were to say, "These are mine;" and the injunctive remedy applied is simply a command that this form of speech—this method of saying, These are mine—shall not be intruded upon unfairly by a like speech of another.

Standing apart, the symbol or speech is not property. Disconnected from the business in which it is utilized, it cannot be monopolized. But used as a method of making an enterprise succeed, so that its appropriation by another would be a distinctive injury to the enterprise to which it is attached, the name, or mark, becomes at once the subject-matter of equitable protection. Here, as elsewhere, the eye of equity jurisdiction seeks out results, and, though the immediate thing to be acted upon by the injunction is not itself, alone considered, property, it is enough that the act complained of will result, even though somewhat remotely, in injury to property.

Considering that in such case equity, without question, lays its restraining hands upon the injurious appropriation of words that belong to the common language of mankind,—than which nothing could be freer to the uses of men,—there ought, it would seem, to be no difficulty, in the case under consideration, to find the power so manifestly needful.

The case under consideration may be summed up as follows: The business of appellee is that of a carrier of information.

The gist of its service to the patron is, that, by such carriage, the patron acquires knowledge of the matter communicated earlier than those not thus served. The ticker, with its printed tape, is an implement or means only to this commercial end, which the patron, or the patron's patron, may utilize to the end intended, but may not appropriate to some end not intended, especially if such appropriation result in injury to, or total destruction of, the service. In short, the law being clearly inadequate to that purpose, equity should see to it that the one who is served, and the one who serves, each gets what the engagement between them calls for; and that neither, to the injury of the other, shall appropriate more.

The immediate business of appellee brought to our attention, in the case under review, may not arouse any great solicitude. It relates to the gathering and distributing of news, not looked upon, perhaps, in all quarters, as essential to the public welfare. But the questions raised are of much wider significance. They involve, among others, that modern enterprise—one of the distinctive achievements of our day—which, combining the genius and the accumulations of men, with the forces of electricity, combs the earth's surface, each day, for what the day has brought forth, that whatever befalls the sons of men shall come, almost instantaneously, into the consciousness of mankind. Thus, a gun thunders in a harbor on the other side of the earth; before its reverberations have ceased, the moral sequence of the event has taken root in every civilized quarter of the earth. Famine arises in India to begin its grim march; it has gotten but little under way until a counter army—the unfailing benevolence of human kind—has been mustered from America to Russia. On an isolated island, and without premonition, a mountain claps its black hands upon the population of a city; almost before a ship in the harbor, with tidings of the catastrophe, could have set sail, relief ships from the harbors of Christendom are under way. By such agencies as these the world is made to face itself unceasingly in the glass, and is put to those tests that bring increasing helpfulness and beauty into the heart of our race.

Is service like this to be outlawed? Is the enterprise of the great news agencies, or the independent enterprise of the great newspapers, or of the great telegraph and cable lines, to be denied appeal to the courts, against the inroads of the parasite, for no other reason than that the law, fashioned hitherto to fit the relations of authors and the public, cannot be made to fit the relations of the public and this dissimilar class of servants? Are we to fail our plain duty for mere lack of precedent? We choose, rather, to make precedent,—one from which is eliminated, as immaterial, the law grown up around authorship,—and we see no better way to start this precedent upon a

career, than by affirming the order appealed from.

Affirmed.

NOTE.—Baker, Circuit Judge, though not sitting in this case, read, in connection with

Illinois Commission Co. v. Cleveland Teleg. Co. 119 Fed. 301, the briefs and record herein, and took part, uniformly, in the conferences. He authorizes the statement that the reasoning and conclusions arrived at in this case meet with his concurrence.

MASSACHUSETTS SUPREME JUDICIAL COURT.

F. W. DODGE COMPANY

v.

CONSTRUCTION INFORMATION COMPANY *et al.*

(183 Mass. 62.)

1. Facts with reference to contemplated buildings or improvements, which have been ascertained promptly by effort and expense, and compiled and put in form for the use of contractors, having a commercial value so long as they are not generally known, are property, and entitled to protection as such.
2. The furnishing to subscribers of secret information, gathered by effort and expense, regarding intended buildings or improvements, which is advantageous to their respective lines of business, under contract not to disclose it, is not a publication which will deprive its owner of the right to protection against the unlawful use of it by a rival.

(February 26, 1903.)

REPORT by the Supreme Court for Suffolk County for the opinion of the full bench of an action brought to enjoin defendants from utilizing information which complainant had gathered and sold to customers. *Demurrers to bill overruled.*

The facts are stated in the opinion.

Messrs. William Odlin and Dunbar & Rackemann for plaintiff.

Messrs. Charles F. Choate, Jr., and Edward C. Stone, for defendants:

The plaintiff, by offering or sending out its information in the form of reports to an indefinite number of persons, and to anyone who will subscribe therefor, has abandoned whatever property rights, if any, it may have had in it.

Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co. 155 N. Y. 241, 41 L. R. A. 846, 49 N. E. 872; *Oallaghan v. Myers*, 128 U. S. 617-667, 32 L. ed. 547-562, 9 Sup. Ct. Rep. 177; *Larrove-Loisette v. O'Loughlin*, 88 Fed. 896; *Keene v. Wheatley*, 4 Phila. 157, Fed. Cas. No. 7,644.

Anyone may make any use of published matter not protected by copyright statutes.

Nash v. Lathrop, 142 Mass. 29, 6 N. E. 559; *Connecticut v. Gould*, 34 Fed. 319; *West Pub. Co. v. Lawyers' Co-op. Pub. Co.* 25 L. R. A. 441, 64 Fed. 364; *Wheaton v. Peters*, 8 Pet. 591, 8 L. ed. 1055; *Banks v. Manchester*, 128 U. S. 244, 252, 32 L. ed. 425, 428, 9 Sup. Ct. Rep. 36; *Clemens v. Belford*, 11

NOTE.—See the preceding case, and footnote thereto.

60 L. R. A.

Biss, 459, 14 Fed. 728; *Sarony v. Burrow-Giles Lithographic Co.* 17 Fed. 593; *Clayton v. Stone*, 2 Paine, 382, Fed. Cas. 2,872; *Stowe v. Thomas*, 2 Wall. Jr. 547, Fed. Cas. No. 13,514; *Rees v. Peltzer*, 75 Ill. 475; *French v. Maguire*, 55 How. Pr. 471; *Bouci-cault v. Foz*, 5 Blatchf. 88, Fed. Cas. No. 1,691; *Macklin v. Richardson*, 2 Ambl. 694; *Southey v. Shervood*, 2 Meriv. 438; *Queensberry v. Shebbeare*, 2 Eden, 329; *Little v. Hall*, 18 How. 170, 15 L. ed. 331; *Forrester v. Waller*, 4 Burr. 2331; *Stevens v. Gladding*, 17 How. 454, 15 L. ed. 158; *Stephens v. Cady*, 14 How. 529, 14 L. ed. 528; *Parton v. Prang*, 3 Cliff. 537, Fed. Cas. No. 10,784; *Drone*, Copyright, p. 121, *Prince Albert v. Strange*, 14 DeG. & Sm. 652; *Bartlette v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1,082; *Ladd v. Ornard*, 75 Fed. 703.

The kind of publication necessary to confer upon a "copyrighted" article the protection of the statutes is the kind of publication which devests the common-law right.

Drone, Copyright, p. 120; *Copinger*, Copyright, p. 117; *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.* 155 N. Y. 241, 41 L. R. A. 846, 49 N. E. 872; *Keene v. Wheatley*, 4 Phila. 157, Fed. Cas. No. 7,644; *White v. Geroch*, 2 Barn. & Ald. 298; *Back v. Longman*, 2 Cowp. 623; *Clementi v. Goulding*, 11 East, 244, 2 Campb. 25; *Clayton v. Stone*, 2 Paine, 382, Fed. Cas. No. 2,872; *Shakespeare's Hen. IV. Pt. 1, act 3, scene 1*.

The plaintiff could not acquire any property right in the information collected and compiled.

Millar v. Taylor, 4 Burr. 2392; *Donaldson v. Becket*, 4 Burr. 2408; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147; *Jefferys v. Boosey*, 4 H. L. Cas. 815; *Keene v. Wheatley*, 4 Phila. 157, Fed. Cas. No. 7,644.

Knowlton, Ch. J., delivered the opinion of the court:

This case comes before us on demurrers to the plaintiff's bill. The plaintiff corporation has been engaged for some years in the business of collecting information in regard to the erection of buildings, both public and private, the construction of sewers, water-works, and other undertakings of public utility, as soon after they are contemplated as possible. This information is carefully compiled and distributed each day to the plaintiff's customers in accordance with their contracts, enabling them very early to take such steps as may seem to them best to obtain contracts to do the work or to furnish

supplies. The plaintiff, at great expense, has many servants and agents employed in the collection, preparation, and distribution of this information, which it sells to its subscribers under a contract in writing, whereby the subscriber binds himself to use the reports in strict confidence, and for his business only. The formal contract with subscribers, annexed to the bill, which is in blank, with large spaces for writing in special arrangements, shows that the information may be printed, written, or oral, and implies that the information furnished to the subscribers is such as pertains to their different kinds of business, so that different subscribers receive information in detail on different subjects, according to their interests. It also contains an agreement to be signed by each subscriber to hold the information in strict confidence, and for his business only. The plaintiff avers that the defendant corporation is engaged in the same kind of business as the plaintiff, and that it has obtained unlawfully and dishonestly, from the plaintiff's subscribers, information furnished them by the plaintiff under these contracts, being aware of the terms of the contracts between the plaintiff and its subscribers, and that it is purchasing these reports from these subscribers for cash, and is furnishing them to its subscribers daily, and is informing the plaintiff's subscribers that by subscribing for the reports of the defendant they will obtain the advantages of the plaintiff's reports for a less price than the plaintiff charges for them. The plaintiff says that the defendant has thereby prevailed upon many of the plaintiff's subscribers to cease buying the plaintiff's reports, and has caused the plaintiff great loss and damage. The prayer of the bill is for an injunction and an account.

The important question in this case may be divided into two parts: First. Has the plaintiff any property in the information after it has been obtained at great expense and compiled for the use of its subscribers? Second. Does it lose its property by publication, abandonment or dedication to the public, when it furnishes the information to subscribers under these contracts? The facts, before it has ascertained them, unless they are held for a special purpose confidentially, and as secrets, are not property; but when these facts have been discovered promptly by effort and at expense, and have been compiled and put in form, and are of commercial value by reason of the speedy use that can be made of them before they have obtained general publicity, they are property. They represent expensive effort and valuable service, and, in the form in which they are presented to subscribers, they may be used with a reasonable expectation of profit from the early possession of them. The information is not visible, tangible property, but there is a valuable right of property in it, which the courts ought to protect in every reasonable way against those seeking to obtain it from the owner without right, to his damage. What the plaintiff has when the defendant seeks to ob-

tain it from him is the possession of valuable information. This early possession is valuable in itself. The plaintiff has it and the defendant does not have it. If the defendant can obtain it legitimately, he becomes the owner of the same kind of property, and the two may become competitors in the market as vendors to those who are willing to pay for it. But if the defendant surreptitiously and against the plaintiff's will takes from the plaintiff and appropriates the form of expression which is the symbol of the plaintiff's possession, and thus, by direct attack, as it were, divides the plaintiff's possession, and shares it, this conduct is a violation of the plaintiff's right of property. That there is a right of property of this kind has been decided in England in regard to information of stock quotations and other different kinds of news obtained to be furnished to those who will pay for it. *Exchange Tele. Co. v. Gregory* [1896] 1 Q. B. 147; *Exchange Tele. Co. v. Central News Co.* [1897] 2 Ch. 48. This has also been held by different courts in this country. *Kiernan v. Manhattan Quotation Tele. Co.*, 50 How. Pr. 194; *Chicago Board of Trade v. Christie Grain & Stock Co.* 116 Fed. 944; *National Tele. News Co. v. Western U. Tele. Co.* 119 Fed. 297. We are of opinion that one's possession of information which he has obtained, compiled, and put in form for a specific use is a right which ought to be protected against those who would share it with him without his consent.

The next question is whether the giving of information by the plaintiff to its subscribers is a publication of it, such as dedicates it to the public, and deprives the plaintiff of its right of control. It is well established that the private circulation of information or literary composition, in writing or in print, for a restricted purpose, is not a publication which gives the public a right to use it. *Prince Albert v. Strange*, 1 Macn. & G. 25; *Jeffreys v. Boosey*, 4 H. L. Cas. 815, 867; *Exchange Tele. Co. v. Gregory* [1896] 1 Q. B. 147; *Exchange Tele. Co. v. Central News Co.* [1897] 2 Ch. 48; *Bartlett v. Crittenden*, 4 McLean, 300, Fed. Cas. No. 1082. See also *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *The Mikado Case*, 23 Blatchf. 347, 25 Fed. 183; *Press Pub. Co. v. Monroe*, 51 L. R. A. 353, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 196. It has been held in *Ladd v. Oanard*, 75 Fed. 703-729, and in *Jewelers' Mercantile Agency v. Jewelers' Weekly Pub. Co.* 155 N. Y. 241, 41 L. R. A. 846, 49 N. E. 872, that where a company furnished a reference book, or a book of mercantile agency credit ratings, to an unlimited number of subscribers, under a stipulation that the book was furnished as a loan, and not as a sale, and that it should not go into other hands, there was a publication. Each of these suits was brought under the United States copyright act for an infringement of the copyright, and the decision was on the ground that by reason of publication the copyright was not perfected. In the latter case three of the

judges did not agree that there was a publication. The thing sent out in these cases was a book designed to be preserved and used for a considerable time. It was in a convenient form for transfer from hand to hand, and for use from time to time by different persons. We do not think that these cases very much resemble the case before us. The information given by the plaintiff in this case, as we infer, is of specific facts for particular persons or classes of persons, adapted to their interests, and furnished from time to time as the facts are ascertained. It seems very unlike the sale or loan of a large printed book, designed to be distributed among a large class of persons. We think the case falls within the principles laid down in the cases first above cited. It makes no difference that the information in some of these cases was furnished by telegraph, and that in this it is furnished orally or in writing or in print. We are of opinion that the averments of the bill do not show a publication which deprives the plaintiff of its rights or property.

We have considered the case without reference to the question whether it would be possible to obtain a copyright upon the plaintiff's compilations, for we think its rights are the same, however this question might be decided. It would seem, however, to be impracticable to obtain copyrights in the course of the plaintiff's business, whether the material would be a subject for a copyright under the statute or not.

We do not deem it necessary to consider at length the objections raised by the special demurrer. Although the averments of the bill are not so full as might be desired, we are of opinion that they are sufficient.

Demurrers overruled.

Aubrey MITTENTHAL *et al.*

v.

Pietro MASCAGNI.

(183 Mass. 19.)

A clause in a contract for a tour to conduct entertainments, the performance of which will extend into several countries, that suits upon it shall be brought in the country where the contracting parties are domiciled, is valid, and will be enforced by the courts of other countries.

(February 26, 1903.)

REPORT by the Superior Court for Suffolk County for the opinion of the Supreme Judicial Court of an action brought

NOTE.—A question somewhat analogous to the one discussed above, as to the effect of agreement to arbitrate on right to bring action, is considered in a note to Kinney v. Baltimore & O. Employees' Asso. (W. Va.) 15 L. R. A. 142; also in the later cases of Chapman v. Rockford Ins. Co. (Wis.) 28 L. R. A. 405, and Hartford F. Ins. Co. v. Hon (Neb.) *ante*, 438. 60 L. R. A.

to recover damages for alleged breach of contract. *Action dismissed.*

The facts are stated in the opinion.

Mr. Thomas J. Barry, for plaintiffs:

The filing of the demurrer and of the answer constituted a waiver of all objections to the jurisdiction.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; *York v. Texas*, 137 U. S. 15, 34 L. ed. 604, 11 Sup. Ct. Rep. 9.

The plaintiffs, as citizens of the United States, claim a Federal right to proceed against the defendant for his breach of the contract in this country under the terms of the treaty between the United States of America and the King of Italy.

This treaty right is superior to state laws or decisions, and is the supreme law of the land when litigating with subjects of the King of Italy, either in this country or in Italy.

Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33.

An agreement by the parties to abstain, in all cases arising under a contract, from resorting to the United States courts, is void as against public policy.

Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 174; *The Oramore*, 24 Fed. 922; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539.

Messrs. Brandeis, Dunbar, & Nutter and Edward E. McClennen, for defendant:

The defendant's rights should not be cut off unless the statute very plainly requires it.

Brown v. Kellogg, 182 Mass. 297, 65 N. E. 378.

He has done nothing to preclude him from enforcing the provisions of the contract.

To constitute a waiver there must be conduct manifesting an intention not to insist on performance.

West v. Platt, 127 Mass. 367.

He has not taken a position inconsistent with insisting on such performance.

Rayburn v. Comstock, 80 Mich. 448, 45 N. W. 378.

He has not broken any part of the contract which is a condition to his right to the performance of these provisions.

Knight v. New England Worsted Co. 2 Cush, 271; 2 Parsons, Contr. 8th ed. 798; *Leighton v. Meserve*, 117 Mass. 50.

This is a difference or question arising under the contract.

Barrie v. Earle, 143 Mass. 1, 58 Am. Rep. 126, 8 N. E. 639; *Randegger v. Holmes*, L. R. 1 C. P. 679.

The provision of the contract is an agreement that no action for any difference or question arising under it shall be brought in Massachusetts.

Nute v. Hamilton Mut. Ins. Co. 6 Gray, 174.

The reason generally given for holding agreements in similar language to submit

to arbitration invalid is that, if valid, they would exclude action in court.

Rowe v. Williams, 97 Mass. 163; *Keeffe v. National Accl. Soc.* 4 App. Div. 392, 38 N. Y. Supp. 854.

This agreement, if valid, amounts to a bar.

Nute v. Hamilton Mut. Ins. Co. 6 Gray, 174; *Daley v. People's Bldg., Loan, & Sav. Asso.* 178 Mass. 13, 59 N. E. 452.

This agreement is valid.

Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145; *Atwood v. Walker*, 179 Mass. 519, 61 N. E. 58; *Brookway v. American Exp. Co.* 168 Mass. 257, 47 N. E. 87; *O'Regan v. Cunard S. S. Co.* 160 Mass. 356, 35 N. E. 1070; *Hamlyn v. Talisker Distillery* [1894] A. C. 202; *Re Missouri S. S. Co.* L. R. 42 Ch. Div. 321.

If the parties to a contract agree that it shall be governed by the *lex loci contractus*, effect will be given to the agreement.

Greenwood v. Curtis, 6 Mass. 358, 4 Am. Dec. 145; *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340, 27 N. E. 665; *O'Regan v. Cunard S. S. Co.* 160 Mass. 356, 35 N. E. 1070; *Mamlin v. Talisker Distillery* [1894] A. C. 202; *Daley v. People's Bldg., Loan & Sav. Asso.* 178 Mass. 13, 59 N. E. 452.

The validity of the agreement depends upon the laws of Italy; but it is not apparent what these laws are. The court will, therefore, assume that they do not differ from the laws of Massachusetts, or will apply the laws of this commonwealth, because ignorant, in theory, of any other.

Kennebrew v. Southern Automatic Electric Shock Mach. Co. 106 Ala. 377, 17 So. 545; *Whitford v. Panama R. Co.* 23 N. Y. 465; *Harvey v. Merrill*, 150 Mass. 1, 5 L. R. A. 200, 22 N. E. 49; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512.

An agreement in a contract made in Massachusetts to bring action upon it only in the courts of Massachusetts would be valid.

Daley v. People's Bldg. Loan & Sav. Asso. 178 Mass. 13, 59 N. E. 452.

While an agreement is unenforceable if it keeps from the courts the entire controversy, the same is not true of one which keeps from them but a part of it.

Hood v. Hartshorn, 100 Mass. 117, 1 Am. Rep. 89; *Haley v. Bellamy*, 137 Mass. 357; *Palmer v. Clark*, 106 Mass. 373; *McCarren v. McNulty*, 7 Gray, 139; *Hutchinson v. Liverpool & L. & G. Ins. Co.* 153 Mass. 143, 10 L. R. A. 558, 26 N. E. 439; *Amesbury v. Bouditch Mut. F. Ins. Co.* 6 Gray, 596; *Fulham v. New York Union Ins. Co.* 7 Gray, 61, 66 Am. Dec. 462; *Eliot Nat. Bank v. Beal*, 141 Mass. 566, 6 N. E. 742.

Knowlton, Ch. J., delivered the opinion of the court:

This case comes before us on a report from the superior court submitting the question whether there was an error of the presiding justice in overruling the motion to dismiss, the answer in abatement, and demurrer filed by the defendant, and in rule 60 L. R. A.

ing that the fifteenth paragraph of the contract between the plaintiffs and defendant, upon certain facts agreed, was not a bar to the prosecution of the action in this commonwealth. The contract referred to was made in Florence, Italy, where the defendant, a subject of the King of Italy, had his home, and where the plaintiffs, citizens of the state of New York, elected a domicile by a provision of the contract. By it the defendant undertook to direct certain concerts, and direct and present certain operas, all composed by him, in the course of a tour through such parts of the United States and Canada as the plaintiffs should designate, covering a period of fifteen weeks, for the sum of \$4,000 per week, with sundry provisions for expenses, and the like, and other stipulations prescribing the rights of the parties in various particulars, which it is unnecessary to state. The contract was in the Italian language, and, according to the translated copy set forth in the pleadings it contains the following provisions: "The present contract in its form and substance is regulated by the Italian laws by will of the parties concerned, and according to article 9 of the Italian Civil Code. Whatever difference or question there might arise between the parties, including the agent, will be acted upon by the civil authorities of Florence, Italy. Maestro Mascagni reserves the right to direct action in New York for the payment of his recompense, and therefore he alone has the faculty to derogate the competence of the established contract." The defendant moved to dismiss this suit, and answered in abatement, and demurred on the ground that, under this provision, our courts have no jurisdiction.

The construction and legal effect of a contract is governed by the *lex loci contractus* unless there is something in it indicating a different intention of the parties. *O'Regan v. Cunard S. S. Co.* 160 Mass. 356, 35 N. E. 1070; *Brookway v. American Exp. Co.* 168 Mass. 257, 47 N. E. 87; *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340, 27 N. E. 665; *Re Missouri S. S. Co.* L. R. 42 Ch. Div. 321; *Hamlyn v. Talisker Distillery* [1894] A. C. 202. This contract was made in Italy, where one of the parties had his permanent home, and the other a domicile elected by the terms of the contract. It was to be performed in part there, for the plaintiffs were to pay the defendant \$7,000, ten days before the time fixed for his departure from Cherbourg for the United States, but the further performance was to be in the United States. The intention of the parties that it should be governed by Italian laws was not left to inference, but was expressed in words.

The first and principal question is, What is the effect of the stipulation in regard to the adjustment of differences or questions between the parties? We have little doubt that it was meant to give exclusive jurisdiction of all such matters to the Italian courts; saving only jurisdiction of suits by the defendant to recover his compensation,

which is given to the courts of New York. This seems to be the meaning of the words of this translation, and another translation set out in the answer in abatement, whose correctness has not been disputed, tends to make this meaning even clearer. It is averred in the answer in abatement that such a provision is legal and binding under the laws of Italy. Of course, if this be true, it is immaterial what construction is put upon it under our laws. There is certainly nothing so objectionable in it, on grounds of public policy, that our courts will refuse to give it effect under our treaty with Italy, which gives the citizens of each country full rights in the courts of the other. *Fonseca v. Cunard S. S. Co.* 153 Mass. 553, 12 L. R. A. 340, 27 N. E. 665. It is said in the report that the hearing was upon the pleadings, "without objection that there was no reply to the answer in abatement." We are not quite certain whether, in the absence of a reply, the averments of this answer were taken to be true. If they are true, it is the duty of our courts to give the contract effect according to the law of Italy, but we infer, in the absence of proof in support of the averments of the answer, that the case was considered upon the declaration and admitted facts only. Assuming this, we must also assume that the law of Italy is like our own (*Harvey v. Merrill*, 150 Mass. 1, 5 L. R. A. 200, 22 N. E. 49); and we come to the question whether such an agreement of parties to a contract is valid here.

It is decided that an agreement in a contract that the parties shall not avail themselves of their right to an appeal to the courts for the settlement of their controversies, but shall submit them to private arbitration, will not be enforced, because it is such an utter abnegation of one's legal rights as should not be permitted. *Rowe v. Williams*, 97 Mass. 163; *Wood v. Humphrey*, 114 Mass. 185; *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115. On the other hand, it is allowable for parties to make such agreements in reference to preliminary and incidental matters of dispute, so long as they retain the right to appeal to the courts for the determination of any substantive question of liability. *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Haley v. Bellamy*, 137 Mass. 357; *Palmer v. Clark*, 106 Mass. 373; *Hutchinson v. Liverpool & L. & G. Ins. Co.* 153 Mass. 143, 10 L. R. A. 558, 26 N. E. 439. Perhaps the tendency in modern times is to permit greater freedom in contracting in matters of this kind than formerly. *Miles v. Schmidt*, 168 Mass. 339, 47 N. E. 115; *Daley v. People's Bldg., Loan, & Sav. Asso.* 178 Mass. 13, 59 N. E. 452. In most cases—certainly in a case like the present—there is no occasion for the protection of the dignity or convenience of the courts. The contract was between citizens of foreign states, who, so far as our tribunals are concerned, well might make any reasonable arrangement for the settlement of their disputes.

The determining question seems to be whether such a contract as this is so im-

provident and unreasonable—such an abnegation of legal rights—that the government, for the protection of mankind, will refuse to recognize it, even when made in a foreign country by subjects or citizens of that country. We can fancy the parties to this contract, at the time of making it, saying something like this: "As the performance of this contract will not only involve travel through one or more foreign countries in going to America and returning, but will involve journeying long distances, through a great many independent states, each of which has its own courts and system of laws, under some of which a person sued in a civil action, when about to leave the state, may be arrested and held to bail or in imprisonment,—if suits may be brought in any one of these numerous jurisdictions there is a liability to great trouble and expense on the part of the defendant in meeting the litigation. The contract contemplates a service of fifteen weeks, after which Maestro Mascagni intends to return to his permanent home, in Florence. It will be better and more reasonable for both of us to provide that our controversies, if any arise, shall be settled by the courts of Florence, than to leave both parties subject to suits in forty or fifty different jurisdictions, at great distances from the home of either." If, moved by such considerations, the parties made the agreement in question, shall the court say that they were *non compotes mentis*, and that their agreement was so improvident and unreasonable that it cannot be permitted to stand? The case is quite unlike *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 174, although it has some features in common with that. In that case the provision was contained in a by-law of a mutual insurance company, and it undertook to limit claimants to one county in a small state for the venue of actions. The principles laid down in *Daley v. People's Bldg., Loan, & Sav. Asso.* 178 Mass. 13, 59 N. E. 452, are applicable, although the cases are different in some particulars. Similar doctrines are stated in *Re New York L. & W. R. Co.* 98 N. Y. 447, and *Greve v. Etna Live Stock Ins. Co.* 81 Hun, 28, 30 N. Y. Supp. 668. There is no attempt here to deprive either party of the right of appeal to the courts, as in *Rowe v. Williams*, 97 Mass. 163, but only an attempt to narrow the area within which suits may be brought. This is analogous to the limitation of the subjects of which the courts shall have exclusive jurisdiction, by a provision for the arbitration of incidental and subsidiary questions out of court, which is approved in cases above cited. It is also analogous to the limitation by contract of the time within which suits may be brought. *Eliot Nat. Bank v. Beal*, 141 Mass. 566, 6 N. E. 742. We are of opinion that this part of the contract is valid.

The defendant has done nothing that deprives him of his right to rely on the contract. The suit which he brought prior to this was upon a later contract, and against parties not identical. Besides, in his declaration in that case, in stating inducements,

he took pains to aver that there was no right to sue upon this contract in this country. The second suit, which he brought after he had been held to answer in this, contains a similar averment, and apparently he brought

it to avail himself of such rights as he might have in case the decision in the present suit should be adverse to him. We are of opinion that the ruling was erroneous.

Motion granted.

CALIFORNIA SUPREME COURT.

William H. GIBBS, *Respt.*,
v.

Mary A. TALLY *et al.*, *Appts.*

(133 Cal. 373.)

An owner of property who has made and filed a valid contract for the placing of a building thereon, under which, by the terms of the statute, the entire contract price may be applied to the claims of laborers and material men, cannot constitutionally be required to furnish a bond which will make him liable to them in an additional amount in case their claims are not satisfied by the contractor.

(July 16, 1901.)

APPEAL by defendants from a judgment of the Superior Court for Los Angeles County in favor of plaintiff in an action brought to recover damages for failure to furnish a bond for the payment of the claims of contractors and material men, as required by statute. *Reversed.*

The facts are stated in the opinion.

Mr. Clarence A. Miller, for appellants:

The statute is nothing but an attempt to render the owner liable for 25 per cent more than the contract price, even though the contract is valid, unless a bond be given.

The legislature has no power to hold the owner beyond his valid contract price.

Latson v. Nelson, 11 Pac. Coast L. J. 589; *Wiggins v. Bridge*, 70 Cal. 439, 11 Pac. 754; *Wilson v. Barnard*, 67 Cal. 423, 7 Pac. 845; *O'Donnell v. Kramer*, 65 Cal. 353, 4 Pac. 204; *Whittier v. Hollister*, 64 Cal. 283, 30 Pac. 846; *Dore v. Sellers*, 27 Cal. 693; *Renton v. Conley*, 49 Cal. 185; *Boven v. Aubrey*, 22 Cal. 571; *McAlpin v. Duncan*, 16 Cal. 127; *Knowles v. Joost*, 13 Cal. 621; *Kellogg v. Howes*, 81 Cal. 179, 6 L. R. A. 588, 22 Pac. 509.

The bond complies with the statute.

The present statute says that the bond required shall, by its terms, "inure to the benefit of any and all persons," etc. It does not say whether, by its terms, it shall so inure directly or indirectly. But if a bond inures by its terms directly, and not incidentally, in favor of third parties, they have an action upon it without the aid of this statute.

Civil Code, § 1559; *Wickersham v. Denman*, 68 Cal. 383, 9 Pac. 723; *Alford v.*

Spring Valley Gold Co. 106 Cal. 553, 40 Pac. 27; *Flint v. Cadenasso*, 64 Cal. 83, 28 Pac. 62; *Morgan v. Overman Silver Min. Co.* 37 Cal. 534.

Our bond by its terms inures incidentally to the benefit of parties entitled to liens.

Chung Kee v. Davidson, 73 Cal. 525, 15 Pac. 100.

Mr. T. M. Stewart, for respondent:

The statute takes no property from the defendants.

Kellogg v. Howes, 81 Cal. 177, 6 L. R. A. 588, 22 Pac. 509.

That the statute restricts unlimited exercise of the right of contract does not render it unconstitutional.

For the pursuit of any lawful trade or business, the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business.

Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; *Smith v. Neubaur*, 144 Ind. 95, 33 L. R. A. 685, 42 N. E. 40; *Cole Mfg. Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045; *Kiesig v. Allsbaugh*, 99 Cal. 454, 34 Pac. 106.

He that first sues and obtains judgment on an official bond is entitled to take the whole penalty if his demand amounts to so much, in exclusion of every other claim.

See note to *Dallas v. Chaloner*, 3 Dall. 501, 1 L. ed. 696; *McKean v. Shannon*, 1 Binn. 370; *Hazelhurst v. Dallas*, 4 Dall. 106, 1 L. ed. 761; 1 Rolle, Abr. 925; *Anonymous*, Cro. Eliz. pt. 1, p. 41, 1 Wentworth. Pl. 143, 2 Wentworth. Pl. 73; Wait, Act. & Def. 691; *Sunderland*, Damages, § 486; Pom. Eq. Jur. 106.

The bond filed is no defense.

On petition for rehearing.

The test of reasonableness may in some cases be decisive of the constitutionality of police ordinances, but never of legislative declarations of industrial policy.

Bertholf v. O'Reilly, 74 N. Y. 516, 30 Am. Rep. 323; *Parker v. Bell*, 7 Gray. 429; *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354; *Bal-lou v. Black*, 21 Neb. 147, 31 N. W. 673; *Ainslee v. Kohn*, 16 Or. 371, 19 Pac. 97; *Lonkey v. Cook*, 15 Nev. 58; *Herriott v. Pearson*, 58 Ind. 386; *Jensen v. Brown*, 2 Colo. 697; *Henry & C. Co. v. Evans*, 97 Mo. 47, 3 L. R. A. 332, 10 S. W. 868; *Merrigan v. English*, 9 Mont. 113, 5 L. R. A. 837, 22 Pac. 454.

Temple, J., delivered the opinion of the court:

This is an action for damages against Mrs. Tally, by the assignee of certain persons who

NOTE.—As to constitutionality of statutes creating an absolute liability of the owner of property for the claims in whole or in part of subcontractors or subordinate claimants after he has paid the contractor, see also cases in note to *Frenn v. Bauer* (N. Y.) 20 L. R. A. 565, 60 L. R. .

had performed labor or furnished materials in the construction of a building, for failing to cause a bond to be filed with the building contract, as required by Code Civ. Proc. § 1203. A bond was in fact filed, and apparently in good faith designed to comply with the statute, but it was found defective, because it was not, "by its terms, made to insure to the benefit of any and all persons who perform labor or furnish materials to the contractor, or any person acting for him or by his authority, . . . in an amount equal to at least 25 per cent of the contract price." The statute directs that every contract required to be filed by the provisions of the chapter relating to liens of mechanics and others shall be accompanied by a good and sufficient bond, and that any laborer or material man shall have an action to recover upon the bond for the value of labor and materials, not exceeding the amount of the bond; and such action shall not affect his lien. A failure to comply with the provisions of the section rendered "the owner and contractor jointly and severally liable in damages to any and all material men, laborers, and subcontractors entitled to liens upon property affected by said contract." The statute does not say who shall cause this bond to be executed, nor to whom it shall in form be made payable. It does not undertake that the contractor shall faithfully perform his contract. In short, there is in it nothing which can be of advantage to the owner in any possible event. On the other hand, no possible loss will accrue to the contractor by a failure to provide the bond. The declaration that he shall be severally and jointly liable with the owner is useless verbiage. The contractor is already liable for all labor or materials furnished to him or by his authority. The only person, therefore, upon whom a penalty is put for the failure is the owner. He, therefore, and he only, is required to furnish the bond; and, in effect, the bond is conditioned only that the contractor will pay "such" persons the value of labor and materials so furnished to him; and the action by a lienor does not affect his lien, or an action commenced for the foreclosure of it. The section assumes a valid contract, under which, if the contract is performed, the lienors can have the entire contract price distributed to them. But after that has been done, or even before it, a suit can be brought upon the bond, or, if it has not been filed, against the owner, to recover an additional 25 per cent upon the contract price; and that is this precise case. The material men and laborers could have demanded security from the contractor before furnishing materials or labor. The statute attempts to compel the owner to furnish security for them in a matter to which he is not a party, and in which he is not concerned. The cost may exceed the contract price; because material men combine to charge exorbitant prices, or through bad management of the contractor, or because prices have increased since the contract was let, or from other causes. If this can be required from the owner it lessens materially

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the value of his contract. In fact, so far as price is concerned, it deprives him of it. He has no assurance that his house will be built for the stipulated price. There is no more reason for requiring the owner to give this security than there would be in requiring it from any other person in the community. That the owner may be required to pay more than the contract price is not the only injustice which may result from this most unreasonable statute. The owner, or the sureties he is required to furnish, would be responsible in case the contractor failed to perform his contract. Suppose the structure failed to comply with the contract,—was in fact so defective as to be useless,—and the owner should refuse to pay for it? The very fact that he was injured by the failure of the contractor would create the liability on his part or upon his sureties. Whether the owner is not the principal on the bond, or the party for whom the sureties undertake, I will not discuss. The undertaking, in effect, certainly is that the contractor will pay certain debts if he incurs them; but he is not specially required to furnish the bond, and, as I have stated, incurs no penalty for not doing so, while the owner does.

It is perfectly manifest that this section, if valid, places an unreasonable restraint upon the owner of property in regard to the use thereof. It compels him to become responsible for liabilities he has not incurred, and which were not created for his benefit. It practically forbids him from improving his property by letting a contract unless he becomes liable, or furnishes sureties who will be so liable, for 25 per cent above the contract price, and for the same amount in case the contractor so far fails in keeping his contract that the labor and materials are without value to him, and the contractor has no valid claim against him on account thereof. To impose this burden upon an owner is to some extent to deprive him of his property, for the value of property consists in the right to use it. Blackstone, in stating the fundamental rights of Englishmen, says: "The third absolute right inherent in every Englishman is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution save only by the laws of the land." 1 Bl. Com. 138. And Justice Miller said in *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557: "There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking within the meaning of the Constitution." It was said by Judge Comstock in *Wynehamer v. People*, 13 N. Y. 378: "When a law annihilates the value of property, and strips it of its attributes by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power." It is also an unreasonable and unnecessary restriction upon the power to make contracts. See, upon this point, *Butchers' Union, S. L.*

Ex L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Ex parte Jentzsch*, 112 Cal. 469, 32 L. R. A. 664, 44 Pac. 803; *Cooley*, Const. Lim. 48; *Re Tie Loy*, 11 Sawy. 472, 26 Fed. Rep. 611. It clearly contravenes the provisions of § 1, art. 1, of the Constitution of the state, and the 14th Amendment to the Constitution of the United States. It is not, and clearly it could not be, contended that this law is a regulation which comes within what is called the "police power." It is not calculated, nor was it intended, to conserve the safety, health, or general welfare of the community. The section does not provide for a lien, but it is contended that there is not greater interference with property rights than is found in some of the provisions in regard to liens of laborers and material men, which have been upheld, and particularly in the provision making the contract void in case it is not filed, allowing liens of laborers, material men, and subcontractors to the full value of services rendered and materials furnished, although that may exceed the contract price. The Constitution directs the legislature to provide for liens of those persons upon the property to the improvement of which they have contributed. It has been held that this extends only to the contract price, which cannot be exceeded. If the contract is not filed as directed, it is void; and, there being no contract, it would follow, even though the statute had not said so, that the owner is building himself. In that case the so-called contractor is (as to other lienors) but the agent of the owner. This would be the natural result, and is not a forced conclusion made by the statute. *Kellogg v. Howes*, 81 Cal. 170, 6 L. R. A. 588, 22 Pac. 509, opinion of Justice Fox. Where there is a valid contract under which the work was done, and which is performed by the owner, all that the statute attempts to do, and in fact all that can be done, is to enable the laborers, material men, and subcontractors to cause the contract price to be applied to the payment of their demands. All that has been held upon this point is that it is not an

unreasonable interference with the rights of the owner that whatever contract he makes shall be so executed and published that the constitutional policy may be carried out. No constitutional policy is back of the provision questioned here.

Our attention is called to the cases of *Mangrum v. Truesdale*, 128 Cal. 145, 60 Pac. 775, and *Carpenter v. Furrey*, 128 Cal. 665, 61 Pac. 369. In the first no question as to the validity of the statute was raised, and the only question discussed was whether a bond executed after the contract had been filed, and delivered to a loan association from whom a loan had been negotiated, and not filed with the contract, was a compliance with the law. The liability of the owner in case the bond was not furnished seems to have been admitted. In *Carpenter v. Furrey*, *supra*, the bond had been given, and the suit was against the sureties. They attacked the validity of the law (Laws 1893, p. 202) upon the grounds, only: (1) That the subject was not expressed in the title of the act; and (2) that it was a special law. These points are not raised in this case. In this case, I repeat, there was a valid contract, which was performed on both sides. Mrs. Tally has paid out to the lienors,—or, at least, strictly under the provisions of the law,—the entire contract price. There has been no technical or other obstruction which has prevented the lienors, or any of them, from getting out of this contract price all to which they were entitled. Having got from Mrs. Tally the entire contract price, they are endeavoring in this suit to compel her to pay 25 per cent more because of a mistake made by her or her attorneys in writing the bond. It cannot be done, and the legislature has not the power to require it of her.

The judgment is reversed.

We concur: **Beatty, Ch. J.; McFarland, J.; Henshaw, J.; Vandyke, J.; Garoutte, J.**

Petition for second rehearing denied August 13, 1901.

GEORGIA SUPREME COURT.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Pl. in Err.*

A. O. MURPHEY *et al.*

(.....Ga.....)

*1. Civ. Code, §§ 2317, 2318, provides: "When any freight that has been shipped, to be conveyed by two or more common carriers to its destination, where, under the contract of shipment or by

law, the responsibility of each or either shall cease upon delivery to the next 'in good order,' has been lost, damaged, or destroyed, it shall be the duty of the initial or any connecting carrier, upon application by the shipper, consignee, or their assigns, within thirty days after application, to trace said freight and inform said applicant, in writing, when, where, how, and by which carrier said freight was lost, damaged, or destroyed, and the names of the parties and their official position, if any, by whom the truth of the facts set out in said information can be established. If the carrier to which application is made shall fail to trace said freight and give said in-

*Headnotes by CORB, J.

NOTE.—This seems to be the first case in which any question similar to that considered therein has been raised, if, indeed, the statute in question is not the first of its kind. Or-
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ordinary cases of the duty of connecting carriers seem to have no special pertinency to the questions here considered, so that the case is really one of first impression.

formation in writing, within the time prescribed, then said carrier shall be liable for the value of the freight lost, damaged, or destroyed, in the same manner and to the same extent as if said loss, damage, or destruction occurred on its line." *Held*, that the provisions of these sections are not unreasonable and arbitrary, either as to the substantial requirements thereof, or as to the time within which the requirements must be met. Nor are they such a regulation of interstate commerce as to be beyond the power of the state. Nor do the sections infringe "the correlative liberty of silence." Nor do they amount to "compulsory private discovery" by "statutory terror." Nor are they unconstitutional and void for any other reason set forth in the present case.

2. An action under the provisions of the statute above quoted, brought in the name of the shipper, is well brought, though it appears that the shipper is not the owner of the goods.
3. Even if the fact that it was impossible to obtain the information required by the statute within the time specified therein would relieve the carrier from liability, the evidence offered to show that it was impossible to so obtain the information did not have this effect, and was therefore properly rejected.
4. There was no error requiring the granting of a new trial.

(January 9, 1903.)

ERROR to the Superior Court for Pike County to review a judgment in favor of plaintiff's in an action brought, upon defendant's refusal to ascertain through whose negligence the injury occurred, to recover the value of certain property delivered to defendant for transportation, which reached its destination in a damaged condition. *Affirmed*.

The facts are stated in the opinion.

Messrs. Hall & Cleveland and R. L. Berner for plaintiff in error.

Mr. W. W. Lambdin for defendants in error.

Cobb, J., delivered the opinion of the court:

A. O. Murphey & Hunt, a partnership, brought suit against the Central of Georgia Railway Company, alleging that they had shipped over the lines of the defendant company a car load of grapes from Barnesville, Georgia, consigned to Rocco Bros., Omaha, Nebraska; that the shipment was under a contract which provided that the responsibility of each carrier should cease upon delivery "in good order" to the next carrier; that when the grapes reached Omaha they were in a damaged condition, the amount of the damages that the plaintiff sustained by the failure to deliver the grapes in good order at their destination being set forth in the petition; that on August 20, 1897, the plaintiffs made to the defendant an application in writing, in which they requested the company to trace the freight, and inform plaintiffs in writing when, where, how, and by which carrier the freight was damaged, and the names of the parties, and their official positions, if

any, by whom the truth of the facts could be established; that the defendant failed to trace the freight and give the information within thirty days, as required by law; and that by reason of this conduct the defendant became indebted to the plaintiffs in the amount set out in the petition. The defendant demurred to the petition, upon the following grounds: (1) Because the petition sets forth no cause of action, and under the allegations thereof the plaintiffs are not entitled to recover. (2) The contract referred to in the petition not being one for a through carriage, the petition is defective in that it does not allege that the loss or damage occurred on the defendant's road, nor is it alleged that the freight was not delivered to the next carrier in good order.

(3) Because the act of the general assembly embraced in Civ. Code, §§ 2317-2318, under which the plaintiff's action is brought, is unconstitutional and void, in that it requires the defendant to furnish evidence to the plaintiffs for the purpose of a person's private claim or lawsuit touching the liability of another corporation, with which liability the defendant is in no wise connected either by contract or by law. (4) Because the law under which plaintiff's action is brought imposes upon the defendant the duty of hunting evidence with which plaintiffs can make out a claim against another carrier, and, in the event such evidence is not reported within a given time, the defendant is made responsible for the act of another carrier, with which it had no connection in carrying the goods, either by contract or otherwise. "Such legislative act is not a proper classification of legislation, but is arbitrary, and is a violation of the Constitution of this state." (5) Because the act under which the suit is brought impairs the obligation of the contract between plaintiffs and defendant for carrying the goods; the defendant being, under the contract, exempted from liability for damages to goods beyond its own lines. (6) Because the law in question requires the defendant to procure and report to plaintiffs certain information within a given time, and on failure to so report, then, without regard to whether such information could be obtained within the time prescribed, and without opportunity to the defendant to be heard, the act imposes upon the defendant the penalty of paying damages which were caused by another railway company with which the defendant had no connection by contract or otherwise; such law denying to the defendant "due process of law." (7) Because the law in question is in violation of the interstate commerce clause of the Constitution of the United States. (8) Because such law deprives the defendant of its property without due process of law. (9) Because the act is contrary to law, the Constitution, and public policy, in that it seeks to obtain information by statutory compulsion, attaching a penalty to the failure to produce information which the various railroads are entitled to withhold, if they desire to do so, under the correlative liberty of silence guar-

anted by the Constitution. The demurrer was overruled, and the case proceeded to trial, and resulted in a verdict in favor of the plaintiffs. A motion for a new trial filed by the defendant was also overruled. The defendant assigns error upon the judgment overruling the demurrer and the judgment refusing to grant a new trial.

1. This suit was brought under the provisions of Civ. Code, §§ 2317, 2318, which are quoted in the first headnote. The petition set forth a cause of action if the law in question is valid. In passing upon the assignment of error complaining that the court erred in overruling the demurrer, it becomes necessary to determine only one question, and that is whether this law is unconstitutional for any reason assigned in the demurrer. If it is a valid law, the other grounds of the demurrer not relating to the constitutionality of the law were not well taken. We do not think the statute is subject to any of the exceptions taken in the demurrer. It is too well settled now to admit of question that, when private property is "affected with a public interest," the owner of such property "grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good, as long as he maintains the use." *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. It is also equally well settled that the incorporation of a railroad company by a state, and the granting to it special privileges to carry out the object of incorporation, particularly the authority to exercise the state's right of eminent domain, and the obligation assumed by the acceptance of the charter to transport all persons and merchandise upon like conditions and for reasonable rates, affect the property and employment with a public use, and thus subject the business of the company to legislative control in the interest of the public. *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47. It becomes necessary to determine in the present case whether the statute in question is of such a character as to come within the principles just referred to. A railroad company is not compelled to make a contract to forward goods beyond its own line. *Coles v. Central R. & Bkg. Co.* 86 Ga. 251, 12 S. E. 749. See also *State v. Wrightsville & T. R. Co.* 104 Ga. 437, 30 S. E. 891. But when it receives goods consigned to a point beyond the terminus of its own line, it undertakes to transport them to their destination, and, if the goods are lost, it will be liable therefor in the absence of a contract otherwise limiting its liability. *Falvey v. Georgia R. Co.* 76 Ga. 597; *Central R. & Bkg. Co. v. Georgia Fruit & Vegetable Exchange*, 91 Ga. 389, 17 S. E. 904. It may, however, make a contract for the transportation of goods beyond the terminus of its own line, and stipulate in such contract that its liability shall cease when the goods are delivered to the next carrier; thus making itself liable only for damages or loss occurring while the goods are in its possession. *Central R. & Bkg. Co. v.* 60 L. R. A.

Avant, 80 Ga. 195, 5 S. E. 78; *Metropolitan R. Co. v. Shomo*, 90 Ga. 500, 16 S. E. 49. In many instances it is to the interest, not only of the shipper, but also of the carrier, that the contract entered into should provide for a through shipment of goods to their destination over the connecting lines of the initial carrier. In order to secure business where the goods are to be transported to a distant point, it is necessary that the carrier should have traffic arrangements with its connecting lines, by which the shipper may become entitled to a through bill of lading, securing transportation over all the lines between the initial point and the point of destination. Especially is this true in regard to goods of a perishable nature. A carrier which holds itself out to carry such goods would secure little custom from shippers of that class of goods unless it were in a position to give reasonable assurances that the goods would not be subjected, at the terminus of the initial carrier's line, to the delays incident to shipments upon a bill of lading the undertaking of which is accomplished when the goods reach the terminus of the first carrier. The carrier may, under the law, refuse to issue bills of lading to points beyond its own line, but a carrier that would adopt such a rule would do little business in the transportation of goods to distant points, especially at places where there were other competing carriers who would issue through bills of lading to points beyond their own lines. It thus being often to the interest of the carrier to issue a through bill of lading in order that it may secure business, and the law allowing the carrier in such cases to limit its liability to loss or damage while on its own line, is it an unreasonable requirement, when, under such circumstances, a loss occurs beyond its own line, that the initial carrier shall, upon demand, furnish to the shipper, within a reasonable time, information as to the place at which the loss or damage occurred? If a through contract were for the sole interest of the shipper, such a requirement might be said to be unreasonable; but when such a contract is at least for the joint interest of both in all cases, and in many instances the making of such a contract would be the only means of securing the business for the carrier, it does not seem to be beyond the bounds of reason to require the carrier to furnish to the shipper information as to the point at which his goods were lost or damaged. It is much easier for the initial carrier to obtain this information than it would be for the shipper. Carriers, through business arrangements with the connecting carriers, are so intimately associated with each other, and each one is so thoroughly conversant with the systems of the others, that it is much easier for a carrier to obtain this information than a shipper. In fact, it is a practical impossibility in many instances for the shipper to obtain the information himself, and a refusal or failure on the part of the initial carrier, or one of the connecting carriers, to undertake to locate the point at which the loss or dam-

age occurred, amounts practically to a denial of redress to the shipper of goods that have been lost or damaged. The well-known fact that, as a general rule, the shippers, under such contracts, were absolutely helpless where the goods were lost or damaged, was the motive which prompted the passage of the statute now under consideration. The statute is nothing more nor less than a legislative declaration that, where a railroad company, in its own interest, to secure business, makes a contract to transport goods beyonds its own terminus, and limits its liability to loss or damage upon its own line, in the interest of those who deal with the company, who come in contact with it is as a public carrier, in the interest of shippers,—that is, in the interest of the public,—the railroad company making such a contract shall, when the goods are lost or damaged in transit, be required to furnish to the shipper such information as that he may make a legal demand upon those who are responsible for the loss or damage. The right to control by legislative enactment, in the interest of the public, a corporation of this character is unquestioned, and in the legislative control of the character indicated in the law now under consideration we see nothing unreasonable or arbitrary. See, in this connection, *Richmond & A. R. Co. v. R. A. Patterson Tobacco Co.* 92 Va. 670, 41 L. R. A. 511, 24 S. E. 261.

It is said, though, that, even if the statute in question is a reasonable regulation in regard to requiring the carrier to furnish the information therein mentioned, that provision is unreasonable which fixes the time within which the information is to be furnished before the effect of the statute is to impose a penalty upon the initial carrier for the failure to give the information. Of course, if an act of the general assembly imposes a penalty upon an individual or corporation for a failure to perform a given act within a given time, and it is manifest that the character of the act is such that the courts could take judicial notice that it could not be performed within the time required, then it would be the duty of the courts to declare such legislation invalid, as an effort on the part of the lawmaking body to deprive a person of his property without due process of law. On the other hand, if the general assembly has a right to declare that a person shall do a given thing, and it provides that this act shall be performed within a given time, and the court cannot judicially know that it is impossible to do the thing required within the time fixed for its performance, then it is not within the power of the court to declare that the legislation is invalid upon its face. If, under the operation of such a statute in a given case, it should conclusively appear that it was impossible for a person against whom proceedings were had under the statute to perform, within the time required by the statute, the act thereby imposed, the question as to whether there would be any liability under the statute

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would arise as a matter for decision. In these days, when it is a matter of such common knowledge that the courts judicially know that railroad companies engaged in the transportation of persons and freight among the several states conduct their business with such facility by means of the telegraph and other agencies that, when it becomes necessary in their own interest to secure information in regard to the commonest details of the simplest transaction they can do so in a very short space of time, a court would stultify itself that would hold as a matter of law that thirty days was not a reasonable time for a carrier whose principal office was in Georgia to secure information as to where a car load of grapes was lost or damaged which was transported from a point in this state to Omaha, Nebraska. If information on any point involving the same amount of investigation were needed for its own business, it could be ascertained in a much less time than thirty days, and it is not unreasonable to require that it should use the same degree of diligence where one of its shippers is interested. The case of *Wallace v. Georgia, O. & N. R. Co.* 94 Ga. 732, 22 S. E. 579, which lays down the doctrine of "correlative liberty of silence," and that "compulsory private discovery" cannot be enforced by "statutory terror," has no application whatever to the present case. This is also true of the case of *Ohio & M. R. Co. v. Lackey*, 78 Ill. 55, 20 Am. Rep. 259, where it was held that an act requiring railroad companies to pay the costs of inquest and the costs of burial of all persons who died on their cars was invalid, so far as it attempted to make such companies liable where they had violated no law and had been guilty of no negligence. The same is to be said of the case of *Bielenberg v. Montana Union R. Co.* 8 Mont. 271, 2 L. R. A. 813, 20 Pac. 314, where it was held that a statute of Montana which provided that a railroad company which damaged or killed a horse should be liable was invalid in so far as it imposed liability upon corporations that were not negligent in the act complained of. It certainly cannot be said that the statute under consideration is an impairment of the obligation of the contract made by the plaintiffs with the defendant, inasmuch as the statute was enacted long before the contract was entered into. Nor is the law under review such a regulation of commerce among the several states as to be violative of that clause of the Constitution of the United States which grants to Congress the exclusive right to regulate commerce among the several states. While a regulation of the character set forth in the statute under consideration might, in some remote degree, bear upon the matter of interstate commerce, it is in no sense such a regulation of that commerce as that the state would be inhibited from making it. In a broad sense, any regulation which touches at all persons or instrumentalities engaged in interstate commerce would be a regula-

tion of that commerce. Still many such statutes have been held not to encroach upon the right of Congress to control the matter of commerce among the several states. See in this connection, *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Richmond & A. R. Co. v. E. A. Patterson Tobacco Co.* 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335; *St. Joseph & G. I. R. Co. v. Palmer*, 38 Neb. 463, 22 L. R. A. 335, 4 Inters. Com. Rep. 494, 56 N. W. 957; *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 485, 29 N. W. 597; *Gulf, C. & S. F. R. Co. v. Crossman Bros.* 11 Tex. Civ. App. 622, 33 S. W. 290; *Williams v. Fears*, 110 Ga. 584, 50 L. R. A. 685, 35 S. E. 699, Affirmed in 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128.

2. Having reached the conclusion that the demurrer was properly overruled, it becomes necessary to determine whether the court erred in refusing to grant a new trial. Complaint is made that the court erred in excluding the evidence of the plaintiff Murphey to the effect that the fruit shipped belonged to his wife. There was no error in excluding this evidence. The plaintiffs were the shippers. They were the persons with whom the contract of affreightment was made. They were the consignors; and it is well settled that the shipper or consignor can bring an action against the carrier for a breach of the contract of affreightment, without reference to whether the shipper has any property, either general or special, in the goods shipped. See *Carter v. Southern R. Co.* 111 Ga. 38, 50 L. R. A. 354, 36 S. E. 308. In *Lockhart v. Western & A. R. Co.* 73 Ga. 472, 54 Am. Rep. 883, the plaintiff was not only not the shipper, but had no interest whatever in the goods. The act under which this suit is brought gives the right of action in terms to the shipper, and provides that the carrier shall be liable for the value of the goods lost or damaged in the same manner and to the same extent as if the loss or damage occurred on its own line. As the shipper had the right, in the event of loss or damage on its own line, to bring an action against the carrier under the contract, under the statute the shipper had a right to bring an action against the initial carrier upon its failure to comply with the terms of the statute. Of course, when the shipper recovers, he will hold the recovery in trust for the true owner, and there can be no additional recovery by the owner under this statute.

3. It is contended, further, that the court erred in rejecting certain evidence, consisting of correspondence between the claim agent of the defendant and officers and agents of the lines over which the grapes were transported from Barnesville, Georgia, to Omaha, Nebraska, the correspondence consisting of letters and telegrams; and also the evidence of the claim agent that he had charge of the tracing of the freight in con-

troversy; that he instituted the search asked for by the plaintiffs; that he offered them the information which he had obtained just one day after the expiration of the thirty days required by the law, and that it was utterly impossible to have sooner obtained the information. While the evidence offered showed a mass of correspondence by wire and by mail, we cannot say that the evidence would have authorized a finding that it was impossible for the defendant to have obtained the information within thirty days. The company seems to have obtained the information, or at least a portion of it, within thirty-one days, and it would, indeed, be a strain to say that it was a matter of impossibility to have obtained it earlier than this. In these days, when so much can be accomplished in so short a time, and when those in charge of the affairs of the great railways of the country are in thorough communication with each other by the use of their own lines of telegraph as well as the lines of regular telegraph companies, it does seem to us to be an extraordinary claim to be made in behalf of such companies that it is an impossibility, with all of the means at their command, to locate the place at which a car load of freight was lost or damaged in transit from Georgia to Nebraska, when such car can be transported between the two points within four or five days. If such impossibility exists, it is evidence only that those in charge of the affairs of the company have either not sufficient employees to transact the business required of the companies, or the system by which they operate is defective at some point. We have reached the conclusion that the statute is a reasonable regulation, and the companies who are amenable to it must adopt some system by which the statute can be complied with; especially so when there can be no question that it is within the power of the company to adopt a system by which the information can be obtained within the time fixed by law. It may be said that the ruling we now make imposes a very great burden upon railroad companies. Railroad companies are not required to issue through bills of lading beyond their own lines, and if they do not desire to bear the burden incident to through bills of lading of this kind, the remedy is in their own hands. If a case should arise where it appeared that it was really impossible for the initial carrier to secure the information within the time fixed by the statute, another and quite a different question from the one now before us would be presented. The evidence offered in the present case did not make out a case of impossibility under any view of it. It simply demonstrated that the system of the defendant was inadequate; and railroad companies, like everyone else, must adapt their systems of business to the law of the land.

4. The foregoing discussion disposes of all of the grounds of the motion for a new trial that require special notice. The requests to charge were properly refused, and

the portions of the charge complained of were not erroneous for any of the reasons set forth in the motion. Counsel stated in the argument that they did not raise any question as to the amount of the verdict, nor is there anything in their briefs in reference to this subject. We find no error which

would have required the judge to grant a new trial.

Judgment affirmed.

All the Justices concur, except **Simmons**, Ch. J., disqualified, and **Lumphkin**, P. J., absent on account of sickness.

Reversed by Supreme Court of United States, January 9, 1905.

INDIANA SUPREME COURT.

MUNCIE NATURAL GAS COMPANY,
Appt.,

v.

City of MUNCIE.

(.....Ind.....)

1. A municipal corporation has power to stipulate as to the maximum rates to be charged by a gas company when allowing it to lay pipes in the streets, under a statute giving it exclusive power over its streets, highways, and alleys.
2. A gas company, while enjoying a contract permitting it to lay pipes in the streets of a city, cannot attack the power of the city to stipulate in the contract as to the maximum rates to be charged for gas.
3. A municipal corporation may, for the protection of the citizens, maintain an action to enjoin a gas company from violating its contract as to the maximum rate to be charged for gas in consideration of receiving permission to place mains in the streets, although the municipality itself is not a consumer, and its rights in its municipal capacity are therefore not affected.
4. The avoidance of a multiplicity of suits will give equity jurisdiction of a suit by a municipal corporation to enjoin a company which has laid gas mains in its streets from violating its contract as to maximum rates, where it is entitled to nominal damages at law, and each inhabitant has a right of action to vindicate his rights.
5. Injunction will lie to prevent a gas company which has laid its mains in a city street from violating its contract as to maximum rates which it will charge.
6. A municipal corporation which has made a contract with a gas company laying pipes in its streets as to the maximum rates to be charged may maintain an action to enforce the contract as a trustee of an express trust, under a statute allowing action by such trustees, and providing that the term "trustee" shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another.
7. Public contracts should be construed liberally in favor of the public.

8. A motion to modify the decree cannot be considered on appeal, where it was not made a part of the record.

(February 18, 1903.)

A PPEAL by defendant from a judgment of the Circuit Court for Randolph County in favor of plaintiff in a suit to enjoin the violation of a contract. *Affirmed.*

The facts are stated in the opinion.

Messrs. Bingham & Long, for appellant:

Every action must be prosecuted in the name of the real party in interest, except as provided by statute.

Burns's Rev. Stat. 1901, §§ 251, 252, 270; 1 Works, Pl. & Pr. §§ 36, 37 98; Woolens, Trial Procedure, §§ 286-288, 442, p. 106; 15 Enc. Pl. & Pr. p. 663; *Day v. Patterson*, 18 Ind. 117; *Devol v. McIntosh*, 23 Ind. 529; *Cross v. Truesdale*, 28 Ind. 45; *Davis v. Calhoun*, 30 Ind. 112, 95 Am. Dec. 671; *Mathews v. Ritenour*, 31 Ind. 31; *Miller v. Billingsly*, 41 Ind. 489; *Reddick v. Keesling*, 129 Ind. 128, 28 N. E. 316; *Frenzel v. Miller*, 37 Ind. 1, 10 Am. Rep. 62; *Stevens v. Flanagan*, 131 Ind. 122, 30 N. E. 898; *Copeland v. Summers*, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971; *Reynolds v. Louisville, N. A. & C. R. Co.* 143 Ind. 579, 40 N. E. 410; *Bouserv v. Mattler*, 137 Ind. 649, 35 N. E. 701, 36 N. E. 714; *Rawlings v. Fuller*, 31 Ind. 255; *Defenderfer v. Scott*, 5 Ind. App. 243, 32 N. E. 87; *Kahn v. Garit*, 23 Ind. App. 274, 55 N. E. 268; *Westfield Gas & Mill Co. v. Mendenhall*, 142 Ind. 542, 41 N. E. 1033; *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 21 L. R. A. 734, 34 N. E. 702; *Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300; *Tate v. Ohio & M. R. Co.* 10 Ind. 174, 71 Am. Dec. 309; *Smock v. Brush*, 62 Ind. 156; *Mandlove v. Lewis*, 9 Ind. 194; *Moore v. Jackson*, 35 Ind. 360.

If the interest of parties in court and those absent are so interwoven with each other that no decree can be made affecting the one without equally operating upon the other, then the absent persons are indispen-

NOTE.—As to the power of a municipal corporation to regulate the rates to be charged for gas, see also, in this series, *Rushville v. Rushville Natural Gas Co. (Ind.)* 15 L. R. A. 821; *Lewisville Natural Gas Co. v. State (Ind.)* 21 L. R. A. 734; and *Re Pryor (Kan.)* 29 L. R. A. 398.

As to municipal regulation of street-railway fares, see *Sternberg v. State (Neb.)* 19 L. R. A. 570, and cases in note thereto; *People ex* 60 L. R. A.

rel. Jackson v. Suburban R. Co. (Ill.) 49 L. R. A. 650; and *Chicago Union Traction Co. v. Chicago (Ill.)* 59 L. R. A. 631.

As to municipal power to impose conditions when giving consent to railway in street, see *Galveston & W. R. Co. v. Galveston (Tex.)* 86 L. R. A. 33, and note; *Rice v. Detroit, Y. & A. A. R. Co. (Mich.)* 48 L. R. A. 84, and *People ex rel. Jackson v. Suburban R. Co. (Ill.)* 49 L. R. A. 650.

sable parties, without whom the court cannot proceed, and, as a consequence, will refuse to entertain the suit.

Cole Silver Min. Co. v. Virginia & G. H. Water Co. 1 Sawy. 685, Fed. Cas. No. 2,990.

Incorporated cities have power to grant to any person or corporation the right to lay pipes in the streets and alleys for the purpose of supplying the inhabitants thereof with gas.

Burns's Rev. Stat. 1901, § 3547, Acts 1881, p. 103.

These powers such cities can exercise, but they can exercise only the powers expressly granted by statute, and those necessarily and fairly implied in the powers expressly granted, and essential and indispensable to the declared objects and purposes of the corporation.

Noblesville v. Noblesville Gas & Improv. Co. 157 Ind. 162, 60 N. E. 1032; *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 21 L. R. A. 734, 34 N. E. 702; *Ohampner v. Greencastle*, 138 Ind. 339, 24 L. R. A. 768, 35 N. E. 14; *Rowland v. Greencastle (Ind.)*, 58 N. E. 1031; *LaFayette v. Cox*, 5 Ind. 38, *Kyle v. Malin*, 8 Ind. 34; *Reese, Ultra Vires*, §§ 12, 19, 55, 69; *Dill. Mun. Corp.* 3d. ed. §§ 55, 89; 15 Am. & Eng. Enc. Law, § 19, p. 1039; 2 Kent, Com. p. 275; *Smith v. Newbern*, 70 N. C. 14, 16 Am. Rep. 766; *Spaulding v. Lowell*, 23 Pick. 71; *Cook County v. McCrea*, 93 Ill. 236; *Thornton, Municipal Law*, subs. 3, § 3106, p. 112.

A corporation assumes to do that which the statute has not conferred the power to do. Its assumption of power is void; the act is a nullity; the contract is *ultra vires*. The statute is the measure of the corporation's power.

Thomas v. West Jersey R. Co. 101 U. S. 71, 25 L. ed. 950; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Chicago, R. I. & P. R. Co. v. Union P. R. Co.* 47 Fed. 15; *Head v. Providence Ins. Co.* 2 Cranch, 127, 2 L. ed. 229; *People ex rel. Atty. Gen. v. Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Perrine v. Chesapeake & D. Canal Co.* 9 How. 172, 13 L. ed. 92; *Pearce v. Madison & I. R. Co.* 21 How. 441, 16 L. ed. 184; *Hood v. New York & N. H. R. Co.* 22 Conn. 502; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221; *Colman v. Eastern Counties R. Co.* 10 Beav. 1; *East Anglian R. Co. v. Eastern Counties R. Co.* 11 C. B. 775; *Asbury R. Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Atty. Gen. v. Great Eastern R. Co.* L. R. 5 App. Cas. 473; *Small v. Smith*, L. R. 10 App. Cas. 119; *Baroness Wenlock v. River Dee Co.* L. R. 10 App. Cas. 354; *Trevor v. Whitworth*, L. R. 12 App. Cas. 409; *National Home Bldg. & L. Asso. v. Home Sav. Bank*, 181 Ill. 35, 54 N. E. 619; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 286, 8 L. R. A. 497, 22 N. E. 798.

There is a clear difference between acts of officers of a corporation, municipal or pri-

vate, committed without authority from the corporation, and acts of the corporation itself. The term *ultra vires* is used indiscriminately, and applies to both classes of acts. In its legitimate sense it applies only to such acts as are beyond the powers of the corporation itself.

Reese, Ultra Vires, § 17; *Camden & A. R. Co. v. May's Landing & E. H. City R. Co.* 48 N. J. L. 530, 7 Atl. 523.

All powers not given a corporation, municipal or private, in a direct and unmistakable manner, are withheld.

Noblesville v. Noblesville Gas & Improv. Co. 157 Ind. 162, 60 N. E. 1032; *Rowland v. Greencastle (Ind.)* 58 N. E. 1031; *Lewisville Natural Gas Co. v. State*, 135 Ind. 51, 21 L. R. A. 734, 34 N. E. 702; *Anderson v. O'Connor*, 98 Ind. 168; *Reese, Ultra Vires*, § 10; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 26, 32 L. ed. 842, 9 Sup. Ct. Rep. 409; *Com. v. Erie & N. E. R. Co.* 27 Pa. 351, 67 Am. Dec. 471; *Morris & E. R. Co. v. Sussex R. Co.* 20 N. J. Eq. 542; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *People ex rel. Peabody v. Chicago Gas Trust Co.* 130 Ill. 286, 8 L. R. A. 497, 22 N. E. 798; *National Home Bldg. & L. Asso. v. Home Sav. Bank*, 181 Ill. 35, 54 N. E. 619.

The right of a city is limited to the control of the supply and distribution of natural gas, and to require gas companies "to pay a reasonable license for such franchise and privilege" as it sees fit to grant them. No right exists to fix maximum prices which citizens shall pay for their fuel and lights.

Burns's Rev. Stat. 1901, §§ 3547, 3623, 4306, 4583, 5056; *Noblesville v. Noblesville Gas & Improv. Co.* 157 Ind. 162, 60 N. E. 1032; *Lewisville Natural Gas Co. v. State*, 135 Ind. 49, 21 L. R. A. 734, 34 N. E. 702; *Crowder v. Sulliton*, 128 Ind. 486, 13 L. R. A. 647, 28 N. E. 94; *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624; *Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268, 28 N. E. 849; *Indianapolis v. Consumers' Gas Trust Co.* 140 Ind. 107, 27 L. R. A. 514, 39 N. E. 433; *State ex rel. St. Louis v. Lucile Gaslight Co.* 102 Mo. 472, 14 S. W. 974, 15 S. W. 383; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; 2 Kent, Com. p. 275; 15 Am. & Eng. Enc. Law, § 19, p. 1039.

The test of the validity of a municipality's contracts is not that the other contracting party was under no disability, but it is whether the thing contracted for will promote or aid in local government.

Hamilton v. Shelbyville, 6 Ind. App. 538, 33 N. E. 1007; *Ft. Wayne v. Lehr*, 88 Ind. 62; *Manhattan Trust Co. v. Dayton*, 8 C. C. A. 140, 16 U. S. App. 588, 59 Fed. 327; *Detroit v. Detroit City R. Co.* 56 Fed. 867; *Higgins v. San Diego*, 118 Cal. 524, 45 Pac. 324, 50 Pac. 670; *Dawson v. Dawson Waterworks Co.* 106 Ga. 696, 32 S. E. 29; *Carter v. Dubuque*, 35 Iowa, 416; *McPherson v. Foster Bros.* 43 Iowa, 48, 22 Am. Rep. 215; *Lavenworth v. Rankin*, 2 Kan. 357; *Nicholasville Water Co. v. Nicholasville*, 18 Ky. L.

Rep. 592, 36 S. W. 549, 38 S. W. 430; *For v. New Orleans*, 12 La. Ann. 154, 68 Am. Dec. 766; *Sang v. Duluth*, 58 Minn. 81, 59 N. W. 878; *Chaska v. Hedman*, 53 Minn. 525, 55 N. W. 737; *Saxton v. St. Joseph*, 60 Mo. 153; *Atlantio City Waterworks Co. v. Read*, 50 N. J. L. 685, 15 Atl. 10; *McDonald v. New York*, 1 Hun, 719; *Kernitz v. Long Island City*, 50 Hun, 428, 3 N. Y. Supp. 144; *Wellston v. Morgan*, 59 Ohio St. 147, 52 N. E. 127; *Guthrie v. Territory*, 1 Okla. 188, 21 L. R. A. 841, 31 Pac. 190; *Blackburn v. Oklahoma City*, 1 Okla. 292, 31 Pac. 782, 33 Pac. 708; *Winchester v. Redmond*, 93 Va. 711, 25 S. E. 1001; *Abernethy v. Medical Lake*, 9 Wash. 112, 37 Pac. 306; *Perry v. Superior City*, 26 Wis. 64.

The acceptance of an *ultra vires* city ordinance fixing maximum rates to be charged third parties by a gas company does not invest the city with any new power, nor does it invest it with any authority to pass the same as an ordinance, or make it a valid contract. A power which the state has not conferred upon a municipality cannot be granted or supplied by a gas company. The creature gets its powers from the creator.

Reese, Ultra Vires, §§ 46, 59, 60, 69-71, 76, 78, 89, 174, 194, 217, 218; *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Oregon R. & Nav. Co. v. Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *National Home Bldg. & L. Asso. v. Home Sav. Bank*, 181 Ill. 35, 54 N. E. 619; *East St. Louis v. East St. Louis Gaslight & Coke Co.* 98 Ill. 432, 38 Am. Rep. 97; *Buckeye Marble & Freestone Co. v. Harvey*, 92 Tenn. 115, 18 L. R. A. 252, 20 S. W. 427; *Noblesville v. Noblesville Gas & Improv. Co.* 157 Ind. 162, 60 N. E. 1032.

If every citizen and gas company in *Muncie* declared his desire that the city make the contract in question, and acquiesced therein, and the legislature had not vested the city with power to make it, such contract would be void.

Asbury R. Carriage & Iron Co. v. Riche, L. R. 7 H. L. 653.

Our statute authorizes the creation of voluntary associations for the purpose of sinking and operating gas wells, and provides that they may sell the product of such wells. This power of sale carries with it the power to fix prices with its consumers who buy from it.

Burns's Rev. Stat. 1901, § 4583, subs. 11: State ex rel. St. Louis v. Laclede Gaslight Co. 102 Mo. 472, 14 S. W. 974, 15 S. W. 383; *St. Louis v. St. Louis Gaslight Co.* 70 Mo. 69; *St. Louis Gaslight Co. v. St. Louis*, 86 Mo. 495; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

When a plaintiff seeks injunctive relief against the commission or continuance of an act, he must allege and prove such facts as show that he will be greatly injured if such act is committed or continued.

Burns's Rev. Stat. 1901, § 1162; Champ v. Kendrick, 130 Ind. 549, 30 N. E. 787; *Xenia* 60 L. R. A.

Real Estate Co. v. Macy, 147 Ind. 568, 47 N. E. 147; *Eruvin v. Fulk*, 94 Ind. 235; *Ooa v. Louisville, N. A. & O. R. Co.* 48 Ind. 178.

An injunction will not be decreed against a natural gas company at the suit of a borough and customers of the company to restrain it from increasing its charges.

Ohio Valley Gas Co.'s Appeal, 1 Monaghan, 97; *Allegheny Heating Co.'s Appeal*, 1 Monaghan, 91.

Messrs. Frank Ellis and Warner & Brady, for appellee:

The cities of Indiana at the time of appellee's grant to appellant possessed "exclusive power over the streets, highways, alleys, and bridges" within their limits.

2. Ind. Rev. Stat. 1901, § 3623; *Indianapolis & C. R. Co. v. State*, 37 Ind. 489; *Wood v. Mcars*, 12 Ind. 515, 74 Am. Dec. 222; *Macy v. Indianapolis*, 17 Ind. 267; *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624.

The streets of a city or town cannot be used by a gas company without the consent of such municipality.

Citizens' Gas & Min. Co. v. Elwood, 114 Ind. 332, 16 N. E. 624; *Indianapolis v. Consumers' Gas Trust Co.* 140 Ind. 107, 27 L. R. A. 514, 39 N. E. 433; *Noblesville v. Noblesville Gas & Improv. Co.* 157 Ind. 162, 60 N. E. 1032.

The grant of such a privilege, when accepted, constitutes a contract between the city and the company.

Western Paving & Supply Co. v. Citizens' Street R. Co. 128 Ind. 525, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88; *State ex rel. Keith v. Michigan City*, 138 Ind. 455, 37 N. E. 1041; *Cambria Iron Co. v. Union Trust Co.* 154 Ind. 291, *sub nom. Union Trust Co. v. Richmond City R. Co.* 48 L. R. A. 41, 55 N. E. 745, 56 N. E. 665.

A municipality is not limited merely to granting or refusing such a franchise, but may make its grant on any terms and conditions not contrary to law.

Indianapolis v. Consumers' Gas Trust Co. 140 Ind. 107, 27 L. R. A. 514, 39 N. E. 433; *Westfield Gas & Mill. Co. v. Mendenhall*, 142 Ind. 538, 41 N. E. 1033; *Logansport & W. V. Gas Co. v. Peru*, 89 Fed. 185; *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495; *Noblesville v. Noblesville Gas & Improv. Co.* 157 Ind. 162, 60 N. E. 1032; 2 Dill. Mun. Corp. 4th ed. § 706; *Elliott, Roads & Streets*, 2d ed. § 743.

A company to which a franchise is granted by a municipality is not bound to accept the same, but, if it elect to accept, it cannot refuse to comply with the terms and conditions attached thereto.

Westfield Gas & Mill. Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033; *Logansport & W. V. Gas Co. v. Peru*, 89 Fed. 185; *Noblesville v. Noblesville Gas & Improv. Co.* 157 Ind. 162, 60 N. E. 1032; *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495.

As a term or condition of the grant to a gas company of the right to lay its pipes in city streets, the granting municipality may establish, or may reserve the right to es-

tablish, the maximum prices at which gas may be sold to private consumers.

Westfield Gas & Mill. Co. v. Mendenhall, 142 Ind. 538, 41 N. E. 1033; *Noblesville v. Noblesville Gas & Improv. Co.* 157 Ind. 162, 60 N. E. 1032; *Logansport & W. V. Gas Co. v. Peru*, 89 Fed. 185; *Indiana Natural & Illuminating Gas Co. v. State*, 158 Ind. 516, 57 L. R. A. 761, 63 N. E. 220.

Establishing such a condition is an exercise of the contractual, not the legislative, power of the city.

Noblesville v. Noblesville Gas & Improv. Co. 157 Ind. 162, 60 N. E. 1032; *Indianapolis v. Consumers' Gas Trust Co.* 140 Ind. 107, 27 L. R. A. 514, 39 N. E. 433; *Indianapolis v. Indianapolis Gaslight & Coke Co.* 66 Ind. 396; *Logansport & W. V. Gas Co. v. Peru*, 89 Fed. 185.

The power of a city to fix by contract the rates at which gas shall be sold is implied from its exclusive power over city streets, its express power by contract or ordinance to grant the use of its streets to gas companies, and its general power to protect and preserve the property of its citizens.

Crawfordsville v. Braden, 130 Ind. 149, 14 L. R. A. 268, 28 N. E. 849; *Jacksonville Electric Light Co. v. Jacksonville*, 36 Fla. 229, 30 L. R. A. 540, 18 So. 677; *Indianapolis v. Navin*, 151 Ind. 139, 41 L. R. A. 337, 47 N. E. 525, 51 N. E. 80; *Central Trust Co. v. Citizens' Street R. Co.* 80 Fed. 218, 82 Fed. 1; *Allegheny v. Millville E. & S. Street R. Co.* 159 Pa. 411, 28 Atl. 202; *Gaedeke v. Staten Island Midland R. Co.* 43 App. Div. 514, 60 N. Y. Supp. 598, 46 App. Div. 219, 61 N. Y. Supp. 290; *State ex rel. St. Louis v. Laclede Gaslight Co.* 102 Mo. 472, 14 S. W. 974, 15 S. W. 383.

Even if such contract was *ultra vires*, so far as it attempted to fix rates, appellant, under the allegations of the complaint, would be estopped to set up such a defense.

State Bd. of Agri. v. Citizens' Street R. Co. 47 Ind. 407, 17 Am. Rep. 702; *Chicago & A. R. Co. v. Derkes*, 103 Ind. 520, 3 N. E. 239; *Louisville, N. A. & C. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907; *Bedford Belt R. Co. v. McDonald*, 17 Ind. App. 492, 46 N. E. 1022; *Voris v. Star City Bldg. & L. Asso.* 20 Ind. App. 630, 50 N. E. 779; 5 Thomp. Corp. §§ 6015, 6024, 6026; Clark, Corp. pp. 171, 179, 180; 28 Am. Law Rev. 405; *San Diego Land & T. Co. v. National City*, 74 Fed. 79.

The fact that such an application to a court of equity was made by the city of Muncie in this case is of infrequent occurrence is unimportant.

Columbian Athletic Club v. State, 143 Ind. 98, 28 L. R. A. 727, 40 N. E. 914; *State v. Ohio Oil Co.* 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809; *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173, 47 Fed. 15; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243, 29 Fed. 546; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, 64 Fed. 724; *Nashville, C. & St. 60 L. R. A.*

L. R. Co. v. McConnell, 82 Fed. 65; *United States v. North Bloomfield Gravel Min. Co.* 81 Fed. 243.

It is a condition implied in every grant of corporate franchises that, if the corporation seriously violate, to the public injury, the conditions, express or implied, of such grant, such franchises may be forfeited by the state, in a proceeding brought for that purpose.

Eel River R. Co. v. State, 155 Ind. 433, 57 N. E. 388; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 483, 53 L. R. A. 413, 53 N. E. 1089; *Bank of Vincennes v. State*, 1 Blackf. 267, 12 Am. Dec. 234; 9 Am. & Eng. Enc. Law, 2d ed. pp. 570, 571; *State ex rel. Leese v. Atchison & N. R. Co.* 24 Neb. 143, 38 N. W. 43; 5 Thomp. Corp. §§ 6609, 6644; *Com. v. Commercial Bank*, 28 Pa. 383; *State v. Commercial Bank*, 33 Miss. 474; *People ex rel. Atty. Gen. v. City Bank*, 7 Colo. 226, 3 Pac. 214; *Capital City Water Co. v. State*, 105 Ala. 406, 29 L. R. A. 743, 18 So. 62.

The state may, instead of forfeiting the corporate franchises, maintain a suit in equity to enjoin the misuse of corporate powers to the detriment of the public.

Columbian Athletic Club v. State, 143 Ind. 98, 28 L. R. A. 727, 40 N. E. 914; 2 Pom. Eq. Jur. § 1093; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964; *Pennsylvania R. Co. v. Com. (Pa.)* 7 Atl. 368; *Gulf, O. & S. F. R. Co. v. State*, 72 Tex. 404, 1 L. R. A. 849, 10 S. W. 81; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 432.

The municipality may either forfeit the grant and eject the company from its streets, or it may maintain a suit in equity to compel the corporation to cease its misuse, and comply with the terms and conditions of the grant.

Farmers' Loan & T. Co. v. Galesburg, 133 U. S. 156, 33 L. ed. 573, 10 Sup. Ct. Rep. 316, 34 Fed. 675; *Palestine Water & P. Co. v. Palestine*, 91 Tex. 540, 40 L. R. A. 203, 44 S. W. 814; *Winfield v. Winfield Water Co.* 51 Kan. 70, 32 Pac. 663; *Light, Heat, & Water Co. v. Jackson*, 73 Miss. 598, 19 So. 771; *Grand Haven v. Grand Haven Waterworks*, 99 Mich. 106, 57 N. W. 1075; *Booth, Street Railways*, § 52; *Burlington v. Burlington Water Co.* 86 Iowa, 266, 53 N. W. 246; *Manhattan Trust Co. v. Dayton*, 8 C. C. A. 140, 16 U. S. App. 588, 59 Fed. 327, Affirming 55 Fed. 181; *Toledo v. Northwestern Ohio Natural Gas Co.* 6 Ohio N. P. 531; *Bienville Water Supply Co. v. Mobile*, 112 Ala. 260, 33 L. R. A. 59, 20 So. 742; 29 Am. & Eng. Enc. Law, 20.

Gillett, J., delivered the opinion of the court:

Appellee instituted this action to restrain appellant from violating a special negative covenant in a contract between said parties regarding the maximum price of natural gas to be furnished by appellant to the inhabitants of said city. The amended complaint was in two paragraphs, to each of which a

demurrer was overruled. Appellant answered in three paragraphs, one of which was a general denial. Demurrers were sustained to the other paragraphs of answer. Upon the request of each of the parties, the court, after a trial, made a special finding of the facts, and stated its conclusions of law thereon. A decree was rendered in favor of appellee.

So far as necessary to the consideration of this case, the facts so found specially are, in substance, as follows: On the 7th day of December, 1886, appellee passed an ordinance that was accepted by appellant on the 21st day of December, 1886, authorizing appellant to construct and maintain a system of pipes beneath the streets and alleys of said city for the purpose of furnishing and selling natural gas to its inhabitants generally. The 12th section of the ordinance contained the following proviso: "Provided, that in no case shall the total cost to such consumers for private purposes of such gas at any time exceed three fourths of the present current price of wood or coal for fuel, or of artificial gas for lighting; that the price of natural gas to private consumers for heating purposes shall be regulated by a schedule of prices submitted by the board of directors to the common council of said city at the beginning of each fiscal year, and that said company shall not, in any manner or for any purpose whatever, exceed the prices so submitted for that year, which schedule shall not exceed the price above stated in this section, said present price of wood being \$2.50 per cord; of anthracite coal, \$6 per ton; of soft coal, \$4 per ton; and of artificial gas, \$1.80 per 1,000 cubic feet." It is further found that said ordinance is still in force; that the appellant laid, and still maintains, the system of pipes provided for in said ordinance, and is engaged in the business of furnishing natural gas to the inhabitants of said city for heating and lighting purposes for hire; that on the 17th day of September, 1900, appellant submitted to the common council of said city a schedule, which is set out, of prices to be charged private consumers for the year beginning on the 1st day of October, 1900; that the city council investigated and considered such schedule, and by resolution found and declared that the prices in said schedule were excessive, and ordered and directed the appellant to submit a new schedule, which it refused to do. The findings sufficiently show that the schedule submitted provided for prices in excess of the provisions of the ordinance. It was further found by the court that since the 1st day of November, 1900, the appellant had been, and was at the time of the institution of the suit, charging the prices to consumers fixed in said schedule, under threats to discontinue the service of such consumers as refused to pay on the basis of said schedule, and that it threatens and intends to continue to charge and enforce the payment by all of its consumers of the rates set forth in said schedule. It is also found that since 60 L. R. A.

the 1st day of October, 1900, appellant has had more than 3,000 of said consumers in said city, who have, at great expense, fitted their residences with pipes and other fixtures to use natural gas, and that they cannot procure said gas except from the appellant. It is unnecessary to set out the conclusions of law.

The first contention of appellant's counsel is that the city had no authority to enter into a contract fixing the maximum rates to be charged the inhabitants of said city, and that, therefore, the contract was *ultra vires*, and void. We have to deal here with a question of *ultra vires* in its true sense; that is, where the act is claimed to be *ultra vires* the corporation itself. Municipal corporations possess and can exercise such powers only as are granted by the legislature in express words, and those necessarily or fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. 1 Dill. Mun. Corp. §§ 89, 90; 1 Smith, Mod. Law of Mun. Corp. 562, and cases cited; *Pittsburg C. C. & St. L. R. Co. v. Crown Point*, 146 Ind. 421, 35 L. R. A. 684, 45 N. E. 587; *Bogue v. Bennett*, 156 Ind. 478, 60 N. E. 143; *Walker v. Towle*, 156 Ind. 639, 53 L. R. A. 749, 59 N. E. 20; *Lake County Water & Light Co. v. Walsh* (Ind.) 65 N. E. 530. As said by Mr. Dillon: "The general principle of law is settled beyond controversy that the agents, officers, or even city council of a municipal corporation cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation or which (not being legislatively authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators; the officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger and accompanied with such abuse that it would soon end in the ruin of municipalities, or be legislatively overthrown. These considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom it can alone act, if it acts at all, keep within the limits of the chartered authority of the corporation. The history of the workings of municipal bodies has demonstrated the salutary nature of this principle, and that it is the part of true wisdom to keep the corporate wings clipped down to the lawful standard." 1 Dill. Mun. Corp. § 457. But, notwithstanding this background of inhibition, we think that it may be affirmed that appellee had power to enter into the contract in question. Section 61 of the act of March 14, 1867 (*Burns's Rev. Stat.* 1901, § 3623), provides that "the common council shall have exclusive power over

the streets, highways, alleys, and bridges within such city." Natural gas is a public utility that cannot be obtained by the citizens of a municipality generally, except as it is conducted in pipes along the public ways of the city. The grant of exclusive power to the common council over such ways comprehends the right to permit gas companies to use the streets. If the common council may permit a natural gas company to use the streets without any conditions annexed except such as the law attaches, it is not perceived why, as in this case, in making provision for supplying natural gas to all of the inhabitants of the city, it may not protect such inhabitants against extortion by providing that the company shall not charge in excess of certain prices for its service. The right to annex terms by way of limitation upon the authority of the grantee in such cases has been often affirmed by this court. *Western Paving & Supply Co. v. Citizens' Street R. Co.* 128 Ind. 531, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88; *Indianapolis v. Consumers' Gas Trust Co.* 140 Ind. 107, 27 L. R. A. 514, 39 N. E. 433; *Cambria Iron Co. v. Union Trust Co.* 154 Ind. 291, *sub nom. Union Trust Co. v. Richmond City R. Co.* 48 L. R. A. 41, 55 N. E. 745, 56 N. E. 665. And see *Noblesville v. Noblesville Gas & Improv. Co.* 157 Ind. 162, 60 N. E. 1032. In *Indianapolis v. Consumers' Gas Trust Co.* 140 Ind. 116, 27 L. R. A. 517, 39 N. E. 436, it was said: "There was no compulsion on the part of the appellant to grant the privilege to use its streets to any particular company. It was within its discretion to give or not to give its consent, and it had the right to withhold it from all gas companies. *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624. It was not limited alone to the granting of this franchise, but it had the right to prescribe and impose terms and conditions. *Dill. Mun. Corp. § 706*; 2 *Wood, Railroads*, p. 986; *Elliott, Roads and Streets*, p. 565. When these terms and conditions, proposed by the appellant, were accepted by the appellee, and complied with, it became a binding contract. *Western Paving & Supply Co. v. Citizens' Street R. Co.* 128 Ind. 531 [10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88]." In *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, 731, the court said: "In procuring water, or any other commodity, by purchase, one of the first things to be considered and agreed upon is the matter of price. Therefore, to hold that a general power, without limitation, in a municipal corporation, to supply the city with water, does not include power to agree upon a price, it seems to me would be a solecism." The grant in this case may be said to rest upon the business or proprietary power of the city, as distinguished from its governmental or legislative power. *Indianapolis v. Consumers' Gas Trust Co.* 140 Ind. 107, 27 L. R. A. 514, 39 N. E. 433; *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; *Safety Insulated Wire & Cable Co. v. Baltimore*, 13 C. C. A. 375, 25 U. S. App. 60 L. R. A.

166, 66 Fed. 140; *State ex rel. Great Falls Waterworks v. Great Falls*, 19 Mont. 518, 49 Pac. 15.

It is argued by counsel for appellant that, if the common council may contract that natural-gas rates shall not be in excess of a particular scale, it may also exercise general supervision over those who enter into other contracts with the inhabitants of the city. Municipalities cannot, of course, exercise any such paternalism as that. They cannot, under existing legislation, exercise the legislative power to fix rates in any case; but we perceive no reason, in view of the condition of legislation at the time the ordinance in question was accepted, why it was not competent for appellee to annex the terms complained of to the grant of the right to use its streets. We are not required in this case to consider the effect of subsequent legislation. But even if there was a technical want of power upon the part of the city to enter into a contract establishing maximum rates for natural-gas service, yet we do not think that appellant, while enjoying the fruits of the contract, can attack it, notwithstanding the fact that the law of *ultra vires* is stricter in its application to public than to private corporations. Counsel for appellant seem to think that the cases in this state are somewhat out of accord with those of the United States Supreme Court, which has followed the English cases. The leading case in the United States on this subject is *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, wherein it is affirmed that partly executed contracts *ultra vires* the corporation itself are void as to both parties; that they cannot be affirmed by estoppel or otherwise, and that, where the parties have so far acted upon such contracts that they cannot be restored to their original situation, the court is limited to the granting of such relief, if any, as can be given independently of the contract. The declarations of the case mentioned are no broader than those found in *Tipppecanoe County v. Lafayette M. & B. R. Co.* 50 Ind. 85, wherein it is declared that a corporate "contract *ultra vires* the charter is void, and cannot be made valid by any subsequent act of the corporation, because there is no residuary power to confirm it;" and that, "if the act is *ultra vires* the corporation, it is void, and no one is bound." That all power not expressly or impliedly granted to corporations is withheld is a rule that the authorities without division apply in testing the validity of the purely executory contracts of corporations; but in so far as the defense of *ultra vires* to a contract that has been partly executed is concerned, we must look to the cases, rather than to the lexicographers, for a definition of the term *ultra vires*. Without attempting to cover the whole ground, it may be said that, if a contract is of such character that, had the corporation at once proceeded to execute it, its act would have been contrary to public policy, or expressly or impliedly prohibited by statute, or would, in any degree, disable

the corporation from the performance of its statutory duties, the undertaking cannot be enforced by either party. To this extent the cases, English, Federal, and state, are in reasonable harmony. As illustrative of this view, we cite *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 39 L. R. A. 725, 49 N. E. 592; *State ex rel. Scott v. Hart*, 144 Ind. 107, 33 L. R. A. 118, 43 N. E. 7; *Brown v. First Nat. Bank*, 137 Ind. 655, 672, 24 L. R. A. 206, 37 N. E. 158; *Platter v. Elkhart County*, 103 Ind. 360, 2 N. E. 544; *Cullen v. Carthage*, 103 Ind. 197, 53 Am. Rep. 504, 2 N. E. 571; *Miller v. Embree*, 88 Ind. 133; *Ft. Wayne v. Lehr*, 88 Ind. 62; *Driftwood Valley Turnp. Co. v. Bartholomew County*, 72 Ind. 226; *Rothrock v. Carr*, 55 Ind. 334; *Burnett v. Abbott*, 51 Ind. 254; *Tippecanoe County v. Lafayette M. & B. R. Co.* 50 Ind. 85; *Wrought Iron Bridge Co. v. Hendricks County*, 19 Ind. App. 672, 48 N. E. 1050. On the other hand, we have a number of cases, commencing with the leading case of *State Bd. of Agri. v. Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702, in which it is held, on the principle of equitable estoppel, that, where there is a mere defect of power upon the part of the corporation to enter into the contract, a defendant, while enjoying the benefit of the contract, shall not be permitted to raise the question as to the power of the corporation. *Sturgeon v. Daviess County*, 65 Ind. 302; *Poock v. Lafayette Bldg. Asso.* 71 Ind. 357; *Bicknell v. Widner School Twp.* 73 Ind. 501; *Louisville N. A. & O. R. Co. v. Flanagan*, 113 Ind. 488, 14 N. E. 370; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907. The cases last cited are not seriously, if in any respect, out of accord with the Supreme Court of the United States. In *Union P. R. Co. v. Chicago, R. I. & P. R. Co.* 163 U. S. 564, 41 L. ed. 285, 16 Sup. Ct. Rep. 1173, it was pointed out that in a line of cases in that court, including *Central Transp. Co. v. Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478, the contracts condemned as void were against public policy, and it was held that a contract as to which there was a doubt as to whether it was within the implied powers of a corporation was not to be condemned because of a remote chance that in the future it would partially disable the corporation from performing its charter duties. The defense that a contract is *ultra vires* the corporation does not deserve the execration it has received, since in most instances there is a collateral remedy in cases where there ought to be one. Although such contracts are not necessarily illegal, the *ultra vires* doctrine has its roots, like the rule of *par delictum*, in public policy; and its chief value lies in the fact that it is a brake upon improper corporate action, more efficacious, perhaps, in its practical results than the public remedy by information. As to cases, however, of mere defects of power, we think that it should be held, in accordance with the clear weight of authority in the United States, that, while the defendant retains the benefit of the contract, the state alone can raise the question. Tested by this 60 L. R. A.

consideration, we hold that, while the appellant continues to use the streets of the city of Muncie to distribute natural gas to private consumers by virtue of said accepted ordinance, it cannot question the right of the city to enter into such contract.

The next question is, Can the city maintain an action by way of injunction to enforce the contract? It is objected that, as the city is not alleged to be a consumer, the inhabitants of the city using the gas can alone sue for the invasion of their rights; and it is further objected that, in any event, injunction on behalf of the city will not lie. As a step in the solution of these questions, we will first consider who it is that brings this action. It is not the common council, for its members merely represent the municipality. The city sues, and the city is composed of the inhabitants of the locality *Citizens' Gas & Min. Co. v. Elwood*, 114 Ind. 332, 16 N. E. 624; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *Strosser v. Ft. Wayne*, 100 Ind. 443. The rule, both in England and the United States, except as changed by statute, is that it is the attorney general, as the representative of the public, who sues for invasions of the public right, whether by way of purpresture or nuisance, or because of corporate excess. *Atty. Gen. v. Richards*, 2 Anstr. 603; *Atty. Gen. v. Forbes*, 2 Mylne & C. 123; *Georgetown v. Alexandria Canal Co.* 12 Pet. 91, 9 L. ed. 1012; *United States v. American Bell Telph. Co.* 128 U. S. 315, 32 L. ed. 450, 9 Sup. Ct. Rep. 90; *Coosaw Min. Co. v. South Carolina*, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900; *Columbia Athletic Club v. State*, 143 Ind. 98, 28 L. R. A. 727, 40 N. E. 914; *State v. Ohio Oil Co.* 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 482; *Atty. Gen. v. Jamaica Pond Aqueduct*, 133 Mass. 361; *Atty. Gen. v. Delaware & B. B. R. Co.* 27 N. J. Eq. 631; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964; *Com. v. Rush*, 14 Pa. 186; *Kerr v. Trego*, 47 Pa. 292. While the state may elect to bring an action to forfeit the franchise of a corporation created by it because of an *ultra vires* act that tends to the prejudice of the public, yet it is not bound to do so, but may invoke the powers of its courts having general chancery jurisdiction to keep the corporation within the path marked out for it by statute. See cases last above cited. The state may well complain, where a corporation is indulging in *ultra vires* acts to the prejudice of the public, that the corporation has violated its implied contract to observe the laws of the state. *Thomas v. West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Columbia Athletic Club v. State*, 143 Ind. 98, 28 L. R. A. 727, 40 N. E. 914. This view was forcibly expressed by McGill, Ch., in *Stockton v. Central R. Co.* 50 N. J. Eq. 72, 17 L. R. A. 106, 24 Atl. 971, as follows: "Water, gas, telegraph, and similar corporations also render to the public benefits which readily suggest themselves to the mind as it contemplates

their work. While the state confers special privileges upon these favorites, it at the same time exacts from them duties which also tend to the public welfare. The whole scheme of the laws of their organization is to equip and control them as instruments for the public good. Such corporations hold their powers, not merely in trust for the pecuniary profit of their stockholders, but also in trust for the public weal. The impress for public good is stamped upon their very being, and it becomes a duty, which, though not prescribed in express language of the law, is to be implied from the nature of every power conferred. When, therefore, it appears that such a corporation, unmindful of its plain duty, acts prejudicially to the public, in order to make undue gains and profits for its stockholders, it uses its powers in a manner not contemplated by the law which confers them. The use becomes abuse and is tantamount to excess of power."

We, of course, realize that the people of the city of Muncie are not the public at large, and that the breach of contract here complained of is not an *ultra vires* act. But the question is whether the analogy is not sufficiently great to justify courts of chancery, whose peculiar boast is the adaptability of their remedies to extend relief where an adequate remedy is wanting, in granting relief in cases of this kind. It was declared by Lord Chancellor Cottenham, in *Taylor v. Salmon*, 4 Mylne & C. 141, that it is the duty of a court of equity "to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice, and to enforce rights for which there is no other remedy." The people of the city of Muncie—to borrow somewhat from the thought of one of our cases—are the public of that locality, and it appears that the appellant is doing acts to the prejudice of the inhabitants of the city, while exercising a public function by virtue of a contract that has admitted it to the streets of the municipality. The analogy is so close between the case of the state suing to enjoin an *ultra vires* act by one of its corporations and the case in hand that we think that it ought to be held that the city may maintain an action to restrain appellant, if the facts otherwise warrant equitable intervention. But this case is in principle within existing adjudications as to the power of the municipality to sue on behalf of its inhabitants. In *London v. Bolt*, 5 Ves. Jr. 129, the court of chancery granted an injunction, upon the application of the city of London, to restrain acts that amounted to a nuisance by endangering the lives of the inhabitants. The case of *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80, was a suit to enjoin the unauthorized erection of a structure upon grounds dedicated to the public of a

municipality. In disposing of the case, Chancellor Walworth, after stating that he did not feel disposed to go to the length of holding that the legal title of the land was vested in the village, said: "I can see no valid objection to considering the corporation as the proper representative of the equitable rights of the inhabitants of the village to the use of the public square, so as to authorize the filing of a bill by the corporation in this court to protect those equitable rights against the erection of this nuisance." *Guelph v. Canada Co.* 4 Grant, Ch. U. C. 632, was an action to restrain the defendant therein from selling certain property within the town that it was claimed had been dedicated by the defendant in laying out the lands of the municipality. It was objected that the attorney general was not a party, but the court said: "The legislature has intrusted the plaintiffs with extensive powers in relation to the public property of the town of Guelph, and has at the same time devolved upon them the duty of protecting the rights of the public from infringement. Now it cannot be denied that the inhabitants of Guelph have a peculiar interest in the market-place. The infringement complained of would obviously inflict a special injury on the inhabitants of Guelph. A private individual sustaining special damage is allowed to file a bill of this sort, and it is difficult to understand why this municipality should not have the same right." In *Greenwich v. Easton*, 24 N. J. Eq. 217, the court cited approvingly the case of *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80, on the proposition as to the right to an injunction, and pointed out the fact that a township sustains a special injury by the destruction of its highways beyond that of the public in general, because of its burden of repair. See also, as to the right of the city to sue, *State ex rel. Bridgeton v. Bridgeton & M. Traction Co.* 62 N. J. L. 592, 45 L. R. A. 837, 43 Atl. 715; *Florida C. P. R. Co. v. State*, 31 Fla. 482, 20 L. R. A. 419, 13 So. 103; *Williams v. Smith*, 22 Wis. 594. If we appeal to the analogous right of the state to restrain nuisances or to prevent its corporations from committing *ultra vires* acts, it may be affirmed that it is not necessary to show that the city has itself sustained damage when it sues for the benefit of its inhabitants, but that it is enough to show that the act tends to injure the public of the municipality. *Grey v. Greenville & H. R. Co.* 59 N. J. Eq. 372, 46 Atl. 638; *Atty. Gen. v. Shrewsbury Bridge Co.* L. R. 21 Ch. Div. 752. And see *Eel River R. Co. v. State*, 155 Ind. 433, 57 N. E. 388. In *Atty. Gen. v. Ely*, H. & S. R. Co. L. R. 4 Ch. 194, it was said: "The question is whether what has been done has been done in accordance with the law. If not, the attorney general strictly represents the whole of the public in saying that the law shall be observed."

We really need no analogies, however, to uphold the right of appellee to maintain this suit. The city, as a corporate entity, represents all of its inhabitants. The streets,

over which it has exclusive power, are being used by appellant under a contract with the city that appellant has broken. This would entitle the city to at least nominal damages at law; and its right to restrain the further breach of the contract, which amounts to a negative specific enforcement of the contract, can be affirmed on the ground that it will avoid a multiplicity of actions. This is not an independent source or occasion of jurisdiction, but, as laid down by Prof. Pomeroy, where a party is entitled to even legal relief, and there exists between him and a number of others entitled to relief a common interest, relation, or question as against another party, that can be determined by one suit, such acts afford a distinct basis for an appeal to equity. Pom. Eq. Jur. §§ 243 *et seq.* In such cases it is not necessary that the party suing should himself be threatened by, or compelled to resort to, numerous actions to vindicate his right, because considerations of governmental policy enter into the question. As applied to this case, it is a matter of public expediency that by one suit rights shall be established for the time that the injunction has to run, instead of hundreds of the inhabitants of the city being each compelled to sue to vindicate his right, or otherwise to submit to a small, but annoying injustice. *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 432.

But the appellee had a right to appeal to equity on another ground. The city was a party to the contract, and it complains of the breach of a negative covenant. This is a case, so far as the covenant is concerned, for a negative specific performance by means of an injunction. A court of equity, where there is a basis for the assertion of its jurisdiction, will not suffer men to depart from their agreements at pleasure, leaving the party with whom they have contracted to the mere chance of damages which a jury may give. *Lumley v. Wagner*, 1 De G. M. & G. 619; *De Mattos v. Gibson*, 4 De G. & J. 282. A well-known writer on injunctions, after stating that there may be cases where a court of equity would refuse to interfere where it is clear that the damages for a breach would be inappreciable, says: "A covenantee has the right to have the actual enjoyment of property *modo et forma* as stipulated for by him. It is no answer to say that the act complained of will inflict no injury on the plaintiff, or will be even beneficial to him. It is for the plaintiff to judge whether the agreement shall be preserved as far as he is concerned, or whether he shall permit it to be violated. It is not necessary that he should show that any damage has been done. It being established that the acts of the defendant are a violation of the contract entered into by him, the court will protect the plaintiff in the enjoyment of the right which he has purchased." Kerr, *Inj. in Equity*, *533.

Appellant's counsel contend that the contract in question was made for the exclusive benefit of third persons, and that, therefore, the city is not the real party in interest

within § 251, Burns's Rev. Stat. 1901. Assuming the correctness of this position, it does not follow that the city may not sue, for the next section of the statute provides that "an executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." We think it may be properly said, in view of the contract, that, if the city cannot sue on its own account, it appears that it is the trustee of an express trust within the meaning of the statute last mentioned. The language of the covenant is not as clear as it might be, but, so far as objection to it is pointed out, we think that it is capable of construction. The first point to ascertain is what the parties themselves meant and understood, but courts cannot adopt a construction of a legal instrument which would do violence to the rules of language or to the rules of law. 2 Parsons, *Contr.* 5th ed. 494.

It is unnecessary to determine whether § 12 of the ordinance gave the city any power to regulate charges to private consumers within the maximum scale of charges; but it is clear, from language twice repeated, that there was to be a maximum scale. For heating purposes, the price of gas was not to exceed "three quarters of the present current price of wood or coal for fuel," and the cost of natural gas for lighting was not to exceed a like ratio to the cost of artificial gas. Then follows the provision as to the submission of the schedule of charges for heating purposes; next, the provision that the "schedule shall not exceed the price above stated;" and, finally, the then current prices of wood, coal, and artificial gas are fixed. The parties sought a standard, and it ought to be the endeavor of the court, so far as possible, to give to that standard the element of certainty, and not to import elements of uncertainty into it that the parties did not see fit to mention. If there be any question concerning the correctness of this construction, the doubt must be solved in favor of the city, because public contracts should be construed, not *contra proferentem*, but liberally in favor of the public. *Indianapolis Cable Street R. Co. v. Citizens' Street R. Co.* 127 Ind. 369, 8 L. R. A. 539, 24 N. E. 1054, 26 N. E. 893; *Western Paving & Supply Co. v. Citizens' Street R. Co.* 128 Ind. 525, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88; *Cambria Iron Co. v. Union Trust Co.* 154 Ind. 291, *sub nom. Union Trust Co. v. Richmond City R. Co.* 48 L. R. A. 41, 55 N. E. 745, 56 N. E. 665; *Slidell v. Grandjean*, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; *Joy v. St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; *Goosaw Min. Co. v. South Carolina*, 144 U. S. 552, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; Beach, *Modern Law of Contracts*, § 726. This principle of construction, it was said, as applied to pub-

lie grants, in the *Slidell Case*, and also in the *Coosaw Mining Co. Case*, "is a wise one; it serves to defeat any purpose, concealed by the skillful use of terms, to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies."

The views that we have expressed in this opinion dispose of all questions concerning the rulings on the pleadings, except as to the sufficiency of the first paragraph of complaint; but as the special findings set out sufficient facts to warrant a decree under the amended second paragraph of complaint, the error, if any, in sustaining a demurrer to the first paragraph of complaint, was harmless.

The court did not err in overruling the motion for a *venire de novo*, so called. The finding complained of stated matters of ultimate fact, and did not state the whole issue, as counsel assume. The motion for a supplemental finding does not present any question. *Sharp v. Malia*, 124 Ind. 407, 25 N. E. 9; *Bunch v. Hart*, 138 Ind. 1, 37 N. E. 537; *Elliott*, App. Proc. § 757. We do not find that the motion to modify the decree was incorporated in a bill of exceptions, or that it was otherwise made a part of the record, and therefore the question is not before us. *Adams v. La Rose*, 75 Ind. 471; *Forsythe v. Kreuter*, 100 Ind. 27; *People's Sav. L. & Bldg. Asso. v. Spears*, 115 Ind. 297, 17 N. E. 570; § 662, Burns's Rev. Stat. 1901.

We cannot disturb the finding on the evidence. There was a vast quantity of testimony offered as to the comparative values of the fuels and lights in question, and we cannot say that the court erred in its conclusions of fact concerning the same.

The record of the common council showing its rejection of the schedule submitted by appellant was a proper substantive evidence of the fact of such rejection, as a certified copy of the resolution was served upon appellant. After the latter had submitted its schedule of rates for the then ensuing year, it was incumbent upon appellee to reject it before it could sue; and we cannot suppose that the learned judge who tried this case gave credence to any of the interwoven declarations of fact not relevant to the question in issue.

Complaint is made by appellant's counsel as to the action of the trial court in the admission and exclusion of certain items of evidence not already directly or impliedly ruled on in the course of this opinion. For the most part, these objections are insufficiently briefed. *Elliott*, App. Proc. § 445; *Harrison v. Hedges*, 60 Ind. 266; *Bray v. Franklin L. Ins. Co.* 68 Ind. 6; *Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582. The other objections can be disposed of on practice grounds relative to the condition of the transcript, or for the reason that the objections are not well taken.

Judgment affirmed.

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STATE of Indiana *ex rel.* City of INDIANAPOLIS, *Appt.*,

v.

INDIANAPOLIS UNION RAILWAY COMPANY.

(.....Ind.....)

1. On demurrer to an alternative writ of mandamus the question presented is not whether relator is entitled to some relief, but whether he is entitled to the specific relief asked for.
2. Power to require a railroad company to elevate its tracks through the city for the purpose of abolishing grade crossings is not conferred on a municipality by a charter empowering it to define nuisances and require their abatement; to secure the safety of citizens in the running of trains, and to provide protection against injury from their operation; to require railroad companies to change the location, grade, and crossings of their roads; to compel them to raise or lower their tracks to conform to any grade that may be established, and to construct bridges, viaducts, or tunnels across their rights of way at street crossings,—where the conditions at some of the crossings do not require such remedy.
3. General charter authority to define nuisances does not empower a municipal corporation to declare anything a nuisance *per se* which in fact was not recognized as such by the common law.

(February 4, 1908.)

APPEAL by relator from a judgment of the Superior Court for Marion County in favor of defendant in a mandamus proceeding to compel the elevation of defendant's tracks for the purpose of abolishing certain grade crossings. *Affirmed.*

The facts are stated in the opinion.

Messrs. John W. Kern and J. E. Bell for appellant.

Messrs. Baker & Daniel, for appellee:

Upon a demurrer to an alternative writ for the alleged reason of insufficiency of facts, it is not the province of the court to decide whether facts are stated which entitle the relator to some form of relief; it is the province of the court to decide only whether the relator is entitled to the specific relief prayed for.

Commercial Bank v. Canal Comrs. 10 Wend. 26; *People ex rel. Larkin v. Palmer*, 27 Misc. 569, 59 N. Y. Supp. 62; *Vincent v. Hinsdale County*, 12 Colo. App. 40, 54 Pac. 393.

Even if the Indianapolis city charter (2 Burns's Rev. Stat. § 3794) should be construed as conferring upon the city of Indian-

NOTE.—As to power of municipality to define, prevent, and abate nuisance, see also, in this series, *Grossman v. Oakland* (Or.) 86 L. R. A. 593, and note; *Evansville v. Miller* (Ind.) 38 L. R. A. 161; *Darlington v. Ward* (S. C.) 38 L. R. A. 326; *St. Louis v. Edward Heltzeberg Packing & Provision Co. (Mo.)* 39 L. R. A. 551; *Walker v. Towle* (Ind.) 53 L. R. A. 749; *Western & A. R. Co. v. Atlanta* (Ga.) 54 L. R. A. 294; and *Wygant v. McLaughlin* (Or.) 54 L. R. A. 636.

apolis the power to compel the substitution of elevated railroad tracks for surface railroad tracks, still the relator is not entitled to relief by mandate, under the ordinance counted upon in the complaint and alternative writ, because the ordinance leaves it to the railroad company to elect, in its discretion, whether it will remove its surface tracks from its present right of way and so abandon such right of way, or construct elevated railroads upon its present right of way.

Holliday v. Henderson, 67 Ind. 103; *Queen v. Southeastern R. Co.* 4 H. L. Cas. 471.

The provisions of the ordinance which declare that surface railroad tracks upon and across the streets named are a nuisance, are invalid because they declare that to be a nuisance which in fact is not.

Evansville v. Miller, 146 Ind. 613, 38 L. R. A. 161, 45 N. E. 1054; *First Nat. Bank v. Sarile*, 129 Ind. 201, 13 L. R. A. 481, 28 N. E. 434; *St. Louis v. Edward Heitzberg Packing & Provision Co.* 141 Mo. 375, 39 L. R. A. 551, 42 S. W. 954; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Chicago, R. I. & P. R. Co. v. Joliet*, 79 Ill. 25; *Hennessy v. St. Paul*, 37 Fed. 565; *State v. Marshall*, 50 La. Ann. 1176, 24 So. 186; *Rouland v. Greencastle* (Ind.) 58 N. E. 1031.

The power delegated is general, and the manner of its exercise is left to the discretion of the city; the reasonableness of any ordinance, therefore, passed in virtue of the power, is a question for the courts.

Shelbyville v. Cleveland, C. C. & St. L. R. Co. 146 Ind. 66, 44 N. E. 929; *Cleveland, C. C. & St. L. R. Co. v. Connersville*, 147 Ind. 277, 37 L. R. A. 175, 46 N. E. 579; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 48 L. ed. 702, 19 Sup. Ct. Rep. 465.

The appellee is under no obligation, either statutory or common-law, to put up elevated tracks in lieu of its surface tracks.

2 Burns's Rev. Stat. § 5153, subs. 4, 5, § 5227; *Evansville & T. H. R. Co. v. Carver*, 113 Ind. 51, 14 N. E. 738; *Cummins v. Evansville & T. H. R. Co.* 115 Ind. 417, 18 N. E. 6; *Charlottesville v. Southern R. Co.* 97 Va. 428, 34 S. E. 98; *Atchison, T. & S. F. R. Co. v. Henry*, 57 Kan. 154, 45 Pac. 576; *Chicago, B. & Q. R. Co. v. West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485, 40 N. E. 1008; *Roberts v. Chicago & N. W. R. Co.* 35 Wis. 679.

The requirements of the common law respecting the restoration of street grade crossings by railroad companies are not greater than those of the 5th subsection of said § 5153, of 2 Burns's Revision.

Evansville & T. H. R. Co. v. State, 149 Ind. 276, 49 N. E. 2.

The power of the courts in enforcing the duty of railroad companies to "restore" grade crossings does not go so far as to authorize them to compel railroad companies to elevate their tracks.

State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 38 Minn. 246, 36 N. W. 870.

The statutes grant to railroad companies 60 ft. R. A.

the power to cross a road or street at grade, or to carry a road or street under the railroad track or over the railroad track.

Clauston v. Chicago & G. S. R. Co. 95 Ind. 152.

The fact that appellee's railroad is constructed across the streets which are much traveled, and over which travel is increasing, does not make its railroad which is upon the streets a nuisance.

New Castle v. Lake Erie & W. R. Co. 155 Ind. 18, 57 N. E. 516.

It is not within the corporate power of the appellee to construct, maintain, and operate elevated railroad tracks as prayed in the complaint and alternative writ.

People's Rapid Transit Co. v. Dash, 125 N. Y. 93, 10 L. R. A. 728, 26 N. E. 25; *Schaper v. Brooklyn & L. I. Cable R. Co.* 124 N. Y. 630, 26 N. E. 311; *Potts v. Quaker City Elev. R. Co.* 161 Pa. 396, 29 Atl. 109; *Com. ex rel. Atty. Gen. v. Northeastern Elev. R. Co.* 161 Pa. 409, 29 Atl. 112.

Without the consent of the state, and without the acquiescence of its stockholders, the appellee could not elevate its tracks; it would be unlawful for it so to do. Courts will not compel by mandate the doing of an unlawful thing.

Cheboygan County v. Mentor Twp. 94 Mich. 380, 54 N. W. 169; *State ex rel. O'Hara v. Fagan*, 56 N. J. L. 279, 27 Atl. 1089; *First Nat. Bank v. Heflebower*, 58 Kan. 792, 51 Pac. 225.

To construe the Indianapolis city charter as giving the municipality this right of discretion as against the appellee would be placing upon the city charter act a construction which would make necessary a judicial declaration that, as against the appellee, the act is unconstitutional, because it impairs the obligation of a contract.

U. S. Const. art. 1, § 10; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Western Paving & Supply Co. v. Citizens' Street R. Co.* 128 Ind. 525, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88; *Detroit v. Detroit & H. Pl. Road Co.* 43 Mich. 140, 5 N. W. 275.

The governmental power to abolish grade crossings does not go to the extent of compelling an elevated track system for the full length and full width of appellee's railroad.

Fulton v. Short Route R. Transfer Co. 85 Ky. 640, 4 S. W. 332; *Lieberman v. Chicago & S. S. Rapid Transit R. Co.* 141 Ill. 140, 30 N. E. 544; *Eric R. Co. v. Stewart*, 170 N. Y. 172, 63 N. E. 118.

Jordan, J., delivered the opinion of the court:

The state of Indiana, on the relation of the city of Indianapolis, instituted and prosecuted this action in the lower court for a writ of mandamus, seeking thereby to coerce appellee, a corporation owning and controlling a series of railroad tracks in said city, to elevate these tracks at and between certain street crossings. An alternative writ of mandate was issued upon the petition filed. This writ contained all of the mate-

rial facts averred and set out in the petition. The writ, as issued, commanded the defendant to commence, without delay, the work of removing its railroad tracks where the same crossed the streets named, and in lieu thereof to construct elevated railroad tracks "in such a manner as not to interfere with public travel on any of the streets named, and in compliance with the provisions of the ordinance of the common council of the city of Indianapolis, passed on the 23d day of August, 1899." In response to the alternative writ the appellee, defendant below, appeared and demurred thereto for insufficiency of facts. The demurrer was sustained, and judgment was rendered against the relator. Error is assigned on the ruling of the court in sustaining this demurrer, and the question presented in this appeal for our decision is, Do the facts contained in the alternative writ entitle the relator to the specific right which it claims, or do they justify the command or order of the alternative writ? For the rule is well settled in mandamus proceedings that, on a demurrer to the alternative writ, the question presented or raised is not, as is the case in an ordinary action, whether the relator under the facts is entitled to some form of relief, but the question raised is as to whether he is entitled to the specific relief prayed for, or, in other words, can the specific order or command of the alternative writ under the facts therein averred be justified? *Vide* Merrill on Mandamus, §§ 255 and 256, and cases cited in support of the text. *Applegate v. State*, 158 Ind. 119, 63 N. E. 16; *State ex rel. Hart v. Commercial Ins. Co. (Ind.)* 64 N. E. 466, and cases cited.

The following are, in the main, the facts set out in the alternative writ: There is a terminal of some fourteen railroads within the city of Indianapolis, which is an incorporated city and contains a population of more than 100,000, and is acting under and controlled by the provisions of an act approved March 6, 1891, commonly known as the "Indianapolis charter." The defendant is a corporation organized and incorporated pursuant to the statutes governing the incorporation of union railway companies, and is now and has been for many years engaged in maintaining a union railway station in said city, and owning and controlling numerous railroad tracks in said station, extending east and west therefrom through a populous part of said city, across Meridian, Pennsylvania, Delaware, Alabama, New Jersey, and East streets on the east, and Capitol avenue, Senate avenue, and other streets on the west. That passing over said tracks, extending to the east of said Union station, are all the passenger engines and tenders, and all the passenger, baggage, express, and mail cars, run and operated in and through said city by the following lines of railway: (Here follow an enumeration and statement or description of nine divisions of railroads which run into and through the city of Indianapolis.) It is alleged that not less than 80 passenger trains, operated by the various companies

named, pass over the said tracks of defendant, which run east from said Union station every twenty-four hours, which trains run at a high rate of speed, and cross the streets named, and that during certain times named the intervals between the passing of such trains are very short. The time of arrival and departure of all of these several trains at and from the Union station is here set out. That passing over the tracks extending west from said station are all the passenger trains of the following lines of railroad: (a) The Chicago Division of the Big Four Railway Company, a thoroughfare extending from Indianapolis to Chicago, and connecting with the various other divisions of said road centering in Indianapolis. (b) The Peoria Division of said Big Four Railway, extending from Peoria, Illinois, and connecting at Indianapolis with the other divisions of that railroad in said city. (c) The St. Louis Division of said Big Four Railway, extending from Indianapolis to St. Louis. (d) The Terre Haute & Indianapolis (commonly called the Vandalia) Railroad, which connects Indianapolis and St. Louis. (e) The Indiana, Decatur, & Western Railroad, which runs from Indianapolis to Decatur, Illinois, having eastern and western connections at terminal points. (f) The Indianapolis & Vincennes Railroad, operated by and as a part of the Pennsylvania Railroad system, extending from Indianapolis to Vincennes, having connections with other points. That not less than 57 passenger trains, operated by the several companies named, arrive and depart from the west end of said station every twenty-four hours, many of them at short intervals, crossing Capitol avenue and Senate avenue at a high rate of speed. The tracks over which said trains are run extend in a general easterly and westerly direction through the central part of said city. That the population of said city when said tracks were first laid was not to exceed 20,000; that said population is now about 180,000; that the principal thoroughfares of said city connecting that part of the city south of the tracks with that part lying to the north thereof are the above-named streets, which are crossed by the tracks aforesaid; that the part of the city devoted to mercantile business, both wholesale and retail, is situated north of the tracks, while on the south side thereof there are large factories, and at least one third of the entire population of said city resides on that side. The streets so crossed by said tracks are constantly used by the people of said city in passing backwards and forwards between the different parts thereof, from factories to stores and from residences to places of business, such streets being the principal thoroughfares for public travel; that in the necessary and proper movement of the people of said city in the transaction of their daily business, in the attending of schools by children, and the attending of churches and other public places by all, large numbers of men, women, and children are each day and night required to travel upon said streets

where the same are crossed by defendant's tracks, and that no less than 40,000 people are compelled to and do pass daily on and over said tracks, such travel being by pedestrians and those driving in wagons and other vehicles. That when the trains aforesaid are running across such streets at the intervals above set out, some arriving and others departing, the engines emitting large volumes of smoke, the bells thereof ringing, the whistles thereon sounding, and all running at high speed, there is constant danger to the lives of all persons who are traveling in and upon any of such streets at such points of crossing. That within two years last past many inhabitants of said city have been killed at such crossings, and many more seriously injured by engines and cars running upon and against them while they were endeavoring to travel in said streets, as they had the right to do at the points aforesaid. That, by reason of the increased and increasing volume of railroad traffic, the necessity for more engines and cars and more constant use of said tracks is constantly increasing, while, by reason of the increase in the population of said city on both sides of said tracks, the necessity for more travel across such tracks is also constantly increasing, so that dangers to life and property by reason of such crossings are also increasing in corresponding proportion to such increase of railway traffic and population. That the continued existence of such tracks upon and over the streets named has become and is wholly inconsistent with the use of said streets for public travel, and said continued existence is a constant menace to the lives of all the people using the same at the points aforesaid. That it is necessary, in order to make such streets and highways at such crossings reasonably safe for the inhabitants of said city making proper use thereof, and for property being conveyed along the same, and to restore said streets so occupied by said tracks so that they may be safe and convenient for public travel, that the surface of said streets should not be occupied by such tracks, or any tracks used for the passage of locomotive engines and railroad cars propelled by steam, and that such railway tracks should be removed from the surface of such streets with all reasonable despatch. That the common council of said city, on August 23, 1899, recognizing the evils hereinbefore recited, attempted to remedy the same by the passage of an ordinance entitled "An Ordinance for the Restoration of Highways and Streets in the City of Indianapolis, Whose Surface is Occupied by Railroad Tracks, by the Removal of Such Tracks and for the Removal of Railroad Tracks from the Surface of Streets and Highways in Such City; Providing Penalties for Its Violation, and Fixing a Time when the Same shall Take Effect."—which ordinance, being properly approved, took effect and is now in force. That, by reason of the facts hereinbefore recited and stated, the city ordinance under its terms declares the railroad crossings in said city to be nuisances, and that the con-

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tinuation of such crossings at grade is entirely inconsistent with the use of such streets for travel by the public, and the ordinance, among other things, provides: That all railroads and railroad tracks and structures upon the surface of the streets and highways, within a designated territory in said city, called the first district, which district included all the streets and crossings described in the complaint and writ, should be removed therefrom on or before the 1st day of September, 1901, and should not thereafter be relaid. That every railroad track existing or being upon any public street or highway at grade, contrary to the provisions of said ordinance, is declared to be a nuisance, the same being a menace to life and property therein, and a serious interference with the comfort, safety, and convenience of the public. That, after the time therein limited for the removal of such tracks, the board of public works of said city shall be authorized and directed to cause the same to be removed and abated. That any corporation, person, or persons who should construct, operate, or maintain any railroad tracks upon the surface of streets, contrary to the provisions of such ordinance, should be liable to a penalty of \$200 per day. And said ordinance also provided that, subject to the limitations, conditions, reservations, and exceptions contained therein, "the consent of the common council is hereby given to all persons and corporations now owning or operating any railroad or railroad tracks upon the surface of any of the streets or highways, within the limits of said city, heretofore constructed upon or across the same, in pursuance of lawful authority, to construct, maintain, and operate elevated railroads in lieu thereof." That among the conditions imposed by said ordinance upon which such railroad companies might maintain elevated tracks in lieu of the tracks at grade, as at present, was the condition "that the work of constructing each of said elevated railroads within the first district shall be commenced not later than the 1st day of April, 1900, and completed not later than the 1st day of September, 1901," and the further condition "that each person or corporation desiring to construct any elevated railroad shall first submit plans and specifications therefor to the board of public works for its approval, and that the construction of such elevated railroads shall be upon plans and specifications approved by said board, and not otherwise."

Under the ordinance in question the railroad companies are authorized and required to construct elevated tracks and roadbeds, and it is provided that such roadbeds and tracks shall be upheld by iron and steel cross-girders, these to be supported by iron and steel posts. The girders are required to be fully 14 feet above the established grade of the streets, and the roadbeds and tracks are to be so elevated as not to interfere with the travel of the public upon the streets. The ordinance goes into detail as to the manner of constructing the elevated

tracks, and as to the rights of the companies to construct, maintain, and use telegraph, telephone, and signal service for their own exclusive use along and upon said elevated railroad. It further provides "that the persons or corporations constituting or owning any elevated railroads in pursuance hereof, as well as their lessees, successors, and assigns, shall forever indemnify and save harmless the city of Indianapolis from any and all damages, judgments, decrees, costs, and expenses for which it may be made liable, or which may be recovered against it by reason of its having consented to the construction, maintenance, or operation of such elevated railroad." This ordinance is set out and made a part of the petition and alternative writ. It is further alleged in said writ that after the 1st day of April, 1900, a written demand was made upon the defendant and all railroad companies running trains over the tracks in question, requesting and directing them to proceed with the work of constructing elevated tracks in lieu of the tracks now maintained by them and each of them, but that each and all of said companies have failed and refused to comply with said request and demand; that defendant and all said companies have failed to submit to the board of public works of said city any plan or specifications for the construction of such elevated tracks, but that, on the contrary, the defendant and all of the companies, owning or operating through their duly authorized agents and officers, have given out that it is their purpose to ignore the provisions of said ordinance, and their determination to continue to maintain the said tracks at grade, and to operate over and on the same the trains of cars hereinbefore described. That if said work of elevating the tracks in question, and constructing an elevated railroad in accordance with the provisions of said ordinance, should be commenced at the date of the return of this proceeding, it would have to be prosecuted with extraordinary diligence to complete the same by the 1st of September, 1901. That it is the purpose of the defendant to refuse to take any steps looking to the elevation of the tracks until after September 1, 1901, and then to continue such refusal and contest the validity of said ordinance. That such delay will result in a continued loss of life, and the indefinite continuation of the perils and dangers hereinbefore recited. That the construction of elevated railroads or tracks by said defendant and by said other corporations is the proper and only feasible remedy for the evils and dangers complained of, which will give to the people the free, safe, and unobstructed use of their public streets and thoroughfares for travel, without in any wise interfering with the running of the trains of the said railroad companies, which are necessarily used in the transportation of passengers throughout the country.

An examination of the facts set out in the petition and alternative writ discloses that the relator does not base the right which it seeks to enforce against the appellee upon 60 L. R. A.

the 5th clause of § 5153, Burns's Rev. Stat., of the general law relating to the organization and control of railroad companies, but founds the right which it claims and asserts upon the ordinance adopted by its common council, wherein the crossings as they are maintained are declared to be nuisances. The relator, under the circumstances, then, in maintaining the right which it claims, must stand or fall upon the ordinance which it advances in support of its claim. The question, therefore, with which we have to deal is one relating to the power of the city under the law to adopt the ordinance involved, and thereunder compel appellee to remove the surface tracks of its railroads, and substitute instead thereof a system or series of elevated tracks in the prescribed district over which it must operate or run its cars. Counsel for appellant argue that the ordinance in question is sustained by the police power of the state, which it is said may be exercised directly by the latter, or that it may be delegated by it to municipal corporations. It may be conceded, *arguendo*, that the authority of the relator herein, if it is invested with such power to require appellee to abolish its grade crossings and elevate the tracks of its roads above the surface of the public streets in order to protect the lives and property of those using the same, rests upon the police power of the state, which the latter through its legislative department may delegate to or confer upon municipal corporations. That this power extends to and may be exercised to protect the lives and property of the people, and also to promote their health and morals, is universally recognized. That the right to exercise this power cannot be bargained or bartered away, either by the state or by any of its governmental subdivisions upon which it has been conferred, is equally well settled. In *State v. Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469, this court, in speaking in regard to the extent of the police power, said: "The police power of a state is recognized by the courts to be one of wide sweep. It is exercised by the state in order to promote the health, safety, comfort, morals, and welfare of the public. The right to exercise this power is said to be inherent in the people in every free government. It is not a grant, derived from or under any written constitution. It is not, however, without limitation, and it cannot be invoked so as to invade the fundamental rights of a citizen. As a general proposition, it may be asserted that it is the province of the legislature to decide when the exigency exists for the exercise of this power, but as to what are the subjects which come within it is evidently a judicial question."

These well-settled propositions, however, do not solve the question which confronts us in this appeal, for the inquiry still remains, Has the legislature delegated to or conferred upon the relator herein any such power as will authorize that which it seeks to enforce under the ordinance in controversy? Counsel for appellant refer us to § 23 (Burns's Rev. Stat. § 3794) of the act

commonly known as the "Charter of the City of Indianapolis." It is claimed that under the several provisions of that section ample power to deal with the problem presented has been conferred upon relator's common council. This section provides that the common council shall have power to enact ordinances for the following purposes:

" . . . To declare what shall constitute a nuisance, to prevent the same, require its abatement, authorize the removal of the same by the proper officers, and provide for the punishment of the person or persons causing, continuing, or suffering the same to exist, and to assess the expenses of its removal against such person or persons, and provide for collecting such expenses either by placing the same on the tax duplicate or by suit. . . . To secure the safety of citizens and others, in the running of trains, in or through such city; to require persons or corporations, owning or operating railroads, to fence their respective railroads, to construct cattle guards, street-crossings, and viaducts, and public roads, and to keep the same in repair and safe condition for persons on foot, in vehicles, or otherwise; to keep flagmen at railroad crossings, and provide protection against injury to persons or property from the operation of said railroads. To authorize and require railroad companies to change the location, grade, and crossings of their respective railroads; to compel them to raise or lower their railroad tracks to conform to any grade which may be established by such ordinance; to compel persons or companies owning or operating railroads to construct bridges, viaducts, or tunnels, and approaches thereto, across their respective railroads or rights of way, at street or alley crossings; to compel railroad companies to make and keep open and in repair ditches, drains, sewers, and culverts, along and under their respective tracks. To compel railroad corporations, or persons owning or operating railroads, to keep gutters and street crossings clean along their right of way. To prohibit the laying of any railroad track across any street or alley or public place without permission first obtained therefor from the department of public works, and to provide for the taking up and removing any track so laid, without notice, and charge the expense thereof against the offending person or corporation. To require any person or company, owning or operating any railroad, to take up and change the location of any railroad track or switch heretofore or hereafter laid within the limits of said city.

It cannot in reason be asserted, from the mere fact that the relator is invested with some of the police power of the state in regard to the running or operating of railroads within its corporate limits, that it necessarily follows, under the circumstances, that it has unlimited power to deal alike with all of appellee's railroad crossings and confine it to the particular or specific method or means of elevated tracks to be constructed by it at all of its crossings, regardless of the existing conditions and cir-

cumstances applicable thereto, in order to afford safety or protection to the public.

In regard to the power of the state to confer or delegate the extraordinary authority which the relator under its charter claims to have, we need not discuss nor decide, for that is not the question herein involved.

Under the provisions of § 23, *supra*, by which the relator is empowered to require railroad companies to change the grade and crossings of their respective roads, and to raise or lower their tracks in order to conform to any grade which may be established by ordinance, certainly the broad and extraordinary power of abolishing grade crossings within the city, and compelling the companies to construct and maintain a system of elevated tracks, as exacted by the ordinance in issue, was not intended or contemplated by the legislature. It appears that, in order to afford protection to the public using the streets of the city, § 23 points out or enumerates some of the means which the city may compel railroad companies to employ for that purpose, among which is mentioned to keep flagmen at their crossings, and to construct bridges, viaducts, or tunnels at street or alley crossings, but there is nothing in the section to indicate that it was the legislative intent to invest relator's common council with the extraordinary power to impose upon railroad companies the duty or obligation of removing their railroad tracks from the surface of the streets, where they were legally authorized to be located, and construct in lieu thereof a series of elevated tracks as contemplated by the ordinance involved over which they must run or operate their cars. Under the plain language of this section there is no room to work out or hold by judicial construction that the legislature intended to confer upon the relator the power, either expressly or impliedly, to compel appellee to employ the particular and specific method, regardless of all others, of elevating its railroad tracks as prescribed by the ordinance. If we entertained a reasonable doubt, which we do not, of relator's being invested with such power, we would be required under such circumstances to solve the doubt against it and deny the existence of the power. *Pittsburgh, C. O. & St. L. R. Co. v. Crown Point*, 146 Ind. 421, 422, 35 L. R. A. 684, 45 N. E. 587; *Bogue v. Bennett*, 156 Ind. 478, 480, 481, 60 N. E. 143; *Dill. Mun. Corp.* 4th ed. § 89; *Crawfordsville v. Braden*, 130 Ind. 149, 14 L. R. A. 268, 28 N. E. 849; *Adams v. Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114.

The general rule is well affirmed that municipal corporations derive their powers from the legislature, and, where a power to such corporations is expressly granted or necessarily implied or inferred, it should not be defeated or denied by a stringent judicial construction, but, nevertheless, the proposition that they can do no act for which authority is not expressly granted or may not be reasonably inferred or implied is well settled by the authorities. *Kyle v.*

Malin, 8 Ind. 34; *Smith v. Madison*, 7 Ind. 86; Dill. Mun. Corp. 4th ed. § 90.

The power of relator may be conceded, *arguendo*, either under its charter law or under Burns's Rev. Stat. clause 5 of § 5153, *supra*, where any particular railroad crossing over its public streets by reason of the peculiar or particular circumstances or conditions thereof can only be made safe for public travel thereover by elevating the tracks of the road, to compel the railroad company to discharge such duty or obligation. But certainly such authority under the existing laws cannot be extended by construction so as to warrant the relator in coercing appellee to construct and maintain a system of elevated tracks for all of its various roads running into and through the city of Indianapolis. The ultimatum presented to appellee by the ordinance in question was to remove the surface tracks of its roads and construct and maintain elevated tracks over all of the crossings in the prescribed district, without regard to the conditions or circumstances of any particular crossing. The same means, without distinction, were to be provided for all crossings, irrespective of circumstances or conditions. This court in *Chicago, I. & L. R. Co. v. State*, 158 Ind. 189, 63 N. E. 224, quoted with approval § 1107 of Elliott on Railroads, where the author says: "Each particular crossing presents different conditions, but the general rule . . . is that the company must erect whatever structures are reasonably necessary to the safety and convenience of the traveler using the crossing." The fact that relator's common council under the ordinance in controversy has by its own fiat declared all of the appellee's railroad crossings to be nuisances does not justify the demand that, by reason of such declaration, appellee must remove its surface tracks and construct, instead thereof, a series of elevated ones. The general authority as granted by its charter to declare what shall constitute a nuisance does not empower it to declare anything a nuisance *per se* which in fact was not recognized as such by the common law. Its common council, under such general grant of power, may, within recognized limits, by ordinance define or declare what things or classes of things may, and under what circumstances or conditions they may become or shall be deemed to, constitute a nuisance, and may prescribe, within the authorized limit, what the penalty shall be upon conviction of the offending party. Certain things by reason of their nature or character are considered by the law a nuisance *per se*, while on the other hand there are other things which may or may not be a nuisance, their character as such being a question of fact depending on the particular circumstances of the case. *Evansville v. Miller*, 146 Ind. 613, 38 L. R. A. 161, 45 N. E. 1054; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 13 L. R. A. 481, 28 N. E. 434; 40 L. R. A.

Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25; *St. Louis v. Edward Heitzberg Packing & Provision Co.* 141 Mo. 375, 39 L. R. A. 551, 42 S. W. 954; Dill. Mun. Corp. 4th ed. § 374.

Judge Dillon, in the section cited, in considering the powers of municipal corporations to declare and abate nuisances, properly says: "Such power conferred in general terms cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which in its nature, situation, or use is not such."

The crossings of appellee's railroads over the public streets of the city were authorized by law, and, if they are so maintained as to become nuisances, that is a question of fact to be judicially determined upon a case properly presented. Counsel for appellant assert that the facts set out in the petition and alternative writ disclose such a condition of affairs as a court cannot afford to tolerate. But it must be remembered that this action is not one to abate a nuisance, but is a suit wherein the extraordinary remedy of mandate is sought, and, in testing the sufficiency of the pleading, consideration must be had only for facts well pleaded, and not for legal conclusions. We have previously shown that in cases of the character of the one at bar the only province of a court is to decide whether, upon the facts alleged in the alternative writ, the relator is entitled to be awarded the specific relief or right demanded. The functions of a court are not of a legislative character, and while the state of affairs, as counsel claim, may possibly be of a very grievous or intolerable nature, nevertheless it is not in our power to declare a law under which the relator may be enabled to secure the relief which it seeks by way of the particular method which it advances and demands for the object or purpose in view. If it has unsuccessfully exercised all of the power in the premises with which it has been invested by the legislature, and believes that the only remedy for the evil complained of is to compel appellee to construct and maintain an elevated railroad within the prescribed territory over which it must run or operate its cars, then it would appear that its appeal should not be to the courts, but to the legislature for a further or additional grant of power under which the vast undertaking upon the part of the appellee as contemplated by the ordinance involved could be enforced.

We have given this case a patient consideration, and have examined all of the authorities cited by appellant, and as a final conclusion we are constrained to adjudge that the relator had not, under the existing laws, the power to adopt the ordinance in question, and therefore is not entitled to the specific relief or right demanded. The demurrer to the alternative writ of *mandamus* was properly sustained.

Judgment affirmed.

IOWA SUPREME COURT.

Augusta T. VORSE

v.

NEW JERSEY PLATE-GLASS INSURANCE COMPANY, *Appt.*

(.....Iowa.....)

1. The breaking of a plate-glass window by the explosion of gas generated by the use of gasoline to clean clothes is not caused by the blowing up of the building, within the meaning of an insurance policy thereon which exempts the insurer from loss caused by the blowing up of buildings.
2. Fire is not the cause of the breaking of a window, within the meaning of an insurance policy exempting the insurer from liability for losses which happened by or in consequence of any fire, where the loss was caused by the explosion of gas ignited by a match or light.

(February 10, 1903.)

APPPEAL by defendant from a judgment of the District Court for Polk County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy insuring against loss or damage to plate glass. *Affirmed.*

The facts are stated in the opinion.

Messrs. McVey, McVey, & Graham, for appellant:

The principle that governs the case at bar is laid down by the supreme court of Massachusetts in *Scripture v. Lowell Mut. F. Ins. Co.* 10 Cush. 366, 57 Am. Dec. 111, and is that where gunpowder or other inflammable or explosive or expansive substance or material is ignited by the flame of a lamp, match, or any agent, the moving factor of which is fire, and combustion and explosion occur simultaneously, causing the loss, the proximate cause of the loss is fire, and is covered by a fire policy, unless loss by such explosion is especially excepted by the contract.

United Life F. & M. Ins. Co. v. Foote, 22 Ohio St. 340, 10 Am. Rep. 735; *Heuer v. North Western National Ins. Co.* 144 Ill. 393, 19 L. R. A. 594, 33 N. E. 411; *American Steam Boiler Ins. Co. v. Chicago Sugar Ref. Co.* 21 L. R. A. 572, 6 C. C. A. 336, 9 U. S. App. 186, 57 Fed. 302; *Renshaw v. Missouri State Mut. F. & M. Ins. Co.* 103 Mo. 595, 15 S. W. 945; *Waters v. Merchants' Louisville Ins. Co.* 11 Pet. 213, 9 L. ed. 69; *City F. Ins. Co. v. Oorties*, 21 Wend. 367; *Briggs v. North American & M. Ins. Co.* 53 N. Y. 446; *St. John v. American Mut. F. & M. Ins. Co.* 11 N. Y. 516; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, 16 Am. Rep. 557.

NOTE.—For explosion of gas as fire, see, in this series, *Heuer v. Northwestern Nat. Ins. Co.* (Ill.) 19 L. R. A. 594, with note as to *Liability of insurer for loss caused by explosion.*

For explosion of starch dust as fire, see *American Steam Boiler Ins. Co. v. Chicago Sugar Ref. Co.* (C. C. App. 7th C.) 21 L. R. A. 572.

60 L. R. A.

If a combustible substance in the process of combustion produces explosion, it is not easy to perceive why, of the two diverse, but concurrent, results of the combustion, the one should be ascribed to fire any less than the other.

Scripture v. Lowell Mut. F. Ins. Co. 10 Cush. 366, 57 Am. Dec. 111; *American Steam Boiler Ins. Co. v. Chicago Sugar Ref. Co.* 57 Fed. 302; *Renshaw v. Missouri State Mut. F. & M. Ins. Co.* 103 Mo. 595, 15 S. W. 945.

The combustion of gas is a fire, under a fire policy which does not except loss by explosion.

United Life F. & M. Ins. Co. v. Foote, 22 Ohio St. 348, 10 Am. Rep. 735; *American Steam Boiler Ins. Co. v. Chicago Sugar Ref. Co.* 21 L. R. A. 572, 6 C. C. A. 336, 9 U. S. App. 186, 57 Fed. 302; *Renshaw v. Missouri State Mut. F. & M. Ins. Co.* 103 Mo. 595, 15 S. W. 945.

A loss caused by gasoline explosion ignited by a flame is a loss by or in consequence of a fire, and a fire insurance company would be liable, unless the damage is excepted.

Mitchell v. Potomac Ins. Co. 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. Rep. 42.

Messrs. Edward A. Davis and C. C. & C. L. Nourse, for appellee:

That construction of the language of the policy should be adopted which is most favorable to the assured.

Collins v. Merchants' & B. Mut. Ins. Co. 95 Iowa, 540, 64 N. W. 602; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473, 66 N. W. 157; *Road v. State Ins. Co.* 103 Iowa, 307, 72 N. W. 665; *Funk v. Iowa Business Men's Mut. F. Asso.* 103 Iowa, 660, 72 N. W. 774.

This case appears to be a pioneer in "plate-glass insurance" litigation.

The words of a policy of insurance are to be considered by the court in the popular sense in which they are used and understood by ordinary people, and not in the sense they would be used. A lighted match coming in contact with gasoline vapor, and "causing an explosion, is not to be considered as 'fire' within the meaning of the policy."

Mitchell v. Potomac Ins. Co. 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. Rep. 42; *Boatman's F. & M. Ins. Co. v. Parker*, 23 Ohio St. 85, 13 Am. Rep. 228.

Deemer, J., delivered the opinion of the court:

The action is on a policy insuring plaintiff against loss or damage by breakage, through accident, of certain plate glass in a building owned by her in the city of Des Moines. The policy contained these, among other, stipulations: "This company is not liable to make good any losses or damage which may happen by or in consequence of any fire. . . . and is not liable for any losses or damage to glass caused by the blowing up of buildings." During the life of the

policy the insured property was broken and destroyed, and the cause thereof, according to the agreed statement of facts on which the case was tried, was as follows: "Third. That the cause of said breakage and destruction in said west storeroom was the explosion of gas generating from gasoline being used in the rear of said room for the purpose of cleaning clothes, which gas was ignited by a match or light in the room, and said explosion was not caused wilfully or by intention on the part of this plaintiff or her tenant; that the said breakage and destruction of the glass and explosion in said west room occurred prior to the fire in said building. Fourth. That on the same day other plate glass in the said building was broken and destroyed as set out in count 2 of plaintiff's petition, as amended and substituted; that said glass was broken by firemen intentionally, and in order to gain access to the building for the purpose of extinguishing a fire which was then burning in the said storeroom; that the doors were fastened, and it was necessary to break in the front of the building for the purpose of gaining admission to put out the fire." During the trial the plaintiff withdrew the second count of her petition; hence we have nothing to consider but the statements above made as to how the damage occurred.

Defendant contends that the damage was caused by the "blowing up" of the building. These words should be given their ordinary signification, in arriving at the intent of the parties; and we think, when defined in this light, and applied to the agreed facts which we have quoted, that it does not sufficiently appear that the building was blown up. Ordinarily the term means to scatter or destroy by an explosion of some kind. When we speak of a building as having been blown up, we ordinarily intend to convey the notion that its constituent parts have been scattered, and the integrity of the structure destroyed. This is evidently what is meant by the terms employed in the policy now before us. In any event, the policy, if susceptible of two constructions, should be given that one which is most favorable to the insured. *Collins v. Merchants' & B. Mut. Ins. Co.* 95 Iowa, 540, 64 N. W. 602; *Goodwin v. Provident Sav. Life Assur. Asso.* 97 Iowa, 226, 32 L. R. A. 473, 66 N. W. 157. With this rule in mind, we have no difficulty in arriving at the conclusion that the breakage was not due to the blowing up of the building. See, as supporting these conclusions, *Breuner v. Liverpool & L. & G. Ins. Co.* 51 Cal. 101, 21 Am. Rep. 703.

The next contention made by defendant is much more difficult of satisfactory solution. It is argued that the damage to the glass happened by, or was in consequence of, fire. The real point made is that the explosion was due to, or was in consequence of, fire, if not fire itself. The term "explosion" has no fixed and definite meaning either in ordinary speech or in law. It may be described, in a general way, as sudden and rapid combustion, causing violent expansion of the air, and accompanied by a report. It

may and does vary in degrees of intensity and in the vehemence of the report, and it is not always due to the presence of fire. Indeed, it may result from decomposition or chemical action. In the case before us, it was undoubtedly caused by fire, or, as stated in the agreed statement of facts, "by a match or light in the room," which transformed the gasoline gas into heat, which was propagated from one particle of air to another, and finally against the glass, the shock of which caused the breakage complained of. The stipulation says that the breakage and explosion occurred prior to the fire in the building, which, we assume, means that the glass was broken before any part of the structure, or of the goods stored therein, were ignited, for it is clear that there must have been a match or light in the room, which caused the explosion. Did the breakage, then, happen by, or was it in consequence of, any fire? The question is a nice one, and by no means free from doubt; but we are inclined to the view that the loss here did not happen by, nor was in consequence of, any fire, as those terms are used in the policy in suit. Of course, but for the lighted match, or other light in the room, the explosion would not have happened, and the explosion itself was due to rapid combustion. But in ordinary parlance the damage was due to the explosion, or to the concussion produced thereby, or, as said in the agreed statement of facts, the explosion and breakage occurred prior to the fire in the building. The lighted match, or other light in the building, was not contemplated by the parties as the fire which was excepted by the terms of the policy. It was not a destructive fire, against the immediate effects of which the condition in the policy was intended as a protection. It was, it is true, the possible means of putting the destructive force in motion, but was not the excepted peril. Had there been no fire after the explosion, it seems to us it could not fairly be claimed that the damage done the glass was due to, or in consequence of, any fire. The immediate cause of the breakage was concussion produced by the ignition of gas, it is true; but that such an effect was due to or in consequence of fire, as that term is ordinarily used, or as the parties intended it in this case, is hardly supposable. In *Wood, Ins. vol. 1*, 2d ed. p. 245, it is said: "Where, however, the explosion is caused by fire, the damage must be traceable directly to the fire, as the proximate cause, and not merely as the result of the explosion. The fire must be shown to be the *causa proxima*, and not the *causa remota*. If the injury is entirely due to concussion, the fact that it was caused by fire does not make the fire the proximate cause, but the cause of the cause; and consequently the *causa remota*, instead of the *causa proxima*. 'It were infinite for the law,' says Lord Bacon, 'to consider the causes of the causes, and their impulsion one of another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.' 'If that were not so,' said Byles, J., 'and a ship was in the neigh-

borhood of *Ætna* or *Vesuvius*, and was violently shaken by an eruption, that would be damage by fire; or if a gun were fired off, loaded with small shot, among crockery, that would be damage by fire; or it might be said that, if the heat of the sun was too great, that would be damage by fire." Policies of insurance should not have a technical construction for the purpose of defeating the insured. He has nothing to do with the wording of the policy, and must accept it as tendered. Hence the rule of construction hitherto quoted. Indeed, we think language such as that on which defendant relies should be given its ordinary and common signification, and not its scientific and technical meaning. The insured went to the company for a policy of insurance on the plate glass in her building, and received a policy providing indemnity for breakage not caused by, nor in consequence of, any fire. She had the right to assume that the policy covered damage by an explosion, such as the one in question, and was not called upon to go to some scientist for a technical definition of fire. After all, the question is, What would an ordinary man understand from the use of the term? Would such a person, having no technical information on the subject, understand that a gasoline explosion, caused by a lighted match, was a fire, in the absence of proof that something aside from the gas was ignited? We think not. At any rate, the trial judge was authorized to find the negative of this proposition. We cannot too strongly emphasize the thought that the match or other light referred to in the agreed statement of facts was not a fire, within the meaning of the condition of the policy now under consideration. See *United Life F. & M. Ins. Co. v. Foote*, 22 Ohio St. 340, 10 Am. Rep. 735; *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403; *Briggs v. North American & M. Ins. Co.* 53 N. Y. 446. If, then, the lighted match, or other fire which caused the explosion, was not a fire, within the condition of the policy, and there was no ignition of the building, or of the goods stored therein, which caused the breakage, but all damage was done before the fire was started, as stated in the agreed statement of facts, then it is clear that plaintiff had a right to recover, and that the district court was correct in its holding. The parties themselves have distinguished the explosion from the fire in their agreed statements of facts, from which we have quoted. Giving the language used in the policy its ordinary signification, and applying it to the agreed statement of facts, we think the damage did not happen by, nor in consequence of, any fire. See, as further supporting our conclusions, *Everett v. London Assurance*, 19 C. B. N. S. 126; *Mitchell v. Potomac Ins. Co.* 183 U. S. 42, 46 L. ed. 74, 22 Sup. Ct. Rep. 42; *Kenniston v. Merrimack County Mut. Ins. Co.* 14 N. H. 341, 40 Am. Dec. 193; *Dous v. Merchants' Ins. Co.* 127 Mass. 346; *Millaudon v. New Orleans Ins. Co.* 4 La. Ann. 15, 50 Am. Dec. 550; *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 79, 40 Am. Rep. 403; *Louisville Underwriters v. Durland*, 123 60 L. R. A.

Ind. 544, 7 L. R. A. 399, 24 N. E. 221; *Boatman's F. & M. Ins. Co. v. Parker*, 23 Ohio St. 85, 13 Am. Rep. 228; *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, 16 Am. Rep. 557; *Caballero v. Home Mut. Ins. Co.* 15 La. Ann. 217.

We must take notice, it is said in argument, of the fact that the condition in the policy in suit exempting the company from liability for fire was for the purpose of avoiding double insurance, and that, if the property was destroyed by fire, it was covered by the fire policy on the building, of which the plate glass was a part. Conceding the rule, the conclusion by no means follows. If we are to consider these matters, we are also justified in assuming that the fire policy, if there was one, on the property, contained the usual stipulation exempting the company from liability for losses occasioned by explosions. It is well known that policies of insurance usually contain such exceptions. See standard forms in the states of Michigan, Minnesota, New Jersey, North Dakota, Pennsylvania, Wisconsin, Massachusetts, and New Hampshire, as set forth in the appendix to Clement, *Fire Insurance Digest*; also at page 8 of table of contents. With such an exception in a fire policy, it is manifest that it would not cover such a loss as happened in this case.

Keeping in mind the fact that the language of a policy of insurance is to be given its ordinary and popular signification, rather than its technical meaning, and that, when capable of two constructions, it is to be given that which is most favorable to the insured, we reach the satisfactory conclusion that, under the agreed statement of facts in this case, the defendant is liable for the breakage.

The judgment is therefore affirmed.

John C. DAILY, by Next Friend,
v.

Sarah T. MINNICK et al., Appts.

(.....Iowa.....)

1. Naming a child for grantor is sufficient performance of consideration to take an oral agreement to convey land to him in consideration thereof out of the statute of frauds, where payment of the purchase money, or part thereof, is allowed to do so.
2. An infant named for the promisor is in such privity to his father as to be entitled to enforce a promise made to the latter to convey land to the child in consideration of such naming.
3. The purchase by promisor of a tract of land, and his declaration that it is the land he intends to convey in fulfillment of his promise, are sufficient to render certain his promise to convey to an infant a certain quantity of land in case he is named for him.
4. The naming of a child for promisor in accordance with his previous request is a sufficient consideration for a subsequent

NOTE.—For moral obligation as a consideration for a promise, see *Trimble v. Rudy* (Ky.) 53 L. R. A. 353, and note.

promise to convey to the child a particular tract of land because of such act.

5. A consideration previously received may constitute a sufficient performance of an oral promise to convey land to take it out of the statute of frauds.

(*McClain, J., dissents.*)

(October 15, 1902.)

APPEAL by defendants from a decree of the District Court for Marion County in favor of plaintiff in an action to quiet title to certain real estate. *Affirmed.*

Statement by Deemer, J.:

Action to quiet title. Plaintiff, who is a minor, suing by his father, James C. Daily, as his next friend, brings this action to quiet title to 40 acres of land, against the defendants, who are the heirs at law of John Cochrane, deceased, who during his lifetime was the owner of the land. The defendants deny plaintiff's title; and C. A. Minnick, the husband of one of the heirs of Cochrane, who was also made a defendant, by cross petition asks to have title to an undivided interest in the property quieted in him, claiming to be the owner thereof by conveyances from the several heirs. The trial court quieted title in the plaintiff, and defendants appeal.

Messrs. Kinkhead, Mentzer, & Granger, for appellants:

The burden of proof is upon plaintiff.

Williamson v. Williamson, 4 Iowa, 281; *McPherson v. Berry*, 92 Iowa, 64, 60 N. W. 241; *Lich v. Lich*, 81 Iowa, 84, 46 N. W. 763.

Equity, as well as law, contemplates that all contracts relating to real estate shall be evidenced by some writing signed by the party to be charged; and, when it is sought to bring a case within any of the exceptions allowed, to avoid the operation of the statute, the court should never be left to conjectures, or upon proofs loose and indeterminate in their character.

Story, Eq. Jur. § 764; Noel v. Noel, 1 Iowa, 423; *Shindler v. Houston*, 1 N. Y. 261, 49 Am. Dec. 316; *Alabama Mineral Land Co. v. Jackson*, 121 Ala. 172, 25 So. 709; *Nightingale v. Barney*, 4 G. Greene, 106; *Walker v. Irwin*, 94 Iowa, 448, 62 N. W. 785; *Beach, Contr. § 161.*

In order to take this contract out of the statute by payment of the purchase money, in whole or in part, it was necessary that some writing evidencing the payment of said obligation, and signed by plaintiff, should have been delivered to Cochrane. In the absence of such written evidence the contract was *nudum pactum*.

Gorman v. Brossard, 120 Mich. 611, 79 N. W. 903; *Brown v. Wade*, 42 Iowa, 647; *Brabin v. Hyde*, 32 N. Y. 519.

The consideration of surrendering to Cochrane the right to name said child could not have passed in reliance upon Cochrane's promise to convey this particular 40, because it is admitted that at that time he did not agree to convey the 40 in controversy.

The question of consideration wholly fails, 60 L. R. A.

and, unless plaintiff has established the fact by clear and unequivocal evidence that he has taken and held exclusive possession of said land and made permanent improvements thereon upon the faith of such oral contract, this court cannot aid him by decreeing specific performance.

Moore v. Pierson, 6 Iowa, 297, 71 Am. Dec. 409; *Benedict v. Bird*, 103 Iowa, 616, 72 N. W. 768.

The mere continuance in possession by a tenant is not sufficient taking and holding possession to take a verbal contract out of the statute of frauds.

Mahana v. Blunt, 20 Iowa, 142; *Lake Erie & W. R. Co. v. Michigan C. R. Co.* 86 Fed. 840; *Marsh v. Rouse*, 44 N. Y. 647; *Gorman v. Brossard*, 120 Mich. 611, 79 N. W. 903.

Messrs. Hays & Amos, for appellee:

The surrender of the right to name the plaintiff furnished a sufficient consideration for the promise to convey real estate.

Wolford v. Powers, 85 Ind. 294, 44 Am. Rep. 16; *Eaton v. Libbey*, 165 Mass. 218, 42 N. E. 1127; *Parks v. Francis*, 50 Vt. 626, 28 Am. Rep. 517; *Harlan v. Harlan*, 102 Iowa, 701, 72 N. W. 286; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101.

The consideration being paid, the case is taken out of the operation of the statute of frauds.

Devin v. Himer, 29 Iowa, 297; *Stem v. Nysonger*, 69 Iowa, 512, 29 N. W. 433.

Though the contract may have been so indefinite as to the land as to be incapable of enforcement at the time of the payment of the consideration, still, if it was afterwards, by the acts of the parties, or performance, made certain and definite, specific performance will lie. And it is sufficient if the contract is thus made certain and definite at any time before the commencement of the action.

Ottumwa, C. F. & St. P. R. Co. v. McWilliams, 71 Iowa, 164, 32 N. W. 315; *Collins v. Vandever*, 1 Iowa, 573; *Stem v. Nysonger*, 69 Iowa, 512, 29 N. W. 433.

There is no such indefiniteness or uncertainty as to parties as will render void the contract.

Gaines v. Kendall, 176 Ill. 228, 52 N. E. 141.

The naming of the child had been done at the request of the promisor, Cochrane; he received the benefit, and it is he of whom payment is demanded. In such case the past consideration is sufficient for a promise to pay for the same.

Lampleigh v. Brathwait, Hob. 105, 1 Smith, Lead Cas. 8th ed. 267; *Chadwick v. Know*, 31 N. H. 226, 64 Am. Dec. 329; *Bartholomew v. Jackson*, 20 Johns. 28, 11 Am. Dec. 237; *Carson v. Clark*, 1 Mo. 159; *Mills v. Wyman*, 3 Pick. 207; *Shepherd v. Young*, 8 Gray, 152, 69 Am. Dec. 242.

A purchaser by quitclaim deed is not entitled to be considered a good-faith purchaser.

Steele v. Sioux Valley Bank, 79 Iowa, 339, 7 L. R. A. 524, 44 N. W. 564; *Smith v. Dunton*, 42 Iowa, 48; *Wightman v. Spofford*, 56 Iowa, 145, 8 N. W. 680; *Kaiser v. Waggoner*,

59 Iowa, 40, 12 N. W. 754; *Laraway v. Larue*, 63 Iowa, 407, 19 N. W. 242; *Rush v. Mitchell*, 71 Iowa, 333, 32 N. W. 367; 2 Washb. Real Prop. p. 606.

Whether the conveyance be a quitclaim or not, is dependent upon the intent of the parties to it, as that intent appears from the language of the instrument itself. If the deed purports, and is intended, to convey only the right, title, and interest in the land, as distinguished from the land itself, it comes within the strict sense of a quitclaim deed, and will not sustain the defense of an innocent purchaser. If it appears that it was the intention to convey the land itself, then it is not such quitclaim deed, although it may possess characteristics peculiar to such deeds.

Garrett v. Christopher, 74 Tex. 453, 12 S. W. 67; *Richardson v. Levi*, 67 Tex. 366, 3 S. W. 444; *Tram Lumber Co. v. Hancock*, 70 Tex. 314, 7 S. W. 724; *Young v. Clippinger*, 14 Kan. 148; *Cummings v. Dearborn*, 56 Vt. 441; *Veit v. Dill*, 78 Hun, 171, 28 N. Y. Supp. 937.

Deemer, J., delivered the opinion of the court:

Plaintiff's claim of title to the land is based upon an alleged agreement between his parents and John Cochrane, during his lifetime, whereby he, the said Cochrane, orally promised that, if they would name the plaintiff (then a small infant) after him (Cochrane), he would give the child 40 acres of land. No particular 40 acres was named, nor did Cochrane own the land now claimed by the plaintiff at the time the promise was made; but it is contended that he subsequently purchased the subject-matter of the litigation for the plaintiff, taking title thereto, however, in his own name, and that ever thereafter he, by acts and declarations, recognized the tract as the property of plaintiff, and gave the possession thereof to the father to hold for him (plaintiff). Bearing on this last proposition, it appears from the evidence that James C. Daily, the father of plaintiff, had lived with Cochrane, as a member of his family, from childhood until his marriage, and that for some time thereafter he and his wife continued to reside with Cochrane, who in the meantime had become a widower. He was treated by Cochrane as a son, and after his marriage had largely the control of Cochrane's business affairs; acting with him in carrying on the farm on which they lived, in making contracts for him, and otherwise acting as his agent and assistant. James C. Daily suggested to Cochrane the purchase of the 40 acres in question as a suitable tract to be used in performance of the original agreement to give plaintiff 40 acres of land for his name, but the purchase was made by Cochrane in his own way and with his own money, and the title was taken in his name. Subsequently he discussed with James C. Daily the management of this 40-acre tract, permitted him to cut timber therefrom and to raise crops thereon, and from time to time declared to others that he intended the tract 60 L. R. A.

for the plaintiff; saying that he would deed it to him when the latter was old enough, but would not give it to plaintiff's father, for fear he would squander it. Daily not only cut timber and raised crops upon the land, but he also opened a coal bank thereon, cleared it, and dug a well thereon. Cochrane built a house upon the land with Daily's consent, which was occupied for a time, at least, by Cochrane's brother-in-law. The declarations made by Cochrane generally related, it is true, to an intent to give the land to plaintiff in the future, but it is clear to our minds that they amounted to a recognition of the contract, and a designation of the land intended to be conveyed in fulfillment thereof. It is suggested that all of these matters may have had reference to some other arrangement between Cochrane and plaintiff's father, but this is purely speculative, for no other arrangements or agreements are shown.

The promise to convey the land was oral, and is clearly within the statute of frauds, unless it be shown that there has been part performance, or payment of the purchase price, or a part thereof, as provided in §§ 4625 and 4626 of the Code. That the privilege of naming a child is a valid and legal consideration for a promise is well established by all the authorities. See *Eaton v. Libbey*, 165 Mass. 218, 42 N. E. 1127; *Wolford v. Powers*, 85 Ind. 297, 44 Am. Rep. 16; *Parks v. Francis*, 50 Vt. 626, 28 Am. Rep. 517; *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101. In making such contracts, parents act as the natural guardians of the child, and are presumed to act for its interest. The child was named according to the agreement, and plaintiff has continued to bear the name down to the present, and by the bringing of this suit has ratified the contract made by his parents. Moreover, there was such a privity between plaintiff and the promisee that he (the plaintiff) may enforce the contract, although not made directly by him. *Dutton v. Poole*, 2 Lev. 210; *Todd v. Weber*, 95 N. Y. 193, 47 Am. Rep. 20; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195.

But it is said that at the time the contract was made it was so uncertain and indefinite that it cannot be enforced, that no particular tract was designated at the time the contract was entered into, and that therefore it is void. The mere fact that Cochrane did not then own the land which he agreed to convey to plaintiff is not controlling. One may agree to procure land for another, or to sell land which he does not own; and the question is not whether or not the contract was uncertain when executed, but, May a court of equity put its finger on the subject-matter of the contract when it is called upon to act? *Thompson v. Myrick*, 20 Minn. 205, Gil. 184; *Dresel v. Jordan*, 104 Mass. 407; *Allerton v. Johnson*, 3 Sandf. Ch. 72; *East v. Cayuga Lake Ice Line*, 50 N. Y. S. R. 362, 21 N. Y. Supp. 887; *Collins v. Vandever*, 1 Iowa, 573; *Ottumwa, O. F. & St. P. R. Co. v. McWilliams*, 71 Iowa, 164, 32 N. W. 315. It goes without saying that if the contract

be so uncertain as to subject-matter, when executed, that the court cannot identify it in the light of admissible extrinsic evidence, and it so remains at the time action is brought, it cannot be enforced, or, as some of the authorities put it, it is void. But ambiguity or uncertainty may be removed by the acts, conduct, declarations, or agreements of the parties. *Wallace v. Ryan*, 93 Iowa, 115, 61 N. W. 395. In other words, an uncertain agreement may be so supplemented by subsequent acts, agreements, or declarations of the parties as to make it certain and enforceable. *Alabama G. S. R. Co. So. 286*; *Stone v. Clark*, 1 Met. 378, 35 Am. Dec. 370; *Lovejoy v. Lovett*, 124 Mass. 270. Cochrane's declaration in this case as to the land he intended to convey to the plaintiff in fulfilment of his promise was both a construction and an execution of his contract, and cleared the agreement of all uncertainty. *South & North Ala. R. Co.* 84 Ala. 570, 3 theretofore existing. It is fundamental that the acts of practical construction placed upon a contract by the parties thereto are binding, and may be resorted to to relieve it from doubt and uncertainty. *Kelley v. Andrews*, 102 Iowa, 119, 71 N. W. 251. This is simply an extension of the maxim, *Id certum est quod certum*, etc. The case is not different from that of a lease to one for so many years as he shall name. In such a case although the term is at present uncertain, yet when the lessee names the term it is then reduced to a certainty. *Broom, Legal Maxims*, *599. So if A should give B money with which to purchase unidentified land, and B should make a purchase, and thereafter say, "This is the land I purchased for you," equity would compel him to make conveyance thereof to A.

These illustrations simply confirm the principle which should be applied to the case now before us. But another aspect of the case is even more conclusive than the one we are now considering. Plaintiff's parents at the request of Cochrane named him (plaintiff) after Cochrane. Thereafter, and in consideration therefor, Cochrane agreed to give plaintiff a certain definite 40 acres of land. This is the effect of the transaction between these parties if we treat the original contract as void for uncertainty. Defendant received the benefit of the name, and the parents parted with the right to give the child such name as they might choose. This, as has been seen, is a valuable consideration. At the time Cochrane agreed to give the child 40 acres of land, but the contract was invalid because of uncertainty of the subject-matter. Thereafter Cochrane agreed to give the child a certain and definite 40 acres, pursuant to his original promise, and because of the consideration passing at that time. Is such a contract valid? The authorities furnish no uncertain answer to this proposition. It is quite generally held that a mere moral obligation is not sufficient consideration to support a subsequent promise, but it is as generally held that a past legal consideration, especially where the past consideration was based upon a previous request, or a new

promise when the original is in violation of the statute of frauds, or otherwise illegal, when the illegality is not based upon public policy or positive statute, is sufficient. Indeed, there seems to be no dissent from this doctrine. *Boothe v. Fitzpatrick*, 36 Vt. 681; *Jilson v. Gilbert*, 26 Wis. 637, 7 Am. Rep. 100; *Silverthorn v. Wyllie*, 96 Wis. 69, 71 N. W. 107; *Pool v. Horner*, 64 Md. 131, 20 Atl. 1036, and authorities collected in an excellent note found in *Trimble v. Rudy* (Ky.) 53 L. R. A. 353.

This view of the case seems to settle the validity of the contract, unless it be for the statute of frauds, which requires contracts relating to an interest in lands to be in writing. That the contract is unenforceable under this statute is certain, unless it be found that the purchase money, or some part thereof, has been paid, or that possession of the property was taken by the vendee, with the consent of the vendor, under the exceptions to that statute found in § 4626 of the Code. These exceptions did not prevail at common law; hence authorities from other states do not give us much light on the question at issue, and are likely to be misleading. At common law, payment of the consideration was not regarded as part performance, so as to take the case out of the statute. *Browne*, Stat. Fr. § 463; *Puterbaugh v. Puterbaugh*, 131 Ind. 288, 15 L. R. A. 341, 30 N. E. 519; *Townsend v. Houston*, 1 Harr. (Del.) 532, 27 Am. Dec. 745, and cases cited. The reason for this was that nothing was regarded which did not put the party performing in such a position that a fraud would be allowed to be practised upon him if the contract was not enforced. The money or the purchase price could be recovered back, and the parties thus restored to their original position. This rule has not received universal assent in this country. *Rhodes v. Rhodes*, 3 Sandf. Ch. 279. It fully explains the holding, however, in *Maddison v. Alderson*, L. R. 8 App. Cas. 467; *Ellis v. Carey*, 74 Wis. 176, 4 L. R. A. 55, 42 N. W. 252; and other like cases. In this state and in Delaware, however, the statute, in express terms, makes an exception where the purchase money, or any part thereof, has been paid. It then becomes important to determine what is meant by "purchase money." That has been settled by numerous previous decisions of this court. Thus, in *Devlin v. Himer*, 29 Iowa, 297, it is held that such term means the consideration received, in whatever form it may exist. See also *Mitchell v. Colby*, 95 Iowa, 202, 63 N. W. 769. In many cases the performance of services has been held to be the payment of the purchase price. *Bonnon v. Urton*, 3 G. Greene, 228; *Stem v. Nysonger*, 69 Iowa, 512, 29 N. W. 433; *Franklin v. Tuckerman*, 68 Iowa, 572, 27 N. W. 759, and cases cited. The cancellation of a pre-existing indebtedness has also been held to be part payment. *Peake v. Conlan*, 43 Iowa, 297. At common law neither marriage nor the performance of services was sufficient to take the case out of the statute. *Wallace v. Long*, 105 Ind. 522, 55 Am. Rep. 222, 5 N. E. 666; *Peek v. Peek*, 77 Cal. 106, 1 L. R. A. 185, 19 Pac. 227;

Ducie v. Ford, 8 Mont. 233, 19 Pac. 414; *Maddison v. Alderson*, L. R. 8 App. Cas. 467. When it is conceded that the contract between plaintiff's father and Cochrane is supported by a sufficient consideration, whether past or present, it follows that Cochrane has received that consideration, and the agreement, by the express language of the statute, is enforceable. The consideration has been paid. But it is said that the consideration had no reference to this particular tract of land, because Cochrane did not own it when he made the promise. We have seen that whatever of ambiguity or uncertainty there may have been in the contract when first made was rectified by the parties, who thereafter fixed and identified the tract intended to be conveyed. That this was more than two years after the child was named is unimportant, for, under our own cases, uncertainty in the original contract may be cured at any time before attempt is made to enforce it. See cases heretofore cited, and particularly *Collins v. Vandever*. This latter case also answers the suggestion that there was no mutuality in the contract. It is therefore entirely immaterial whether we say that what the parties did after the naming of the child made that certain which was theretofore uncertain, or that it amounted to a new contract, based upon a past legal consideration. If the former, the designation of the land related back to the making of the original agreement, and the land is thus identified; and, if the latter, the consideration, being past, was treated by Cochrane as a present and continuing one, and it is so connected with the land in question that the objects and purposes of the statute are as fully conserved as if the consideration had been so much money received by Cochrane, or was past services rendered at his request, and for which he agreed to convey the land. When part payment of the consideration is relied upon alone as taking a case out of the statute, the identification of the land must always rest in parol, and it is no objection to the enforcement of the contract that there is nothing in the act performed which serves to identify the land. Under common-law rules, as modified by equitable exceptions, which were introduced for the purpose of preventing the statute from becoming an instrument of fraud, appellants' contention would undoubtedly be sound, and the authorities relied upon by them in point. But under our statutory exceptions the rule is so much broader that the cases on which they rely are not controlling. Counsel practically concede in argument that the contract, if valid, is not within the statute, and we may well accept their concession, in view of the provisions of our statute. The parties, by agreement, brought consideration and subject-matter together, and, if the consideration was paid, there was no necessity for any writing. The uncertainty of the subject-matter does not in any manner affect the consideration, nor cancel the legal obligation Cochrane was under in virtue of the child's having been named for him, at his request. Should we treat the contract

as void for uncertainty, there was nevertheless a legal obligation on the part of Cochrane, which was a sufficient consideration for his subsequent promise; and, when he agreed to give a certain tract of land in satisfaction of that obligation, he as surely received the consideration as if plaintiff's father had canceled a debt which he held against him. This latter, as has been seen, is sufficient to take a case out of the statute. In *Palmer v. Albee*, 50 Iowa, 429, there was no attempt to show that the parties had subsequently agreed upon the land, which was described with such uncertainty that it could not be identified. The case was decided upon a demurrer to the petition, and it is clear that the description was so uncertain that a court of equity could not enforce it. Moreover, there was no subsequent promise, as in this case. If it be said that the contract, as originally made, was void for uncertainty, this did not relieve Cochrane of an obligation on his part. Keener, *Quasi Contracts*, pp. 326 *et seq.* He had received the benefits of the contract, and, when he thereafter agreed to give the land in satisfaction of this obligation, he made a valid and binding contract, based upon an adequate consideration received by him. The law will not attempt to measure the benefits received by him in the perpetuation of his name. He said it was worth the 40 acres of land, and courts should accept him at his word. In many states, equity has specifically enforced parol contracts made in consideration of services performed, which were not in writing, in the absence of a statute such as our own. *Carney v. Carney*, 95 Mo. 353, 8 S. W. 729; *Warren v. Warren*, 106 Ill. 568; *Lester v. Lester*, 28 Gratt. 737; *Hinkle v. Hinkle*, 55 Ark. 583, 18 S. W. 1049. But other courts have refused to enforce them. Our statute was undoubtedly passed to settle this proposition; and there is no doubt, under our decisions, that performance of services, like the payment of money, is alone sufficient, in itself, to take a case out of the statute of frauds.

These views seem to dispose of the case, but the writer and perhaps some other members of the court are satisfied, not only that the case is taken out of the statute by reason of the payment of the purchase price, but for the further reason that plaintiff's father took possession of the land under the contract with the express consent of Cochrane, held it, made improvements thereon, and otherwise treated it as belonging to his son, for nearly the whole time after it was purchased, down to the time of the commencement of this action. This, with payment of the purchase price, would, under all the authorities, take the case out of the statute. There is no other ground on which to account for the conduct of the parties, unless, we indulge in surmises which to my mind are not justified by the evidence. It is cold comfort to say to the plaintiff in this case that, while Cochrane's obligation to him has not been extinguished, he cannot have the land which was purchased for him, but must sue someone for damages, or, rather, for

benefits conferred, in taking Cochrane's name. The measure of damages in such a case would be rather difficult to estimate. This is another reason for enforcing the contract. Of course, if it is clearly within the statute, or is so uncertain that it should not be enforced, these equitable considerations must stand aside. There is, however, no tenable objection to the enforcement of the contract.

The trial court saw and heard the witnesses, and was in a better position than we to weigh their evidence, and it is some consolation to know that its conclusion as to the facts coincides with the finding herein made.

The decree is right, and it is affirmed.

McClain, J., dissenting:

Two propositions of law are announced in the majority opinion to which I cannot give assent, to wit: First, that a contract to convey land can be modified by subsequent parol agreement so as to apply to land not covered by or contemplated in the original contract, there being no payment of purchase price or taking of possession which has reference to such subsequent agreement; second, that an oral agreement to convey land on a past consideration is not within the statute of frauds.

It is elementary that a contract so indefinite as to subject-matter that it is impossible to determine to what the agreement of the contracting parties relates, or to know that as to the matter under consideration there was a meeting of the minds of such parties, is void for uncertainty and of no effect. *Church v. Noble*, 24 Ill. 291; *Atkins v. Van Buren School Twp.* 77 Ind. 447; *Thomson v. Gortner*, 73 Md. 474, 21 Atl. 371; *Wainwright v. Straub*, 15 Vt. 215, 40 Am. Dec. 675; *Erwin v. Erwin*, 25 Ala. 236; *Cole v. Clark*, 3 Pinney (Wis.) 303; *Guthing v. Lynn*, 2 Barn. & Ad. 232. Pertinent quotations might be made from many of these cases, but it is sufficient here to cite them. That the expression "40 acres of land," without other designation, described nothing to which the alleged agreement in connection with the naming of plaintiff could be considered as having relation, is clear. 40-acre tracts of land — even agricultural land — cannot be regarded as interchangeable. Would it have been competent for plaintiff's father to have selected and demanded under the agreement any one of the various tracts containing 40 acres which he might select out of the land owned by Cochrane when his promise was made,—for instance, the 40 on which his farm buildings were situated? On the other hand, could Cochrane have properly tendered the poorest 40-acre tract he owned? It is plain that, until the parties attempted to agree further as to the specific land which was to pass, there was no agreement for conveyance which could have been enforced in behalf of plaintiff. The majority say, *Id certum est quod certum reddi potest*; but I had supposed that this maxim related solely to the establishment of a pre-existing valid contract, and not to the cre-

ation of a new contract; that is, that it applied only when the parties had indicated and agreed upon some means by which the uncertainty might be removed, or the evidence tended to show the understanding of the parties when the contract was made. It is true that subsequent acts of the parties to a contract may be shown for the purpose of construction in the case of a latent ambiguity, and that is the rule supported by the cases which the majority cite. Such evidence is not received for the purpose of showing a new agreement. If any of the cases cited go beyond this, they clearly, as it seems to me, go beyond reason and the weight of authority. Undoubtedly the parties to a valid contract may by mutual agreement change it, and become bound by a subsequent agreement based upon the consideration of mutual relinquishment of rights under the previous agreement; but how can there be any such relinquishment in consideration of the new agreement if the first agreement was so indefinite as to confer no rights? Undoubtedly, also, if one party to the contract which is void for uncertainty has parted with a consideration, he may recover back its value; and I should not object to an allowance to plaintiff, as against Cochrane's estate, in a proper proceeding, of the money value of any detriment he suffered or any advantage Cochrane gained by the affixing to plaintiff of Cochrane's name as a Christian name. Until there was a new agreement, this was the measure of plaintiff's right. I might further admit, for the sake of argument, that the parties could subsequently agree upon the conveyance of this particular 40-acre tract in extinguishment of the indefinite claim arising to plaintiff from the transaction, provided the agreement was reduced to writing or possession was given as contemplated by the statute of frauds. In other words, if, in view of plaintiff's having been named for Cochrane with the understanding that he was to have some pecuniary benefit, Cochrane should subsequently have agreed to give plaintiff \$10,000. I will admit for present purposes that such subsequent agreement was based on a valid consideration; but the fact that the intention to make a pecuniary return for the name was indicated by the expression of an intention to give him 40 acres of land would not make the case any stronger. The fundamental difficulty is that the statute of frauds requires that an agreement to convey lands shall be in writing, even though there is a valid consideration; and the question here is whether or not in this case the subsequent agreement to convey specific land was taken out of the statute of frauds, for it seems to me perfectly clear that, whether the contract itself is void because not made in contemplation of any specific land, or whether it refers to specific land, and the attempt is subsequently made to substitute other land than that originally intended, any substitution or new agreement must be in writing, or taken out of the statute by some exception. See *Alabama Mineral Land Co. v. Jackson*, 121 Ala. 172, 25 So. 709. Will it do to say that,

under a valid contract to convey particular land, the parties may by subsequent oral agreement, without any new payment of purchase price and without any changing of possession, substitute wholly different land from that intended when the first contract was made?

We reach, then, the second proposition of the majority opinion,—that a past and wholly executed consideration, having at the time of its execution no relation to the agreement subsequently sought to be supported by it, is a sufficient “payment of the purchase price” to take the contract out of our statute of frauds as to contracts for the conveyance of lands. If this proposition is sound, then there can hardly be any imaginable contract to convey, which has a sufficient consideration to support it, that will not be within the statutory exception. Any relinquishment of a claim or advantage, no matter how vague or indefinite, and established by parol evidence alone, will justify the introduction of parol evidence of an agreement to convey. And why stop here? Is not an oral and binding agreement to pay in the future just as much the payment of the purchase price, by way of furnishing a consideration, as an oral agreement to release a claim? It may be the legislature ought to repeal the statute of frauds as to contracts to convey land, and allow such agreements, based on considerations, executed without reference to the contract, to be established by parol evidence, but I am not yet willing to do this by judicial legislation. The construction of the words “payment of the purchase price” for which I contend is payment of the price or execution of the consideration, whatever it may be, with direct reference to and in reliance on the very parol agreement to convey which is sought to be enforced. As the majority aptly say, there are very few authorities on the precise question, because the exception found in our statute is not in the statute of frauds as enacted in England, or in most

of the states of this Union, and goes further than that of part performance recognized by courts of equity. But for this very reason I think it should not be extended beyond the meaning plainly indicated by the language used. It is said that it is not the policy of courts of equity to enlarge the exceptions to the statute of frauds (*Webster v. Gray*, 37 Mich. 37), and I think it is equally impolitic for courts of law to extend them by unreasonable interpretation. The construction for which I contend, which would limit “payment of the purchase price” to something done in reliance upon the specific agreement to convey which is sought to be brought within the exception, is supported by the reasoning in the following cases: *Ellis v. Cary*, 74 Wis. 176, 4 L. R. A. 55, 42 N. W. 252; *Atlee v. Bartholomew*, 69 Wis. 43, 33 N. W. 110; *Maddison v. Alderson*, L. R. 8 App. Cas. 467. The majority cite many cases in regard to the sufficiency of a past consideration to support a contract, but none of them relate to past consideration as constituting “payment of the purchase price,” or similar expressions used with reference to the provisions of the statute of frauds in relation to the conveyance of land.

If the affirmance were based solely on the ground that the evidence shows the taking of possession and making of improvements by James C. Daily, I should not dissent, though I am satisfied that such evidence does not clearly and satisfactorily establish (as it should do in order to bring the case within the exception of taking and holding possession with the actual or implied consent of the vendor, as recognized by Code, § 4626) that possession was ever taken by James C. Daily or improvements made by him under the alleged contract. *Lich v. Lich*, 81 Iowa, 84, 46 N. W. 763; *Benedict v. Bird*, 103 Iowa, 612, 72 N. W. 768; *Mahana v. Blunt*, 20 Iowa, 142; *Lake Erie & W. R. Co. v. Michigan C. R. Co.* 86 Fed. 840.

KENTUCKY COURT OF APPEALS.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appt.*,

v.

W. E. MATTHEWS.

(.....Ky.....)

1. Only what a passenger takes with him for his own personal use and convenience is within the meaning of a statute requiring carriers to check baggage.
2. A carrier may assume liability for merchandise delivered to it by a passenger, equal to that which is imposed upon it in case

of baggage, by accepting it for transportation as baggage, with knowledge of its character.

3. Notice to the carrier that a package delivered to it for transportation as baggage contains articles which are not such is not imputed by the fact that the passenger pays a charge for excessive rate.
4. A traveling salesman who is responsible to his employer for the loss or damage to samples in his possession has such an interest in them that, in case they are checked as baggage by a railroad company, and injured in transportation, he may maintain an action to recover for the injury.

(February 23, 1903.)

NOTE.—For other cases in this series as to liability of carrier in transporting merchandise of traveling salesman as baggage, see *Kansas City, M. & B. R. Co. v. Higdon* (Ala.) 14 L. R. A. 515, and note; *Kansas City, P. & G. R. Co. v. State* (Ark.) 41 L. R. A. 338; and *Trimble v. New York C. & H. R. R. Co.* (N. Y.) 48 L. R. A. 115.
60 L. R. A.

APPPEAL by defendant from a judgment of the Circuit Court for Hickman County in favor of plaintiff in an action brought to recover damages for injury to the contents of a trunk, sustained while in defendant's possession for transportation. *Reversed.*

The facts are stated in the opinion.

Messrs. N. P. Moss, Firtle & Trabue,
and *J. M. Dickinson*, for appellant:

A passenger has no right to carry other people's goods at the risk of the carrier.

Dunlop v. International S. B. Co. 98 Mass. 371; *Mississippi C. R. Co. v. Kennedy*, 41 Miss. 671; *Pettigrew v. Barnum*, 11 Md. 449, 69 Am. Dec. 212; *Doyle v. Kiser*, 6 Ind. 242; *Pardee v. Drew*, 25 Wend. 460.

Merchandise is not baggage, except sometimes drummer's samples.

Humphreys v. Perry, 148 U. S. 647, 37 L. ed. 595, 13 Sup. Ct. Rep. 711.

Mr. J. W. Bennett for appellee.

O'Rear, J., delivered the opinion of the court:

Appellee was a traveling salesman or drummer for certain wholesale dealers in dental instruments. He bought a ticket and took passage on one of appellant's trains, and had his trunk checked for transmission by that train to his point of destination. The trunk was heavier than was allowed as free baggage to one passenger, and appellee was required to and did pay 60 cents extra as overweight charges. The trunk contained about \$1,700 worth of dental goods—steel instruments, presumably. These goods were used, not only as samples by which other goods of a like quality were sold for future shipment, but they were sold from the stock in custody of appellee, and then delivered by him to the customers, if they so desired. The goods belonged to appellee's employers, the wholesalers. While the trunk was in appellant's possession it got wet, and the instruments were damaged by rust, it is claimed, to the extent of about \$500. There was evidence for appellee that when the trunk was being loaded on the train the person handling it (whether a porter, roustabout, or baggage master, or whether connected with the railroad he did not know) remarked as to its extraordinary weight, and that appellee replied that it contained dental instruments. For appellants, its baggage master at the station at which the trunk was checked and shipped testified that he was in sole charge of the checking of baggage at that station, and that he was not apprised of the nature of the contents of the trunk; but that it was customary with that road to ship drummers' sample trunks as baggage. The cause of the damage, and the extent of it, do not seem to be controverted by the proof. On this state of case the court gave the jury the following instructions: "No. 1. The court instructs the jury that if they believe from the evidence the defendant, while the plaintiffs' trunks were in its custody, left them exposed to rain, and that said trunks or contents became wet, and thereby damaged, they should find for the plaintiffs the actual damages which said trunks or merchandise therein sustained by reason of such injury, not exceeding the sum set out therefor in the petition. No. 2. If the jury believe from the evidence the plaintiffs' trunk, while in the custody and care of the defendant, was bursted or torn in 60 L. R. A.

handling, through the negligence or carelessness of the defendant's agents or servants, and that it was thereby damaged, they will find for the plaintiffs such damages as they sustained for this injury to their trunks, not exceeding the sum claimed therefor in the petition." Appellant asked for this instruction, which was refused: "The court instructs the jury that if they believe from the evidence that the trunks shipped by plaintiff contained merchandise which he was carrying for sale, and said merchandise was checked as baggage on the passenger cars by defendant, and at the time of said shipment plaintiff failed to make known to the agent of defendant who checked said baggage, or other agent authorized to ship and have said baggage checked and shipped on its passenger trains, the law is for the defendant, and the jury should so find." From a verdict and judgment in favor of appellee for \$531.50 damages, this appeal is prosecuted.

The first instruction given to the jury assumes, as a matter of law, that the common carrier is accountable, under its liability as carrier, for all damage to the contents of trunks shipped as baggage, without reference to the nature or ownership of such contents, and regardless of the carrier's knowledge or notice or agreement as to such contents. The second instruction is not questioned on this appeal. The only legislation in this state on the subject of baggage is that found in Ky. Stat. § 783, as follows: "Every company shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, offer, or be offered, for transportation, at places established by the corporation for receiving and discharging passengers and freight, and shall, when requested, check every parcel of baggage taken for transportation, if there is a handle, loop, or fixture, so that the same can be attached, and shall give to the person delivering such baggage a check for the same." We are thus left to determine what is meant by the term "baggage" by reference to the common law. A very considerable number of adjudications have been rendered on this subject, as might naturally be expected. From them it may be stated that the word "baggage," as used in the connection under discussion, refers only to what the passenger takes with him for his own personal use and convenience, and which he has committed to the care of the carrier. Generally, the articles allowed as baggage to accompany the passenger, and which the carrier is bound to transmit as an insurer, are the personal apparel of the passenger, but may include a number of other articles, which may not unreasonably be designed for his pleasure, business, or convenience upon the journey which he is prosecuting. "In a general sense, it may be said to include such articles as it is usual for persons traveling to take with them for their pleasure, convenience, and comfort, according to the habits and wants of the class to which they belong." *Oakes v. Northern P. R. Co.* 20 Or. 392, 12 L. R. A. 318, 26 Pac. 230. Story, *Bailments*, § 499, thus states it: "By

'baggage' we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use; and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as sale or the like." *Bomar v. Maxwell*, 9 Humph. 624, 51 Am. Dec. 682; *Macrow v. Great Western R. Co.* L. R. 6 Q. B. 612. Rorer, Railroads, 988, states it this way: "It is difficult to enumerate the articles that may be included, in each particular case, in the term 'baggage.' This depends much upon the condition, habits, and circumstances of life of the passenger. Ordinarily, it includes a trunk or trunks, with the necessary wearing apparel for both comfort and dress suitable to the condition in life of the person; . . . but not money in larger amount than for necessary expenses, nor articles of merchandise or of virtu. . . ." As, ordinarily, only the wearing apparel and similar kindred articles are included in the personal baggage of the traveler, the carrier knows the probable extent of his liability in the event of the loss or damage of the baggage, and may reasonably be presumed to have regulated his charges and provided means for its safe-keeping proportioned to that liability. If, on the other hand, the passenger might include in his parcel valuable jewels, not properly classed as baggage, or plate, or merchandise, bonds, or money, of many thousands of dollars in value, and the carrier made liable for its loss without knowledge or notice of its extraordinary value, he is compelled to assume a responsibility for which he has not been paid in fact, and without an opportunity to provide that extraordinary care and attention which, by common prudence, would be due to such a valuable charge. Baggage, to a certain reasonable limit, and belonging to a passenger, is carried free, as an incident of the passenger's contract for passage. The common-law definition of baggage forms a part of the carrier's undertaking as though expressly stated and assented to at the time of the passage. The parties may, of course, vary this contract by agreement. If the carrier elects to receive and transport that as baggage which in fact is freight, and which it would have the right to refuse to take as baggage on its passenger trains, it ought to be liable therefor upon the same terms as if it were baggage. But this is not because of its common-law liability therefor, but because it has agreed by special contract, for a consideration, to be so bound. The elements of such a contract are sufficiently satisfied by an acceptance of the package or trunk by the carrier for transportation as baggage, with knowledge of its contents. *Hutchinson*, Carr. 1st ed. § 685; *Texas & P. R. Co. v. Capps*, 2 Tex. App. Civ. Cas. (Willson) § 33, p. 35; *Jacobs v. Tutt*, 33 Fed. 412; *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 39 Fed. 417; *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711. The fact that the passenger paid for the extra weight of the trunk does not vary the rule; 60 L. R. A.

for, if the trunk or trunks contained enough of those articles clearly entitled to be classed as personal baggage of the passenger as to be over the weight allowed, and reasonably allowable, to each passenger for free carriage, he would have to pay a just compensation for its being carried. This fact alone is not notice that the package contains anything besides the usual articles entitled to be taken as personal baggage, the nature and probable value of which are generally well known. The carrier might refuse to carry on its passenger train articles not properly baggage. It could not be required to carry freight on passenger trains. Delivering to the carrier a trunk or closed package, ostensibly ordinary baggage, without a statement as to its contents, is equivalent to a representation by the passenger that it belongs to him, and contains only such articles as are properly classed as personal baggage. *Haines v. Chicago, St. P. M. & O. R. Co.* 29 Minn. 160, 43 Am. Rep. 199, 12 N. W. 447; *Michigan C. R. Co. v. Carrouc*, 73 Ill. 348, 24 Am. Rep. 248. If it contains other articles, and the carrier is not informed of the fact, it is a deception upon the carrier as to such articles, and as to such they are not covered by the carrier's contract. *Story*, Bailments, 9th ed. § 565. In the event of loss of, or damage to, such articles while in the carrier's possession, without notice of their character when received and checked as baggage, or without a special agreement with reference thereto, it is not liable, except as in case of a bailee without hire. But notice in terms of the contents of the trunks is not required. It is sufficient if, from all the circumstances of the case, the jury may reasonably infer that the carrier's agent, charged with the duty of receiving and checking baggage over its lines, knew of the extraordinary contents of the package when he received it and checked it as baggage for the passenger; that is, knew that they contained merchandise or other articles than the traveler's wearing apparel. *Sloman v. Great Western R. Co.* 67 N. Y. 208; *Brown v. Camden & A. R. Co.* 93 Pa. 316.

While it is true that a carrier cannot be made liable for the goods of another than the passenger or a member of his family traveling with him, which may be included in the passenger's baggage, yet the facts in this case tend to show that, although the goods belonged to the wholesale merchants, by an agreement between them and appellee he had such an interest in them, by reason of his being responsible to them for their loss or damage, and required to replace them in such event, that they may fairly be treated as his for the purposes of this action. The damage fell upon him. They were being carried for him. He was the passenger. We therefore conclude that the court erred in assuming appellant's liability for the damage to the dental instruments shipped as baggage.

The judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Appt.,
v.

G. A. HENDON.

(.....Ky.....)

1. The measure of damages for wrongfully disconnecting a telephone because of mistake as to payment of rent is the amount which will compensate the patron for the injuries caused by the breach of contract.
2. The compensatory damages to be awarded a patron of a telephone company for wrongful discontinuance of the service is the amount paid for the service for the time during which it was refused, in the absence of any proof of specific loss because of the disconnection.

(January 7, 1908.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Jefferson County in favor of plaintiff in an action brought to recover damages for wrongfully discontinuing plaintiff's telephone service. *Reversed.*

The facts are stated in the opinion.

Messrs. Fairleigh, Straus, & Eagles, for appellant:

The action cannot be treated as one for slander of the business of appellee, because there is no averment of malice. This allegation is absolutely necessary in such an action.

Morgan v. Booth, 13 Bush, 480; *Louisville Courier-Journal Co. v. Weaver*, 13 Ky. L. Rep. 599, 17 S. W. 1018.

The action is, therefore, one for breach of contract; and it was necessary that the appellee should state what damages he suffered because of the breach of the contract.

The verdict is excessive and unconscionable, and ought to be set aside.

Southern R. Co. v. Marshall, 23 Ky. L. Rep. 813, 64 S. W. 418.

Messrs. O'Neal & O'Neal, with *Messrs. Pryor & Sapinsky*, for appellee:

The case presented here by the pleadings is that of tort, in which the appellee is entitled, not only to the actual damages sustained, but also to exemplary or punitive damages growing out of the breach of the appellant's duty to him and the wanton and reckless disregard of the appellee's rights in the premises.

Louisville N. R. Co. v. Ballard, 85 Ky. 307, 3 S. W. 530; *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406; *Jennings v. Maddox*, 8 B. Mon. 430; *Parker v. Jenkins*, 3 Bush, 587; *Memphis & O. Packet Co. v. Nagel*, 97 Ky. 9, 29 S. W. 743; *Wilson v. Vaughn*, 23 Fed. 229; *Day v. Woodworth*, 13 How. 371, 14 L. ed. 185; *Mihcaukee & St. P.*

R. Co. v. Arms, 91 U. S. 493, 23 L. ed. 376; *Hefley v. Baker*, 19 Kan. 9; 12 Am. & Eng. Enc. Law, p. 13; *Bronson v. Green*, 2 Duv. 234; *Slater v. Sherman*, 5 Bush, 206; *Fleet v. Hollenkemp*, 13 B. Mon. 219, 56 Am. Dec. 563; *Tyson v. Ewing*, 3 J. J. Marsh. 185.

In an action of tort for a wilful injury to the person, the manner and manifest motive of the wrongful act may be given in evidence as affecting the question of damages; for, when the merely physical injury is the same, it may be more aggravated in its effects upon the mind if it is done in wanton disregard of the rights and feelings of the plaintiff than if it is the result of mere carelessness.

Hawes v. Knowles, 114 Mass. 518, 19 Am. Rep. 383; 12 Am. & Eng. Enc. Law, 2d ed. p. 7.

Hobson, J., delivered the opinion of the court:

Appellee, Hendon, is a physician, living in Louisville. He was a patron of the appellant, the Cumberland Telephone & Telegraph Company, and had one of its instruments in his office. Appellant discontinued the telephone from 3 o'clock P. M. of October 23, 1900, to 8:45 A. M. the next morning, or something less than eighteen hours, and this action was brought to recover damages therefor. The reason the telephone was disconnected was that the bookkeeper made a mistake in posting the amount paid. His book did not show that Hendon had paid for the month of September, although he had in fact paid. On October 22d a notice was sent to him that his 'phone was discontinued for this reason, and, he having paid no attention to the notice, twenty-four hours afterwards the connection at the office was severed, although the instrument was not removed. When he got home at 6 o'clock that evening and found that he had been cut off, he tried to 'phone to the office, but failed to get them. The next morning he went down, the mistake was at once corrected, and the instrument was no longer discontinued. The proof showed that he had not only paid for September, but had also paid in advance for October, November, and December. It also showed that one person who needed the doctor for his wife that night, being unable to reach him by 'phone, walked to his office and waked him up. It also showed that three other persons who wished to talk with him were unable to reach him on the 'phone, and that, when one of them asked at the office what was the matter, the assistant manager answered that his 'phone had been discontinued for nonpayment of rent. It is not shown that he suffered any pecuniary loss by the suspension of the service, although it would seem that he was considerably annoyed about it. On these facts the jury found for him a

NOTE.—There are no exact precedents for this case, but, on the general question of the loss of profits as element of damages for breach of contract, see note to *Wells v. National Life Asso.* (C. C. App. 5th C.) 53 L. R. A. 88.

As to damages for dishonor of check, see, in 60 L. R. A.

this series, *Schaffner v. Ehrman* (Ill.) 15 L. R. A. 134, and note; *Svendsen v. State Bank* (Minn.) 81 L. R. A. 552; *Mt. Sterling Nat. Bank v. Greene* (Ky.) 32 L. R. A. 568; *J. M. James Co. v. Continental Nat. Bank* (Tenn.) 51 L. R. A. 255, and *American Nat. Bank v. Morey* (Ky.) 58 L. R. A. 956.

verdict for \$200, on which the court entered judgment. The court instructed the jury that they should find for the plaintiff at least nominal damages, and, if they believed from the evidence he suffered inconvenience by reason of his telephone service being discontinued, then they should further find for him such sum as would fairly and reasonably compensate him for the inconvenience so sustained. There was nothing in the case to warrant an instruction on punitive damages, and the court properly refused to instruct the jury on this subject. The plaintiff had by contract acquired the right to a certain service, and, this contract being broken, the measure of damages is compensation for the breach, as in other cases of broken obligations. The case is entirely different from those where there is a physical trespass, as in the case of the expulsion of a passenger from a train, where there is not only a breach of contract but an actual tort. The proper measure of damages to compensate for the breach of the contract is a matter of some difficulty, and we have been referred to no authorities directly in point. Where the contract is to deliver a specific message, and is broken, the measure of damage has been often adjudicated, and we see no reason why the same principles should not apply to the case before us, for the contract here was, in substance, an undertaking to convey all messages the subscriber might

wish to send, or others might wish to send to him, over appellant's line, within the time paid for by him. In the absence of proof of special damage for the failure to carry a message, the recovery would be limited to the amount paid for the service which was not furnished. Mere inconvenience or annoyance cannot be recovered for except in peculiar cases. 25 Am. & Eng. Enc. Law, pp. 855-863; *Chapman v. Western U. Teleg. Co.* 90 Ky. 265, 13 S. W. 880. Where there is a contract, not for a specific message, but for the carriage of all messages within a certain time, the refusal to carry any messages for a certain part of the time is a breach of contract not different in character from the neglect to carry a specific message, and the measure of damages, in the absence of any proof of specific loss is the amount paid for the service for the time during which it is refused. In case of special damage, this, in addition, may be recovered under proper averments. *Robinson v. Western U. Teleg. Co.* 24 Ky. L. Rep. 452, 57 L. R. A. 611, 68 S. W. 656. Under the evidence, the court should have instructed the jury to find for the plaintiff the amount paid by him for the service for the time his 'phone was discontinued, taking for the basis the amount paid by the month, and allowing for the time lost such part thereof as they deemed right.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

KANSAS SUPREME COURT.

SUMNER COUNTY COMMISSIONERS *et al.*, *Plffs. in Err.*,
r.

City of WELLINGTON.

(.....Kan.....)

*A waterworks plant owned and operated by a city is exempt from taxation, and the fact that water is furnished by the city to citizens and other consumers at prescribed rentals does not affect the exemption.

(April 11, 1903.)

*Headnote by JOHNSTON, CH. J.

NOTE.—*Taxation of municipal waterworks.*

Property owned by municipal corporations and devoted to public use is generally exempt from taxation, and an attempt has been made to bring the property connected with a plant for supplying water to the municipality and its inhabitants within this rule.

Property of private company.

So far as the property belongs to a private corporation organized for the purpose of supplying water, there is, in the absence of express contract or statutory exemption, no ground for claiming it.

A waterworks plant that supplies the city with water, the rates for which are regulated by the council, and which for the term of the ordinance under which it was constructed may

be purchased for a fixed price by the city, is the property of a private corporation, and is as such subject to taxation, and is not public property. *Re Des Moines Water Co.'s Appeal*, 48 Iowa, 324.

The facts are stated in the opinion.

Messrs. Ready & Ready, with Mr. Emme-

ra E. Wilson, for plaintiffs in error:

In order for any property such as is described in the plaintiff's petition to be exempt from taxation, said property must be used exclusively for such purpose, and not be used for gain and profit.

Stahl v. Kansas Edu. Asso. 54 Kan. 542, 38 Pac. 796; *St. Mary's College v. Crowl*, 10 Kan. 443; *Vail v. Beach*, 10 Kan. 214;

Water companies are not exempt from taxation in the absence of express statutory exemption and an act of legislature amending the charter of a water company by declaring such company the property of a municipal corporation, and therefore thereby exempted from the payment of taxes of every kind or character, does not apply to taxes due or imposed before such act was passed. *Louisville Water Co. v. Hamilton*, 81 Ky. 517.

The property of a waterworks company is not exempt from taxation as a fire engine or the implements for extinguishing fires, or as grounds used exclusively for the buildings and

Washburn College v. Shawnee County, 8 Kan. 344.

Where any part of the property is devoted to any other than the exempt purposes, the whole becomes taxable.

Wyman v. St. Louis, 17 Mo. 335; *Red v. Johnson*, 53 Tex. 284; *Morris v. Lone Star Chapter No. 6*, *E. A. M.* 68 Tex. 698, 5 S. W. 519; *First M. E. Church v. Chicago*, 26 Ill. 482; *Orr v. Baker*, 4 Ind. 86; *Red v. Morris*, 72 Tex. 554, 10 S. W. 681.

It is the use to which property is put, and not ownership, that determines the question as to its exemption from taxation.

Washburn College v. Shawnee County, 8 Kan. 344; *Vail v. Beach*, 10 Kan. 214; *St. Mary's College v. Crowl*, 10 Kan. 442.

Mr. C. E. Elliott, with *Mr. J. S. Dey*, for defendant in error:

The legislatures of the several states have

meetings of the fire companies, as its primary and exclusive use is not the extinguishing of fires. *Re Des Moines Water Co.'s Appeal*, 48 Iowa, 324.

A municipal waterworks system is subject to state and county taxation when only public property held for public purposes, or property from which no revenue is derived, can be exempt. *Chadwick v. Maginnes*, 94 Pa. 117.

The franchises and privileges of a waterworks company may be taxed under a statute requiring all property not exempted to be taxed. *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 322, 16 L. R. A. 581, 52 N. W. 439.

A water company which has contracted to furnish water to a municipal corporation is not a governmental agency so that its property will be exempt from taxation. *People ex rel. Mills Waterworks Co. v. Forrest*, 97 N. Y. 97, *Affirming* 29 Hun, 548.

A plant used to supply a municipal corporation with water under a contract is not exempt from municipal taxation in the absence of any express contract for such exemption. *Athens City Waterworks Co. v. Athens*, 74 Ga. 413.

The water pipes, hydrants, and conduits of a water company are taxable as real estate in the city or town where they are laid, where the statutes state that "lands" shall include "all tenements and hereditaments connected therewith, and all rights thereto and interest therein." *Paris v. Norway Water Co.* 85 Me. 380, 21 L. R. A. 525, 27 Atl. 148.

The lessee of the waterworks of an aqueduct company is not entitled to exemption from municipal taxation thereof under a contract for supplying the municipality with water for a period of years with the privilege of purchase by the municipality upon the expiration of the term, where there is no provision in the contract by which the right of the city to impose taxes is taken away. *Stein v. Mobile*, 17 Ala. 234, 24 Ala. 591, 54 Ala. 23.

One who takes from a city owning a plant for a municipal water supply the right to use and enjoy the plant for a term of years with the right to sell water and take the rents and profits has such an interest in the works as to be subject to taxation. *Los Angeles v. Los Angeles City Waterworks Co.* 49 Cal. 638.

In England water seems generally to be supplied to municipalities by local authorities charged with that duty, or by a company organized for that purpose. In the English cases the liability of the companies seems not to be doubted.

In a number of cases the only questions are as to the manner, extent, or measure of rating 60 L. R. A.

plenary power over the subject of taxation, except where they are limited either by the Constitution of the state or the United States.

1 *Desty*, Taxn. p. 88, § 24; *Hines v. Leavenworth*, 3 Kan. 186; *Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 171; *Francois v. Atchison*, *T. & S. F. R. Co.* 19 Kan. 303; *Kansas State Agricultural College Bd. of Regents v. Hamilton*, 28 Kan. 376; *Durkee v. Greenwood County*, 29 Kan. 697.

The property attempted to be taxed, and sold to enforce the payment of the taxes charged, belonged to a municipal corporation organized by the authority of the state to perform certain public functions appertaining to the sovereignty of the state, and all its property acquired for such purpose is, from the very nature of its relation to the government, exempt from taxation.

reservoirs, pipes, aqueducts, and other property of public water companies, the right to rate being assumed. *King v. Bath*, 14 East, 609; *New River Co. v. St. Pancras*, 45 J. P. 75; *Reg. v. Birmingham Waterworks Co.* 1 Best & S. 84, 4 L. T. N. S. 242; *Rex v. Chelsea Waterworks Co.* 5 Barn. & Ad. 158, 2 Nev. & M. 767; *Reg. v. South Staffordshire Waterworks Co.* 34 Week. Rep. 242, L. R. 16 Q. B. Div. 359, 55 L. J. M. C. N. S. 88, 54 L. T. N. S. 782, 50 J. P. 20; *Reg. v. East London Waterworks Co.* 16 Jur. 711, 18 Q. B. 705, 21 L. J. M. C. N. S. 174; *East London Waterworks Co. v. Leyton Sewer Authority*, L. R. 6 Q. B. 669, 20 Week. Rep. 95, 40 L. J. M. C. N. S. 190; *Peterborough v. Stamford Union*, 31 Week. Rep. 949; *Worcester v. Droitwich Union*, 24 Week. Rep. 490, 45 L. J. M. C. N. S. 81, 34 L. T. N. S. 288, in which it is said that the question as to the ratability of waterworks in respect to premises occupied by them for police purposes has been for some time settled; *Chelsea Waterworks v. Bowley*, 17 Q. B. 359, 15 Jur. 1129, 20 L. J. Q. B. N. S. 520; *King v. Rochdale Waterworks*, 1 Maule & S. 634; *Queen v. Mile End Old Town*, 10 Q. B. 208, 11 Jur. 985, 18 L. J. M. C. N. S. 184; *Queen ex rel. Chelsea Waterworks v. Putney*, 3 El. & El. 108, 8 Week. Rep. 607; *Queen v. West Middlesex Waterworks*, 1 El. & El. 716, 5 Jur. N. S. 1159, 28 L. J. M. C. N. S. 185; *Sheffield United Gaslight Co. v. Sheffield*, 4 Best & S. 135, 11 Week. Rep. 1064, 32 L. J. M. C. N. S. 169, 9 Jur. N. S. 628.

Works owned by municipality.

When the works are owned by the municipality itself there is more reason for claiming an exemption, and in some cases it has been allowed.

Where waterworks are owned and run by a municipality for public purposes, and not as a private enterprise for pecuniary gain or profit, such property is exempt from taxation, although there is no express statutory exemption; and a revenue act requiring water companies to pay the state an annual privilege tax does not apply in this case. *Nashville v. Smith*, 86 Tenn. 213, 6 S. W. 273.

Where a municipality owns and conducts waterworks under authority conferred by its charter, for the purposes of extinguishing fires, sprinkling the streets, and of supplying water to its citizens, such waterworks are public property, used for a public purpose, and are exempt from all taxation unless expressly included within the statutes levying such taxes; and this exemption is not defeated where its citizens are

People v. McCrery, 34 Cal. 433; *People v. Doe*, 1,034, 36 Cal. 220; *People ex rel. Doyle v. Austin*, 47 Cal. 353; *Rochester v. Rush*, 80 N. Y. 302; *Alexandria v. O'Shee*, 51 La. Ann. 719, 25 So. 382; *New Orleans v. Clark*, 94 U. S. 652, 24 L. ed. 522; *Camden v. Camden*, 77 Me. 530, 1 Atl. 689; *State, Newark, Prosecutor, v. Clinton Twp.*, 49 N. J. L. 371, 8 Atl. 296; *State, Newark, Prosecutor, v. Verona Twp.*, 59 N. J. L. 94, 34 Atl. 1060; *State, Hackettstown, Prosecutor, v. Conover*, 63 N. J. L. 191, 42 Atl. 838; *State Newark, Prosecutor, v. Belleville Twp.*, 61 N. J. L. 455, 39 Atl. 658; *Collins v. State*, 61 N. J. L. 695, 43 Atl. 1097, 60 N. J. L. 367, 37 Atl. 623; *Somerville v. Waltham*, 170 Mass. 160, 48 N. E. 1092; *Nashville v. Smith*, 86 Tenn. 213, 6 S. W. 273; *Cooley, Taxn.* 172; *1 Desty, Taxn.* 48; *Gachet v. New Orleans*, 52 La. Ann. 813, 27 So. 348.

charged for the water furnished them, and thereby a considerable revenue over and above operating expenses is derived, which is applied to the purposes of the municipality. *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469, 12 S. W. 924.

Lands acquired by a city under an act authorizing construction of waterworks when reasonably necessary therefor, and held in good faith, not speculatively nor for remote contingencies, are exempt from taxation although not in actual use. *State, Jersey City Water Comrs., Prosecutors, v. Gaffney*, 34 N. J. L. 131, 133.

Land taken by a municipal corporation by authority of the legislature to aid in furnishing a water supply to the municipality is not subject to taxation. *Wayland v. Middlesex County*, 4 Gray, 500.

But the furnishing of water for compensation is very close to a business enterprise, and some of the courts have regarded it as so much so as to remove the exemption.

A waterworks system owned by a city is taxable where the citizens are charged for water. *Negley v. Henderson*, 22 Ky. L. Rep. 912, 50 S. W. 19.

Waterworks belonging to a city are not exempt from state and county taxes under § 170 of the Constitution of Kentucky. *Id.* 21 Ky. L. Rep. 1394, 55 S. W. 554.

A municipality selling water generally to the public occupies as to its waterworks the same position as would a private corporation; so that, not only is all its tangible property used by the city for waterworks purposes taxable as nonmunicipal property, but its franchise is, under the statute, subject to a franchise tax. *Newport v. Com.* 106 Ky. 434, 45 L. R. A. 518, 50 S. W. 845, 51 S. W. 433.

The fact that the waterworks of a municipal corporation is owned and operated by it for the comfort and advantage of its inhabitants does not constitute a valid consideration for an act of legislature exempting the same from taxation, as such property is owned and operated by such municipality in its private, and not its governmental, character, and is not necessary to the execution of its duties as a political or governmental power; and therefore such property under such circumstances cannot constitutionally be exempted from taxation except in consideration of public services. *Clark v. Louisville Water Co.* 90 Ky. 515, 14 S. W. 502.

An act of legislature exempting the waterworks owned by a certain municipality from taxation is repealed by the adoption of a new Constitution containing a clause exempting public property used for public purposes, and only 60 L. R. A.

The use to which the property was put is, in law and in fact, a public use.

Louisville Gas Co. v. Citizens' Gaslight Co. 115 U. S. 683, 691, 29 L. ed. 510, 513, 6 Sup. Ct. Rep. 265; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273; *State ex rel. Atty. Gen. v. Toledo*, 48 Ohio St. 112, 11 L. R. A. 729, 26 N. E. 1061; *Toledo v. Hosler*, 54 Ohio St. 418, 43 N. E. 583; *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469, 12 S. W. 924; *Cooley, Taxn.* 172, 174; *1 Desty, Taxn.* 48, § 16; *State, Hackettstown, Prosecutor, v. Conover*, 63 N. J. L. 191, 42 Atl. 838; *Rochester v. Hart*, 52 N. Y. 621.

The property was acquired and full ownership obtained at a time when no tax of any

such, from taxation, inasmuch as such property is not "public property used for public purposes" within the meaning of such clause. *Covington v. Com.* 107 Ky. 680, 39 S. W. 836.

Property outside limits of municipality.

A statute exempting from taxation a town's real estate which is used for public purposes does not apply to real estate with appurtenances thereto used for waterworks situated outside of its geographical limits. *Newport v. Unity*, 68 N. H. 587, 44 Atl. 704.

Property lying outside the limits of a municipality and acquired by it for the purpose of a municipal water supply is subject to taxation under a statute providing for the exemption of property of a municipal corporation of the state held for the public use except the portion of such property not within the corporate limits. *Rochester v. Coe*, 25 App. Div. 300, 49 N. Y. Supp. 502.

A pipe line of a city maintained for the purpose of a water supply beyond its limits is established as real property irrespective of the franchise under the general tax law, and is not exempt as a special franchise under N. Y. Laws 1899, chap. 712. *People ex rel. Rochester v. De Witt*, 59 App. Div. 493, 69 N. Y. Supp. 366.

A pump house, pipe lines, and crib maintained by a city for water-supply purposes outside of the municipal limits are taxable under the general tax law as real estate in the town where they may be situated, and are not exempt under a statute providing for a tax on special franchises such as mains and pipes, but exempting the property of municipal corporations therefrom: since the intent was not to exempt property theretofore taxable, but to restrict the assessment of property subject thereto to the special franchise tax. *People ex rel. Auburn v. Duryea*, 59 App. Div. 488, 69 N. Y. Supp. 383.

Such portion of the waterworks system of a municipal corporation as is outside of its corporate limits is subject to government taxation where located, under the New York act of 1896. *People ex rel. Amsterdam v. Hess*, 157 N. Y. 42, 51 N. E. 410.

But lands acquired under legislative direction by a municipal corporation within the bounds of a township for the preservation for its water supply are not, in the absence of express legislation, liable to taxation by the town. *Rochester v. Rush*, 80 N. Y. 302, *Affirming* 15 Hun. 239.

Pipes and fire plugs of a water company in a township through which it conducts its water are taxable there. *Riverton & P. Water Co. v. Haig*, 58 N. J. L. 295, 33 Atl. 215.

kind was due on the property; and the moment the municipality became the owner of it, according to the law of its organization, that moment the developing liability ceased, and no tax ever became due on it, and will not under the law while the defendant in error owns it.

Bannon v. Burnes, 39 Fed. 893; 12 Am. & Eng. Enc. Law, pp. 308, 309; *People ex rel. American Bible Soc. v. New York*, 142 N. Y. 548, 37 N. E. 116; *Hennepin County v. St. Paul, M. & M. R. Co.* 33 Minn. 534, 24 N. W. 196; *Washington Heights M. E. Church v. New York*, 20 Hun, 297; *St. James Church v. New York*, 41 Hun, 309; *State, East Jersey Water Co. Prosecutor, v. Roat* (N. J. L.) 45 Atl. 910; *Gachet v. New Orleans*, 52 La. Ann. 813, 27 So. 348; *Alexandria v. O'Shee*, 51 La. Ann. 719, 25 So. 382; *State v. Stevenson* (Idaho) 55 Pac. 886.

Real estate and certain appurtenances thereto, owned and used by a town as its waterworks, which are situated within the limits of another town which does not use such real estate for any public purpose, are taxable in such latter town in the absence of statutory exemption. *Newport v. Unity*, 68 N. H. 587, 44 Atl. 704.

Where a city purchases a larger tract of land than necessary for the construction of its reservoir, for the reason that it can obtain the whole for a less price than a part, the excess lying in an adjacent town is not exempt from taxation. *West Hartford v. Hartford Water Comrs.* 44 Conn. 360.

But land purchased in a town by a municipality for the purpose of constructing a reservoir as part of its water system does not lose its exemption from taxation by reason of the fact that it is held by a board of water commissioners which sells the water to consumers, paying the interest on the investment and the operating expenses from the proceeds, or by the fact that during the year the question was submitted to the court, a surplus remained after paying the annual interest and operating expenses. *Ibid.*

When land and a dam were purchased by a city in pursuance of a scheme to supply the city with pure water, they were purchased "for the purposes of its water supply," so as to be within the exemption of taxation prescribed by Pub. Stat. 1893, chap. 352, § 1, when it cannot be held that any revenue in the nature of rent is received by the city from any person occupying or using the same. *Miller v. Fitchburg*, 180 Mass. 32, 61 N. E. 277.

A city will not be rendered liable for a privilege tax levied on her waterworks for "exercising the privilege of running a water company" within her own limits in a city "of 40,000 or over" because she furnishes water to persons and factories beyond her corporate limits, where there is nothing in the record to show that such persons and factories were in any city, town, or taxing district, which is a prerequisite to the exaction of the tax under the statute. *Smith v. Nashville*, 88 Tenn. 464, 7 L. R. A. 469, 12 S. W. 924.

Exemptions.

A municipality cannot exempt the works of a water-supply company from municipal taxation. *Altgelt v. San Antonio*, 81 Tex. 436, 13 L. R. A. 383, 17 S. W. 75.

The legislature can only exempt the property of a municipal water company from taxation so far as the exemption is granted in consideration of services actually rendered to the municipality. *60 L. R. A.*

Any property used exclusively for such purposes as mentioned in § 1 of article 2 of the Constitution, the legislature cannot tax; but the Constitution nowhere says that the legislature cannot exempt other property if it so desires.

Francis v. Atchison, T. & S. F. R. Co. 19 Kan. 311; *Ottawa County v. Nelson*, 19 Kan. 237.

Johnston, Ch. J., delivered the opinion of the court:

The officers of Sumner county undertook to levy and impose taxes upon a waterworks plant owned by the city of Wellington. Originally, the city granted to C. W. Hill and his assigns, upon certain conditions, the right to construct and maintain waterworks for the purpose of providing the city and its inhabitants with water. Under the fran-

pality. *New Orleans v. New Orleans Waterworks Co.* 36 La. Ann. 432.

A municipal corporation has no authority to exempt the property of a company supplying it with water from municipal taxation by contract. The company can neither take the exemption by way of gratuity, nor purchase it by way of commutation. *Cartersville Waterworks Co. v. Cartersville*, 89 Ga. 689, 16 S. E. 70.

An act of the legislature exempting from taxation the property of a water company is unconstitutional and void, although all the stock of the company is owned by a city; and the fact that such act also makes it the duty of such company to furnish water free of charge for fire protection, which may incidentally protect from fire the public buildings of the state, will not support the exemption, where the consideration recited in the act for the making of such exemption, and the real consideration, was in fact that the stock of such company was owned by the sinking fund of the city; therefore the company belonged to the city. *Clark v. Louisville Water Co.* 90 Ky. 515, 14 S. W. 502.

In exercising the power granted to a municipal corporation by an act of the legislature to construct and operate waterworks such municipality acts in the capacity of a private corporation for the convenience and profit of its citizens, and not in the capacity of a municipal government; and an act of legislature exempting such waterworks from taxation is unconstitutional, where such municipality rendered no public service in consideration for such act. *Com. v. Makibben*, 90 Ky. 384, 14 S. W. 372.

An agreement by a municipality to release a water company from municipal taxation on its franchises is valid so far as the same is granted for services actually rendered by the company. *Grant v. Davenport*, 36 Iowa, 396.

An ordinance by a city under legislative authority exempting property of a water company from taxation is valid where the consideration is a free supply of water for schools and other public buildings and for the extinguishment of fires, the corporation being under other considerable obligations to the city and state. *Portland v. Portland Water Co.* 67 Me. 135.

An agreement whereby a city agrees for a valid consideration to save a water company harmless from certain taxes on its property applies, not only to the property then in existence, but to all which it is subsequently necessary to erect in the proper conduct of its business. *Alpena City Water Co. v. Alpena* (Mich.) 9 Det. L. N. 141, 90 N. W. 323.

As to the validity of contracts by the municipality to assume the tax as part of the compen-

chise so granted the plant was constructed, and it was operated as a private enterprise for several years when it was purchased by the city. Since that time the plant has been operated by the city, and, in addition to supplying water to the public buildings and places of the city, and also for fire protection, it furnishes to the people, at fixed charges, water for domestic purposes, and also to private and public corporations for their needs, at prescribed rentals. The plant was located partly within and partly without the corporate boundaries of the city, and consisted of both real and personal property of the value of about \$50,000.

The questions in the case are raised upon the pleadings, and the turning point in the case is whether a waterworks plant owned and operated by a city is, under the Constitution and laws, exempt from taxation. Under the statute a city of the second class (in which Wellington belonged) had full power "to purchase, procure, provide . . . waterworks . . . for the purpose of supplying such cities and the inhabitants thereof with water . . . for domestic use, and any and all other purposes." Gen. Stat. 1901, § 1017. There was undoubted legisla-

tive authority for the city to municipalize the plant. The supplying of water to the inhabitants, while not strictly a governmental function, so much affects the health and welfare of the people as to be closely akin to it. The plant was purchased with public funds. It is operated by the public officers and agents, and rentals derived from its operation go into the public treasury, and are expended for the public benefit. The ownership and the purpose being public, there are good reasons why the property should be exempted from taxation. It is inconsistent with our theory of government to place a tax or burden upon one of the instrumentalities of government, and to thus impede its operation, and in some jurisdictions immunity from such taxation has been adjudged where there were no express constitutional or statutory exemptions. 12 Am. & Eng. Enc. Law, 2d ed. 368. In our state the legislature has unequivocally declared that all property belonging exclusively to the United States, the state, and to any county, city, township, or school district, shall be exempted from taxation. Gen. Stat. 1901, § 7504. This statute only re-enforces and confirms the general principle that the

nation for water supplied, see note to State ex rel. Hallauer v. Gosnell, *post*, —.

Construction of statutes.

A waterworks system for supplying the inhabitants of a city with water for domestic and irrigation purposes, and charging therefor, is not exempt from taxation under a statute exempting therefrom "all rights to the use of water and means of diverting water . . . in all cases where the land or other property upon which the water pertaining to such right is assessable for taxation," as the intention of that act is to exempt the right to use water from taxation only where it is appurtenant to land which is subject to taxation. *Bear Lake & R. Waterworks & Irrig. Co. v. Ogden City*, 8 Utah, 494, 33 Pac. 135.

Mountain land held by a water company for the sole purpose of protecting the purity of its water supply, if a part of its capital stock is liable to taxation by the state, is exempt from local taxation. *Spring Brook Water Supply Co. v. Schadt*, 3 Lack. Legal News, 170.

When the ownership by a water company of vast tracts of wild mountain land is not necessary to protect the purity of its water supply, it is not such an appurtenance to the exercise of its franchise as to exempt them from local taxation, because the capital stock is subject to state taxation. *Roaring Creek Water Co. v. Northumberland County*, 6 Pa. Co. Ct. 473.

A law that the necessary property of a water corporation shall be exempt from taxation, and authorizing it to hold such lands along and contiguous to streams of water or reservoirs from which its supply is obtained as may be necessary to preserve them from contamination, cannot by fair intentment be held to include a whole watershed or area of catchment. *Spring Brook Water Co. v. Kelly*, 17 Pa. Super. Ct. 347.

A statute authorizing the maintenance of a water-supply plant "for such time and upon such terms and conditions as may be deemed proper, including therein the power and authority to exempt pipes and reservoirs from taxation," does not apply to pipes already laid, or reservoirs constructed. *Bowen v. Newell*, 16 R. I. 238, 14 Atl. 873.

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A water company exempted from local taxation on realty used exclusively for corporate purposes is exempt from taxes, for county, municipal, school, and road purposes, on all realty indispensably necessary for the exercise of charter privileges. *Lehigh County v. Bethlehem South Gas & Water Co.* 4 Pa. Dist. R. 723.

A contract whereby a city agrees to relieve a water company from the payment of any city or school tax includes a highway tax. *Alpena City Water Co. v. Alpena* (Mich.) 9 Det. L. N. 141, 90 N. W. 323.

Where taxable.

A waterworks company holding an interest in real estate so long as it shall continue to use the property by the operation of its waterworks, upon which it has built for pumping works a building of brick 36 by 100 feet resting upon a solid foundation of masonry occupied by the building, engines, pumps, and other machinery, the plant being both extensive and substantial, when connected with it is a system of mains and pipes in a neighboring city, together with the hydrants, a filter, and a standpipe also situated in the city,—is taxable for the whole plant, including the mains, pipes, hydrants, standpipes, and filter in the taxing district in which the pumping works are situated. *Oskaloosa Water Co. v. Oskaloosa Bd. of Equalization*, 84 Iowa, 407, 15 L. R. A. 296, 51 N. W. 18.

The land, building, machinery, and water mains of a waterworks company are real estate; and, although the mains may be in different townships, they are subject to assessment in the township in which the works are situated. *Re Des Moines Water Co's Appeal*, 48 Iowa, 324.

A water-supply company is not a manufacturing corporation within the meaning of a statute providing for taxation of property of such corporations where situated, so as to render its pipes, gates, shut-offs, and other things connected with its plant taxable in the jurisdictions where they are located, if they are used in connection with a distributing plant located elsewhere. *Dudley v. Jamaica Pond Aqueduct Corp.* 100 Mass. 183.

instrumentalities of government shall be exempt from taxation, and it, in effect, declares that neither the state nor any of its subdivisions shall tax itself to raise money for itself. The statute makes public ownership of property the ground of immunity from taxation, and, as the plant in question is absolutely owned by the city, it is strictly within the terms of that exemption.

As against this view it is argued that the statute is in conflict with the constitutional provision that "the legislature shall provide for a uniform and equal rate of assessment and taxation; but all property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent, and charitable purposes, and personal property to the amount of at least \$200 for each family, shall be exempted from taxation." Const. art. 11, § 1. It will be noticed that the provision quoted does not require that all property in the state shall be taxed, but does provide that all which is subject to taxation shall be assessed and taxed at a uniform and equal rate. Certain exemptions are therein prescribed which the legislature cannot ignore; but it does not forbid the exercise of the inherent power of

the legislature to exempt property from taxation when, in its judgment, it may conduce to the public welfare. In *Francois v. Atchison, T. & S. F. R. Co.* 19 Kan. 311, and in *Ottawa County v. Nelson*, 19 Kan. 237, 27 Am. Rep. 101, it is, in effect, said that the Constitution does not in terms prohibit the exemption of property not therein enumerated, nor provide that no property shall be exempt except such as is named in that section; and that it actually contains an implication that power exists to make exemptions beyond those expressly enumerated. Our Constitution limits, rather than confers, power, and hence we look to it to see what it prohibits, instead of what it authorizes. Unless the sovereign power of taxation, which includes the power to make exemptions, is actually prohibited by the Constitution, it may be exercised by the legislature. In the absence of constitutional restrictions, the general rule is that the legislature has full power to grant exemptions from taxation; and, there being no such limitation, we cannot say that property like that in question, owned by a city, may not be exempted by the legislature. If use, rather than ownership, were applied as the test to the right

Amount.

In estimating the value of waterworks for the purpose of municipal taxation, there should be considered, in connection with each other, the land on which the reservoir is situated, the pipes through which the water is conducted into the city, and the privilege of charging all who might use it, and the value of the whole thus estimated is subject to taxation. *Stein v. Moblie*, 17 Ala. 234, 24 Ala. 591, 54 Ala. 23.

The purchase price cannot be considered in determining, for the purpose of taxation, the market or real value of the plant and works of a water company or its profit-yielding capacity, where they were purchased or constructed some years previous. *State v. Blenville Water Supply Co.* 89 Ala. 325, 8 So. 54.

Character of property.

Water mains and hydrants laid in the public streets and alleys of a city, and the machinery connected therewith and necessary to the operation of a waterworks plant, are realty for the purpose of taxation, under a statute including as real estate for the purpose of taxation improvements, defined as including "buildings, structures, fixtures, and fences erected upon or affixed to land, whether title has been acquired to said land or not." *Colorado Fuel & Iron Co. v. Pueblo Water Co.* 11 Colo. App. 352, 53 Pac. 282.

The water mains of a water plant for a city, lying under the streets of the same and being connected with the pumping machinery of the plant, constitute a part of such machinery; and where, by statute, the engine and boilers of such plant are, for the purposes of taxation, taken and treated as personal property, the water mains will for the same purpose be also regarded as personal property. *Shelbyville Water Co. v. People ex rel. Craddock*, 140 Ill. 545, 16 L. R. A. 605, 30 N. E. 678.

Water conducted in the pipes of a waterworks system for supplying the inhabitants of a city with water is personal property, and not appurtenant to any land within the meaning of 60 L. R. A.

statutes relating to taxation. *Bear Lake & R. Waterworks & Irrig. Co. v. Ogden City*, 8 Utah, 494, 33 Pac. 135.

Further cases upon the question of the character of water and gas mains for purposes of taxation will be found in a note to *Oskaloosa Water Co. v. Oskaloosa City Bd. of Equalisation* (Iowa) 15 L. R. A. 296.

Enforcement.

Suit against a water company to compel it to pay its delinquent taxes cannot be maintained in the absence of express statutory authority, although no other adequate remedy exists, by reason of the fact that the safety, health, and comfort of the city and the inhabitants where such company is situated depend upon the continued use of its corporate franchise for their water supply, and therefore an interference therewith by seizure and sale by a collecting officer in the usual way could not be permitted. *Louisville Water Co. v. Com.* 89 Ky. 244, 6 L. R. A. 69, 12 S. W. 303.

Owing to the public nature of the duties of a water company, supplying water to the inhabitants of a city, its property cannot be seized and sold for delinquent taxes so as to deprive the public of the benefits derived from its continued use; but, if no property can be found the sale of which will not affect the operation of its franchise, the court will order the appointment of a receiver to take possession of and operate such property until such debt is discharged, unless the money is paid into court by such company within the time fixed by the court. *Louisville Water Co. v. Hamilton*, 81 Ky. 517.

Water plants being essential to the comfort, protection, and good health of a city, such property may not be sold for taxes. The taxing district may, however, after a reasonable demand for the payment of the taxes, maintain an action for the appointment of a receiver over the property, and for the collection of the taxes. *Covington v. Highlands District*, 24 Ky. L. Rep. 438, 68 S. W. 669.

H. P. F.

of exemption, the result would have been the same. The fact that in establishing and carrying on a system of waterworks the city furnishes water to citizens and consumers for rental charges does not make it a mere business enterprise, nor would it affect the exemption. *West Hartford v. Hartford Water Comrs.* 44 Conn. 360. The earnings derived from the water furnished for domestic use

and to consumers is, as we have seen, paid into the city treasury, used in carrying on the city government, and thus inures to the benefit of the people of the municipality.

We think that the trial court reached a correct conclusion, and its judgment will be affirmed.

All the Justices concur.

MAINE SUPREME JUDICIAL COURT.

KENNEBEC WATER DISTRICT

v.

City of WATERVILLE *et al.*

(97 Me. 185.)

1. Franchises possessed, but not in fact exercised, are included in a statute authorizing one water company to acquire, by right of eminent domain, "the entire plant, property, and franchises" of another.
2. The financial returns which a water plant can be made to bear must be considered in determining the value of the franchises of its owner when taken by right of eminent domain.
3. In determining how much income a water plant can be made to produce, for the purpose of ascertaining the value of the franchises of its owner which are sought to be taken by right of eminent domain, it must be allowed a fair amount, based upon the fair value of its property, taking into account the cost of maintenance or depreciation and current operating expenses, allowing something for the risk of the original enterprise, if any, over and above income which it has received at rates which would have been excessive but for such risk, so far as such fair amount can be allowed, and no more should be exacted from the public than the service is worth.
4. Whether or not the franchises of a water company are exclusive, and how far it is without competition, as well as the period for which they are to endure, are to be taken into consideration in determining their value, when sought to be taken by the right of eminent domain.
5. Whether or not the franchises of a water company are exclusive is a question for the court, where the instruments granting them were before it under the pleadings in a proceeding for instructions to appraisers who are to value the property of the company which is to be taken by right of eminent domain; and the question should not be referred to the appraisers to be answered after the charters are put in evidence before them.
6. Evidence of the actual cost of the plant and property of a water company, together with a proper allowance for depreciation, is admissible, but not controlling, upon the question of the amount

which must be allowed for it when the plant is taken by right of eminent domain.

7. The actual rates which have been charged by a water company, and its actual earnings, are admissible in evidence in determining the value of its franchises which are to be taken by right of eminent domain.
8. The selling price of the stock of a water company is not competent evidence of the value of a portion of its system which is to be taken from it by right of eminent domain.
9. The quality of water furnished and of the services rendered, and the fitness of the plant, and the source of the water supply to meet reasonable requirements in the present and future, are to be considered in determining the value of a water plant taken by eminent domain.
10. The faithfulness, or unfaithfulness, even to the extent of rendering the franchises liable to forfeiture of a water company in performing its duties, should not be considered in determining the value of its plant when taken by eminent domain.
11. That a water company has received more than reasonable rates for services rendered should not be considered in determining the amount which must be paid for its plant when taken by eminent domain.
12. Upon taking, by eminent domain, the system supplying one municipal corporation from a water company operating several plants in different places, no increased burden upon, or impairment of value of, the remaining plants because of the severance of the property can be considered as an element of damage, where the various plants are separate and distinct, although some additional cost of management may be thereby imposed upon the remaining ones.
13. Property of a water company not directly connected with the water system or plant which is taken from it by right of eminent domain should be appraised at its fair market value, not at a forced sale, but at what it is fairly worth to the seller under conditions permitting a prudent and beneficial sale.
14. The cost of replacing a water plant with one substantially like it must be considered in determining its value when appropriated by eminent domain; but such consideration must be made in the light of the fact that the plant is a completed structure and a going concern.
15. The element of good will should not be considered in estimating the value of a water plant to be taken by eminent domain so far as the system is practically exclusive.

NOTE.—The question of the measure of damages to be awarded for the condemnation of a water plant is considered at great length in the above case, the right to condemn the plant not being involved.

As to the right to condemn, see, in this series, *Re Brooklyn* (N. Y.) 26 L. R. A. 270. 60 L. R. A.

16. In determining the structure value of a plant for a municipal water supply to be taken by eminent domain, the appraisers should consider the present efficiency of the system, the length of time necessary to construct the same *de novo*, the time and cost needed after construction to develop the new system to the level of the present one in respect to business and income, and the added net incomes and profits, if any, which, by its acquirement as a going concern, would accrue to a purchaser during the time required for the new construction and development of business and income.
17. The possibility of future development of the use of the franchises of a water company should be considered in determining the amount to be allowed for them when taken by eminent domain, in the light of the facts that further investigation may be necessary therefor, and that at any stage of the development the owner of the franchises will be entitled to charge only reasonable rates under the conditions then existing.
18. That a statute provides for the taking of the property and franchises of a water company by eminent domain in no way impairs the value for which compensation must be made.
19. The capitalization of the income of a water company, even at reasonable rates, cannot be adopted as a test of the present value of the plant, upon which to calculate the amount to be paid to it when the plant is taken by eminent domain,—especially where the franchises are not exclusive or perpetual.

(December 27, 1902.)

R EPORT by the Supreme Judicial Court for Kennebec County for the opinion of the full bench of requested instructions to appraisers appointed to determine the compensation which should be awarded for a municipal water-supply plant, which was sought to be taken by eminent domain.

The requests on behalf of plaintiff, which are not sufficiently set out in the opinion, were as follows:

(1) The appraisers are directed to state separately in their report what part of the amount fixed by them as the valuation of the plant, property, and franchises of the Waterville Water Company and the Maine Water Company is fixed as the value of the plant and property, and what part is fixed as the value of the franchises, and further to state what property and what franchises they have considered in fixing these values.

(7) The franchises of the Waterville Water Company are fixed by Priv. & Sp. Laws 1881, chap. 141, as amended by Priv. & Sp. Laws 1887, chap. 59, and Priv. & Sp. Laws 1891, chap. 14.

(8) The franchises of the Maine Water Company material to these proceedings are those of the Waterville Water Company, and those granted by Priv. & Sp. Laws 1893, chap. 352, and no others.

(9) The appraisers shall regard the franchises of the companies as entitling them to continue business as a going concern, but subject to all proper legal rules governing public service companies; it being further understood that said franchises are in no

way exclusive. The franchises shall not be otherwise appraised or valued.

(14) The appraisers may view the premises, so far as they see fit.

(15) They shall procure a stenographer to be in attendance, who shall take notes of all testimony, and furnish transcripts thereof.

(16) They shall make a report showing their doings and findings under each branch of the instructions above given, and also the date as of which the valuation was fixed.

Those by defendants were as follows:

(1) If the court shall be of the opinion that either party at this stage of the case is entitled to instructions under the 8th section of the act above mentioned, the defendants respectively ask the court for the following instructions to said appraisers: the defendants understanding that preliminary requests for instructions are authorized by said 8th section, and that they will be asked for on the part of the plaintiff, and not deeming it right that requests should be presented and considered by the court on the one part, and not on the other.

(5) That, as to the remaining property constituting the water system to be taken, and the franchises, rights, and privileges connected therewith, neither the total construction cost of the entire water system, measured at the date selected for valuation, nor such construction cost less wear and tear and depreciation, nor such construction cost, thus reduced, and afterwards increased by any adjudged percentage or bonus of profit thereon, can constitute the legal criterion of the total values to be awarded under the terms of this act.

(15) That the Constitution of the United States, independent of the terms of this act, requires that just compensation should be made to said water company for all its plant, property, franchises, rights, privileges, good will, incomes, and revenues to be taken under this act, at their full value, not to the taker, but to the seller; and, to secure just and full compensation for all the same, the defendants are entitled, under the Constitution of the United States, to have the court give, and the appraisers follow, as legal rules and material elements of value, in language or in substance, the several foregoing requests; and this request applies to each of said foregoing requests, separately and without reference to any other.

Messrs. Harvey D. Eaton, George E. Boutelle, and Ezra R. Thayer, for plaintiff:

The evidence as to the cost of the works is not only admissible, but very important, in determining similar questions that arise in rate cases.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 597, 41 L. ed. 560, 566, 17 Sup. Ct. Rep. 198; *Smyth v. Ames*, 169 U. S. 466, 546, 547, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804; 15 Harvard Law Review, 264-270.

The water company is a public-service corporation.

Lumbard v. Stearns, 4 Cush. 61; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L. R. A. 424, 28 Pac. 244.

It is entitled to charge only reasonable rates.

What would be reasonable rates can only be determined after a valuation of the company's property.

Smith v. Ames, 169 U. S. 466, 546, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L. R. A. 240, 30 S. E. 319.

The selling value of the capital stock is untrustworthy as an indication of value.

Cotting v. Kansas City Stock-Yards Co. 82 Fed. 854; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L. R. A. 240, 30 S. E. 319.

The franchises of the company are no different in their nature from what they would be if the company had been formed under general laws rather than a special act.

Re Brooklyn, 143 N. Y. 596, 26 L. R. A. 276, 38 N. E. 983; *Memphis & L. R. Co. v. Berry*, 112 U. S. 609, 619, 28 L. ed. 837, 841, 5 Sup. Ct. Rep. 299.

Compensation is to be made for the physical property taken, and adequate damages are to be paid for the loss sustained by the company in discontinuing the exercise of its franchises. And the franchise to be a corporation is not even to be discontinued.

Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533; *Edinburgh Street Tramways Co. v. Edinburgh* [1894] A. C. 456; *Morawetz*, Priv. Corp. chap. *Franchises*.

A rival company, or the public, might be authorized to compete; and, in case better water were furnished, the present company would be simply ruined.

Re Brooklyn, 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983; *Rockland Water Co. v. Camden & R. Water Co.* 80 Me. 544, 1 L. R. A. 388, 15 Atl. 785; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977.

The companies are entitled to damages for being compelled to discontinue the exercise of their franchises, and in that way their full value is to be recovered. But to appraise or value them as ordinary property would be completely to ignore their nature and the principles of law applicable thereto.

Morawetz, Priv. Corp. § 929.

The people have from the first been entitled to the use, and to a certain extent the control, of the works which were authorized, designed, and built for that purpose.

San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 686, 697, 41 L. ed. 1165, 1169, 17 Sup. Ct. Rep. 718.

The relations are analogous in some respects to those of trusteeship, the company being the trustee, the plant the *res*, and the people the beneficiary.

People ex rel. M'Kinch v. Bristol & R. Turnp. Road, 23 Wend. 236.
60 L. R. A.

The company is under the legal duty to Priv. & Sp. Laws 1887, chap. 59, § 1. furnish pure water.

Failure to perform this duty is ground for forfeiture.

Capital City Water Co. v. State, 105 Ala. 406, 29 L. R. A. 743, 18 So. 62; *Farmers' Loan & T. Co. v. Galesburg*, 133 U. S. 156, 33 L. ed. 573, 10 Sup. Ct. Rep. 316.

And repentance after the forfeiture has been incurred is not sufficient to avert the consequences.

Palestine Water & P. Co. v. Palestine, 91 Tex. 540, 40 L. R. A. 203, 44 S. W. 814.

There is no constitutional provision affecting the case, as compensation is required only for property taken, and not for damages.

Me. Const. art. 1, § 21; *Cushman v. Smith*, 34 Me. 247; *Brooks v. Cedar Brook & S. C. River Improv. Co.* 82 Me. 17, 7 L. R. A. 460, 19 Atl. 87; *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336.

The fact that the plant is a running plant, and the probable retention of customers, which is what is meant by "good will," are elements which are included in the valuation of the franchise.

Bristol v. Bristol & W. Waterworks, 23 R. I. 274, 49 Atl. 974; *Cruttcill v. Lye*, 17 Ves. Jr. 334; *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667.

A franchise is property, and nothing more. It is its character of property, only, which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment.

West River Bridge Co. v. Dix, 6 How. 507, 534, 12 L. ed. 535; *Bank of Augusta v. Earle*, 13 Pet. 519, 595, 10 L. ed. 274.

There is a considerable difference between the English and American valuation cases as to the use of business profits as evidence of value. These are admitted in evidence much more freely in England than here.

Cobb v. Boston, 109 Mass. 438; *Maynard v. Northampton*, 157 Mass. 218, 31 N. E. 1062; *Jacksonville & S. R. Co. v. Walsh*, 106 Ill. 253; *Ripley v. Great Northern R. Co.* L. R. 10 Ch. App. 435; *White v. Commissioners of Works & Public Bldgs.* 22 L. T. N. S. 591; *Pile v. Pile*, L. R. 3 Ch. Div. 36.

Where the legislature, for the special purpose of fixing the value of a corporate franchise, had required "a sworn statement of the earning capacity of the corporation, which said earning capacity shall form a basis of estimating the value of its charter or franchise," the court still refused to proceed by the method of capitalizing earnings, saying that, even under this express statutory provision, these were only one element among many affecting the value of the franchise.

Crescent City R. Co. v. Board of Assessors, 51 La. Ann. 335, 25 So. 311; *St. Charles Street R. Co. v. Board of Assessors*, 51 La. Ann. 459, 25 So. 90; *Cotting v. Kansas City Stock-Yards Co.* 82 Fed. 850.

Proposed capitalization of earnings con-

verts into an exclusive franchise one which is confessedly not exclusive.

Hamilton Gaslight & Coke Co. v. Hamilton, 146 U. S. 258, 268, 36 L. ed. 903, 968, 13 Sup. Ct. Rep. 90; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 328, 37 L. ed. 463, 468, 13 Sup. Ct. Rep. 622; *Cotting v. Kansas City Stock Yards Co.* 183 U. S. 79, 93, 94, sub nom. *Cotting v. Godard*, 46 L. ed. 92, 102, 103, 22 Sup. Ct. Rep. 30; *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905; *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407; *Farrington v. Putnam*, 90 Me. 405, 38 L. R. A. 339, 37 Atl. 652; *Bristol v. Bristol & W. Waterworks*, 23 R. I. 274, 49 Atl. 974; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 17, 19, 22, 26 L. ed. 961, 963, 964.

Messrs. Symonds, Snow, Cook, & Hutchinson, Orville D. Baker, and Herbert M. Heath, for defendants:

The appraisers should include damages, if proved, to the property of the water company not taken, caused by severance from its system of the property taken.

Ripley v. Great Northern R. Co. L. R. 10 Ch. 435; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 326, 333, 334, 37 L. ed. 463, 468, 470, 13 Sup. Ct. Rep. 622; *United States v. Gettysburg Electric R. Co.* 160 U. S. 685, 40 L. ed. 582, 16 Sup. Ct. Rep. 427; *Re London Street Tramways Co.* [1894] 2 Q. B. 205; *Edinburgh Street Tramways Co. v. Edinburgh* [1894] A. C. 483.

The question was, not what the property would bring at a forced sale, but what was its true intrinsic value in the hands of a man who could select the time and fix the conditions of his sales.

Somerville & E. R. Co. v. Doughty, 22 N. J. L. 495; 10 Am. & Eng. Enc. Law, 2d ed. p. 1152; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407; *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905.

The original cost of a thing, with or without depreciation, is necessarily a different, and often a misleading, criterion of its value at a date of sale long subsequent, at which date its market value and its actual value to seller and buyer alike may either exceed, or greatly fall short of, its original cost.

National Waterworks Co. v. Kansas City, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853.

Where the purchaser takes a completed plant, ready for instant operation, even if it has no actual takers, business, or income then developed, he takes a plant which, though not then earning, is at least ready to earn an immediate return of the capital invested. This adds a new and material element of value, not included adequately or at all in the construction account.

Re Kirkleatham Local Board [1893] 1 Q. B. Div. 375, [1893] A. C. 449; *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 60 L. R. A.

Fed. 864; *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977; *Bristol v. Bristol & W. Waterworks*, 23 R. I. 274, 49 Atl. 974.

The value of a franchise depends on its productiveness or net earning power, "present and prospective, developed or capable of development, within the entire territory embraced by the taking."

Monongahela Nav. Co. v. United States, 148 U. S. 328, 37 L. ed. 468, 13 Sup. Ct. Rep. 622; *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407; *Mifflin Bridge Co. v. Juniata County*, 144 Pa. 371, 13 L. R. A. 431, 22 Atl. 896; *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905; *Somerville & E. R. Co. v. Doughty*, 22 N. J. L. 495; *Ripley v. Great Northern R. Co.* L. R. 10 Ch. 435.

What constitutes "reasonable water rates" is a question of fact, to be determined upon all the evidence, by the appraisers themselves in a particular case.

Ames v. Union P. R. Co. 4 Inters. Com. Rep. 835, 64 Fed. 176; *Capital City Gaslight Co. v. Des Moines*, 72 Fed. 829.

The value of all franchises, rights, and privileges to be taken is their full value, not to the taker, but to the seller.

Monongahela Nav. Co. v. United States, 148 U. S. 326, 37 L. ed. 468, 13 Sup. Ct. Rep. 622; *United States v. Gettysburg Electric R. Co.* 160 U. S. 685, 40 L. ed. 582, 16 Sup. Ct. Rep. 427; *Fairbank v. United States*, 181 U. S. 300, 45 L. ed. 869, 21 Sup. Ct. Rep. 648.

Just compensation means full compensation for every thing or element of value taken.

Monongahela Nav. Co. v. United States, 148 U. S. 326, 37 L. ed. 468, 13 Sup. Ct. Rep. 622; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427.

The courts, wherever they were not fettered by the taking act, and expressly forbidden to give that "compensation" at all, have adopted the direct capitalization of the income-yield as the truest and most accurate method of valuation of the entire undertaking regarded as a unit.

Re Kirkleatham Local Board [1893] 1 Q. B. 383; *Re London Street Tramways Co.* [1894] 2 Q. B. 208; *Re London County Council* [1894] 2 Q. B. 189; *Edinburgh Street Tramways Co. v. Edinburgh* [1894] A. C. 475; *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533.

The right of the company to lay and maintain pipes in the streets, and its right to collect water rates, could not be estimated by the commissioners.

Newburyport Water Co. v. Newburyport, 168 Mass. 541, 47 N. E. 533.

No matter of forfeiture, or forfeitability even, is open under this inquiry.

Farrington v. Putnam, 90 Me. 405, 38 L.

R. A. 339, 37 Atl. 652; *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407; *Bristol v. Bristol & W. Waterworks*, 23 R. I. 274, 49 Atl. 974.

In determining the values of lands the appraisers should exercise their own judgment, derived from personal knowledge and inspection of the lands, as well as their knowledge derived from the evidence adduced by the parties.

Shoemaker v. United States, 147 U. S. 282, 283, 37 L. ed. 170, 13 Sup. Ct. Rep. 361.

Savage, J., delivered the opinion of the court:

By chapter 200 of the Private and Special Laws of 1899, the Kennebec water district was incorporated; and by § 6 it was empowered to acquire, by the exercise of the right of eminent domain, "the entire plant, property, and franchises, rights and privileges now held by the Maine Water Company within said district and said towns of Benton and Winslow, including all lands, waters, water rights, dams, reservoirs, pipes, machinery, fixtures, hydrants, tools, and all apparatus and appliances owned by said company and used in supplying water in said district and towns, and any other real estate in said district." This act was held constitutional and valid in *Kennebec Water Dist. v. Waterville*, 96 Me. 234, 52 Atl. 774. The act further provides that, in the process of the condemnation proceedings, the court shall appoint three appraisers for the purpose of fixing the valuation of the property mentioned in § 6; that the "appraisers shall, upon hearing, fix the valuation of said plant, property, and franchises at what they are fairly and equitably worth, so that said Maine Water Company shall receive just compensation for all the same," and that "upon payment or tender by said district of the amount fixed, and the performance of all other terms and conditions imposed by the court, said entire plant, property, franchises, rights, and privileges shall become vested in said water district."

It is further provided that, "before a commission is issued to the appraisers, either party may ask for instructions to the appraisers, and all questions of law arising upon said requests or upon any other matters in issue may be reported to the law court for determination before the appraisers proceed to fix the valuation of the property." And it is at this last stage that the proceedings have now arrived. The bill in equity for the judicial appraisal and condemnation of the property having been sustained (*Kennebec Water Dist. v. Waterville*, 96 Me. 234, 52 Atl. 774), both parties have asked for instructions to the appraisers, and the questions of law arising upon the requests for instructions have been reported to this court for its determination.

To say the least, the method thus authorized and adopted is an anomalous one. The questions before the court, which are comprehensive in scope and minute in detail, in effect relate to the admissibility of evidence; and yet they must be decided before the

court knows or can know what specific evidence will be offered or relied upon, or to what conditions the evidence will be applicable. In such case, it is evident that the answers must be general in character. The conditions surrounding properties like the one here proposed to be taken are so variant that it is difficult, and in some particulars impossible, to lay down rules of value which will properly apply to all cases without modification. It was intimated in *Ames v. Union P. R. Co.* 4 Inters. Com. Rep., at page 848, 64 Fed., at page 178, that no hard and fast rule could be made applicable to all properties under all conditions.

And it may be said, further, that, owing to this fact, and to the fact that in scarcely any two cases are the statutes authorizing condemnation proceedings alike, so far as they provide for an estimate of the different elements of value, the expressions of other courts, and results arrived at by them, are frequently of less authority than they otherwise would be.

It should be noticed that this is a bill in equity, to be heard and determined, except as otherwise provided, according to the practice in equity. The hearings, except upon questions of law reserved upon report or exceptions, are to be before a single justice. A single justice is to make all necessary orders and decrees. And the act contemplates that the justice who directs the issuing of a commission to the appraisers may instruct them in regard to the manner of the performance of their duties. The requests for such instructions can be considered by this court only when they raise questions of law. So we construe the act in question. In this view, plaintiff's requests 1, 14, and 15 are not open for consideration by this court. They relate to details of procedure, and raise no questions of law. They relate to questions concerning which the sitting justice may, in his discretion, give or withhold instructions, according as he may think they are, or are not, practicable, and useful to the parties, the appraisers, and the court. The same remarks apply to plaintiff's request 16, in part. Of course, the appraisers must make a report of their doings, and the statute requires that in their report they shall state the date as of which the valuation is fixed. But beyond this, it is for the sitting justice below to pass upon this request, and not for this court.

Before entering upon a consideration of the requests *seriatim*, we think it will be expedient to discuss certain general propositions which concern and must qualify or limit the answers to be given to many or all of the requests.

First, as to the subjects of valuation: In substance, it is claimed by the defendants (request 2), and conceded by the plaintiff, that the latter, if it takes anything, must take every item of property held by the Maine Water Company in the Kennebec water district (the city of Waterville and the Fairfield village corporation), and in Benton and Winslow, at the date of the appraisal, whether specifically named in the

act or not. We think it must be so held. And for every such item of value the Maine Water Company is entitled to "just compensation." This includes the real estate or other property, if any, not connected with the water system. It includes the plant, or physical system, real and personal. It includes all the franchises, rights, and privileges held by the Maine Water Company in the territory described, except the franchise to be a corporation. It is unnecessary to particularize further. The plaintiff criticizes the use of the phrase "capable of being exercised," in speaking of franchises in request 2. But we think it is unobjectionable. Whatever franchise the Maine Water Company holds in this territory is to be taken from it, and must be paid for. Its existence is the criterion, not whether it is being exercised or not. *Joy v. Grindstone-Neck Water Co.* 85 Me. 109, 26 Atl. 1052. It may be doubted whether the Maine Water Company has any franchise in this territory which it is not now exercising. It has some franchises which undoubtedly will be more fully exercised than at present, in the course of the development of its system, if it is allowed to continue in possession of it. It would be, however, rather the extension of the use or exercise of a franchise, than the exercise of an unused franchise.

Secondly, as to reasonable rates: We think it is clear that the pecuniary value of the property of the Maine Water Company, both plant and franchises, depends, to a considerable extent, upon the financial returns it can be made to yield to the stockholders; that is, upon its net income. The franchise or right to do business, if unproductive, is of little value; and it stands to reason that the plant, as a structure, irrespective of franchise, if the business were profitable, would be worth more, and would sell for more, than if the business were unprofitable. The basis of income, of course, is the tolls charged and received. If the Maine Water Company were doing a private business, knowing its present net income, and the facts tending to show a probable increase in the future or otherwise, it would be comparatively easy to approximate the present value of its plant and franchises. But it is not doing a private business. It is not a private corporation. The value of its property cannot be appraised as if it were a private corporation, doing a private business. *Cotting v. Kansas City Stock-Yards Co.* 82 Fed. 850. It is a quasi-public, or public-service, corporation. In pursuit of legitimate gain, it has devoted its property to a public use. In that way the public have acquired an interest in the use of the property. The company owes a duty to the public as well as to its stockholders. It must serve the public faithfully and impartially, and must charge no more than reasonable rates for service. *Brunswick Gaslight Co. v. United Gas, Fuel, & Light Co.* 85 Me. 532, 27 Atl. 525. The legislature may limit the tolls of such a corporation so that they shall be reasonable. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Smyth v. Ames*, 169 U. S. 60 L. R. A.

466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418. Unreasonable charges may be reached by the restraining hand of the court. Thus far the parties agree. And it may be said that the fair and equitable value of the system of the Maine Water Company, as a whole, may, in a large sense, be measured by its net income at reasonable rates, taking into account future probabilities. But the plaintiff (request 4) asks us to say that "what would be reasonable rates can be determined only after and by means of a valuation of the companies' property," and that "the actual rates which may have been charged by the companies, and their actual earnings, have no bearing on the value either of the companies' plant or property, or of their franchises, and are immaterial." On the other hand, the defendants state their proposition in these words (request 11): "That the value of a franchise depends on its productiveness or net earning power, present and prospective, developed or capable of development, within the entire territory embraced by the taking; that whenever net earning power, or net incomes and revenues, is to be determined under this act, it is to be so determined under reasonable water rates, after due allowance for operating expense and maintenance or depreciation."

Waiving other questions for the time being, it will be seen that "reasonable water rates" lie at the foundation of this proposition. But so far we are not in any way aided in determining how they should be ascertained. The differing forms in which the parties have presented their requests upon this subject have given rise, in argument, to the question whether the reasonableness of the rates depends upon the value of the property, or whether the value of the property depends upon the income derived at reasonable rates. But the requests do not present the question in this form. The plaintiff asks that reasonable rates be made to depend upon the value of the property, and we think this is correct, as far as it goes, as we shall have occasion to show hereafter. The defendants say that the value of the franchise (that is, of the right to do the business) depends upon the net income at reasonable rates. And this is also correct, as far as it goes. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622. One refers to the value of the property in gross; the other, to the value of the franchise. But the value of the property is not the only element to be considered in determining what are reasonable rates. As declared in *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, the basis of all calculation as to the reasonableness of rates to be charged by a public-service corporation is the fair value of the property used by it for the convenience of the public. Yet, while the company is entitled, so far as this case shows, to a fair return upon the value of the property used for the public at the time it is being used, the public (that is, the customers) may demand that the rates shall be no higher than the services are worth to them,

not in the aggregate, but as individuals. The value of the services in themselves is to be considered, and not exceeded. These views seem to be consonant with reason. They are also established by the highest judicial authority in our country.

In *Smyth v. Ames*, 169 U. S. 466, at page 544, 169 U. S. at page 848, 42 L. ed., and page 433, 18 Sup. Ct. Rep., the court said: "Such a corporation was created for public purposes. It performs a function of the state. Its authority to exercise the right of eminent domain, and to charge tolls, was given primarily for the benefit of the public. It is under governmental control, though such control must be exercised with due regard to the constitutional guaranties for the protection of its property. . . . It cannot, therefore, be admitted that a railroad corporation maintaining a highway under the authority of the state may fix its rates with a view solely to its own interests, and ignore the rights of the public. But the rights of the public would be ignored if rates for the transportation of persons or property on a railroad are exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders." Again, at page 547, 169 U. S., at page 849, 42 L. ed., and page 434, 18 Sup. Ct. Rep.: "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted for the use of a public highway than the services rendered by it are reasonably worth." Of course, the same principles apply to the water rates as to railroad rates. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804. In the case last cited it was claimed by the appellant, as bearing upon just or reasonable rates for water service, that the court should take into consideration the cost; the cost per annum of operating the plant, including interest paid on money borrowed, and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and a fair net profit. The court said, at page 757, 174 U. S., page 1161, 43 L. ed., and page 811, 19 Sup. Ct. Rep.: "Undoubtedly, all these matters ought to be taken into consideration, and such weight be given them, when rates are being fixed, as, under all the circumstances, will be just to the company and to the public. The basis of calculation suggested by the appellant is, however, defective, in not requiring the real value of the property, and the fair value in themselves of the services rendered, to be taken into consideration. What the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public."

In *Covington & L. Turnp. Road Co. v. San-*

ford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198, it was held that the nature and value of the service rendered by a turnpike company bear upon the reasonableness of rates charged. And in the same case it was held that other considerations were involved, such as "the reasonable cost of maintaining the road in good condition for public use, and the amount that may have been really and necessarily invested in the enterprise."

In *Cotting v. Kansas City Stock-Yards Co.* 183 U. S. 79, *sub nom. Cotting v. Godard*, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, decided since these proceedings were begun, Mr. Justice Brewer declared (p. 91, 183 U. S., p. 101, 46 L. ed., and p. 35, 22 Sup. Ct. Rep.) that the present value of the property is the basis by which the test of reasonableness is to be determined, although the actual cost is to be considered, and that the value of the services rendered to each individual is also to be considered.

In the same case, at page 96, 183 U. S., page 103, 46 L. ed., and page 37, 22 Sup. Ct. Rep., the case of *Canada Southern R. Co. v. International Bridge Co.* L. R. 8 App. Cas. 723, was cited with approval to the point that the question is not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. And Mr. Justice Brewer adds: "The question is, always, not, What does he make, as the aggregate of his profits? but, What is the value of the services which he renders to the one seeking and receiving such services? Of course, it may sometimes be, as suggested in the opinion of Lord Chancellor Selborne, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges; but it is only one factor, and it is not that which finally determines the question of reasonableness."

We deem the principles established by the Supreme Court of the United States as affecting the reasonableness of rates of public-service corporations to be authoritative. The rates of such corporations are within the protection of the 14th Amendment to the Federal Constitution. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Covington & L. Turnp. Road Co. v. Sanford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804. And the declarations of the highest Federal court thereon are of controlling force.

The elemental principles thus far noted may be summarized as, on the one hand, the right of the company to derive a fair income based upon the fair value of the property at the time it is being used for the public, taking into account the cost of maintenance or depreciation, and current operating expenses; and, on the other hand, the right of the public to have no more exacted than the services in themselves are worth.

In some of the cases to which we have referred, it is suggested that there may be instances where these two principles will clash,—where public service rendered at rates not higher than the service in itself is worth may produce less than a fair income, or no net income at all. But we assume that it is unnecessary to discuss this question here, for neither upon the face of the bill and answer, nor in the requests for instructions, nor in the arguments of counsel, is there any suggestion that what will be reasonable rates for the public in this case will not also be reasonable rates for the company.

There is another matter which we think may fairly be considered in connection with the reasonableness of rates. We think something may be allowed in this respect for the risks of the original enterprise, if there were any. It is common sense that they who invest their money in hazardous enterprises may reasonably be entitled, for a time, at least, to larger returns than would be the case if the success of the undertaking were assured from the beginning. The plaintiff, in request 11, concedes that such risks may be considered in valuing the franchise. But inasmuch as the value of the franchise depends chiefly upon the net income which may be produced by its exercise at reasonable rates, as has already been stated, it follows, we think, that the reasonableness of the rate may be affected by the degree of risk to which the original enterprise was naturally subjected. This does not mean unforeseen or emergent risks, but such as may have been justly contemplated by those who made the original investment. We use the word "chiefly," because we apprehend that a franchise, even of an unprofitable business, might have a temporary value for some purposes. But that condition does not seem to exist in this case. The element of risk, however, is not controlling. It is only one element. It is to be fairly considered in connection with the other elements named. To say just how much allowance should be made, and for how long a period, requires the exercise of a careful, conservative, and discriminating judgment. If allowance be sought on account of this element of original risk, we think it will be permissible at the same time to inquire to what extent the company has already received income at rates in excess of what would otherwise be reasonable, and thus has already received compensation for this risk. This latter inquiry should be limited to this specific purpose, and is not open, as we shall hold, under plaintiff's request 13.

Thirdly, as to the character and duration of the franchises: It must be evident that the value of the plant and the franchises themselves, whether taken separately or as a whole, is affected by the character and duration of the franchises. *Bristol v. Bristol & W. Waterworks*, 19 R. I. 413, 32 L. R. A. 740, 34 Atl. 359; *Re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983. An exclusive franchise to do a profitable business is worth more than one which is not exclusive. A perpetual franchise to do a profit-

able business is, or may be, worth more than one which is subject to repeal.

The plaintiff (request 9) asks an instruction that the franchises now held by the Maine Water Company are in no way exclusive. The defendants suggest that whether the franchises are exclusive, or not, is a question for the appraisers to answer after the charters have been put in evidence, and not for the court, in the first instance, at least. We do not think so. Certain acts incorporating the Waterville Water Company and the Maine Water Company, and granting to them powers and franchises, are referred to in the bill and are admitted by the answer. They are necessarily in the case without further proof. The plaintiff may properly ask for a construction of the franchises granted by those acts. Such construction is a matter of law.

We have not searched for other grants of franchises than those contained in plaintiff's requests 7 and 8. It is not our duty to do so. But we have no hesitation in saying that, so far as the franchises granted by those acts are concerned, they are not exclusive. The legislature may at any time, according to its own wisdom, grant to the municipalities within which this water system is situated franchises similar to the ones in question. It may grant similar franchises to one or more corporations like the Waterville Water Company or the Maine Water Company. *Re Brooklyn*, 143 N. Y. 596, 26 L. R. A. 270, 38 N. E. 983; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718. It has granted similar franchises to this plaintiff, a municipal district, and has even authorized it to take away from the defendant water company all the franchises it holds within the district and Benton and Winslow. *Kennebec Water Dist. v. Waterville*, 96 Me. 234, 52 Atl. 774. But the defendants say that the Maine Water Company was "practically in the enjoyment of an exclusive franchise," because it had no competitor, although its franchise may not be legally an exclusive one; citing *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977. And we say that the fact that the company was doing its business without competition may and should be considered by the appraisers when they are valuing the property of the defendant as a going concern. That fact is one of the characteristics of the going business, and may enhance its value. We are considering now only the legal situation of the company. There is a difference between a franchise which is practically exclusive and one which is actually exclusive, as there is a difference between uncertainty and certainty. The distinction is vital in principle, and it may be important in fixing value. Of how much or how little importance it is can only be estimated by the appraisers after hearing the evidence.

Again, the charters under which the company operates are subject to repeal by the legislature. Rev. Stat. chap. 46, § 23. The franchises are not perpetual and irrevocable.

It may be that it is extremely unlikely that the legislature would repeal the charters without providing for compensation in some way. The probabilities are fairly open to consideration. But the legal condition exists. It is a factor to be considered for what it is worth.

Having considered these general propositions, which are far-reaching, and which affect substantially all of the requested instructions, it will now be comparatively easy to pass upon the several requests in the form in which they are presented.

(1) Plaintiff's requests.

The plaintiff, in request 2, asks that the actual cost of the plant and property, together with proper allowances for depreciation, be declared to be legal and competent evidence upon the question of the present value of the same. We so hold. It is competent evidence, but it is not conclusive. It is not a controlling criterion of value, but it is evidence. *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Cotting v. Kansas City Stock-Yards Co.* 183 U. S. 79, *sub nom. Cotting v. Godard*, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905; *Griffin v. Goldsboro Water Co.* 122 N. C. 206, 41 L. R. A. 240, 30 S. E. 319. Of course, this element is subject to inquiry as to whether the works were built prudently, and whether they were built when prevailing prices were high, so that actual cost, in such respects, may exceed present value. *Rugan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

The remainder of plaintiff's request 2 asks that the companies be directed to produce their book accounts and other documentary evidence bearing upon the question of cost before the appraisers. This request raises no question of law, and cannot be considered by us.

Plaintiff's request 3 ought not to be given in the form in which it is presented, which is that "under no circumstances can the value of the plant of the companies be held to exceed the cost of producing at the present time a plant of equal capacity and modern design." Among other things, it leaves out of account the fact that it is the plant of a "going concern," and it seeks to substitute one of the elements of value for the measure of value itself. *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407. We shall discuss further the competency of the cost of reproduction when we consider defendants' requests 6 and 7.

We have already discussed sufficiently the first two propositions of plaintiff's request 4. The deduction sought to be established by 60 L. R. A.

the third proposition is that "the actual rates which may have been charged by the companies, and their actual earnings, have no bearing on the value either of the companies' plant or property, or of their franchises, and are immaterial." We cannot say this as a matter of law. As a matter of proof, we think the evidence of such facts is admissible and material. The value of the evidence, however, depends upon whether the appraisers shall find that the rates charged have been reasonable or not. If reasonable, these facts furnish one important test, but not the only one, in fixing the present value of plant and franchises. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622. But if the charges have been excessive, past receipts should not be regarded by the appraisers as a proper test of value. *Cotting v. Kansas City Stock-Yards Co.* 82 Fed. 850.

We omit plaintiff's request 5. In argument, the counsel on both sides seem to agree that the selling price of the capital stock of the water company is not to be considered as affecting the valuation of the property. The plaintiff does so in part on general principles; the defendant, because of the special circumstances of this particular case; and it is immaterial to the present discussion which is right. If the claim of the defendants that the entire capital stock of the Waterville Water Company is owned by the Maine Water Company, and that the capital stock of the Maine Water Company represents, not only the property in the Waterville system, but also of many others in other towns and cities of the state, is found to be correct, certainly the selling price of capital stock will afford no aid in fixing the value of the Waterville system.

We think the appraisers should be instructed in accordance with plaintiff's requests 6 and 10, without any qualification. They ask that the quality of the water furnished and of the service rendered, and the fitness of the plant and of the source of water supply to meet reasonable requirements in the present and future, be deemed material upon the question of present value.

We have already discussed sufficiently plaintiff's requests 7 and 8, and to some extent its request 9. This last request is that "the appraisers shall regard the franchises of the companies as entitling them to continue business as a going concern, but subject to all proper legal duties governing public-service companies." So far, we think the instruction should be given. *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533. The matter of exclusive franchise referred to in this request has already been disposed of. The remainder of the request is that "the franchise shall not be otherwise appraised or valued." In its present form, this is not approved. It is, to say the least, likely to be misleading. If it means to include all of the franchises of the companies,

so far as they have been disclosed to us, it is unobjectionable. But if it is intended to include all franchises not now exercised by the going concern, or future extensions of the use of franchises now exercised, it is objectionable. The plaintiff will take all of the franchises of the companies, except the franchise to be a corporation, and for all of these franchises of which it will be deprived the Maine Water Company will be entitled to just compensation.

Plaintiff's request 11, in so far as it says that "in fixing the value of the companies' franchises the appraisers may give such regard as is demanded by ample and fair public policy to the past investment, risks, and services of the companies, and to the reasonably just expectations which those who made the investment had in mind when so investing," is approved. We have already discussed this proposition in a former part of this opinion, relating to reasonable rates, to which we think it properly relates.

The remainder of request 11 is not approved. It is that in fixing the value of the companies' franchises the appraisers may give regard "to the faithfulness or unfaithfulness shown by the companies in the performance of their public duty and obligation to furnish pure water at reasonable rates." We do not think that past faithfulness or unfaithfulness in the exercise of a franchise bears any such relation to the present value of it as to make it a proper matter for consideration. It is the franchise as it now exists which is to be taken and paid for. It is the right to do business now, under and within the charter, which must be appraised, irrespective of the past use of that right. If past misconduct has incidentally resulted in lessened business, that matter will have due consideration under other heads. But in this process of condemnation of property, the owner is not to be punished for past misuse of it.

Requests 12 and 13 may be considered together. They seem to imply that the companies in the past have been unfaithful in the performance of their public duties, both by furnishing impure water and by charging excessive rates, and by reason thereof it is claimed that the companies "have rendered themselves liable to such processes as are appropriate to work legal forfeiture" of their rights and franchises, and that this liability to forfeiture is to be considered in fixing the value of the property. We cannot give our assent to this doctrine. If these franchises have become forfeitable for misbehavior of the companies, the remedy is found in quo warranto brought by the state, and only by the state. Any individual affected by the wrongful conduct of the companies might have invoked the intervention of the state. But this does not seem to have been done. On the contrary, it is proposed to take these franchises as they are. Even if forfeitable, they have not been forfeited. They are in full force and vigor. They must be valued as living franchises, not as dead or moribund. Whether the state would ever institute process for forfeiture, and, if it

did, whether the court would find the facts as the appraisers might, are questions so very uncertain that an inquiry concerning them must be purely speculative and unfruitful. To permit this inquiry would be to permit the appraisers to speculate upon what the judgment of the court might be at another trial, under other conditions. We think the franchises must be appraised as they are now held and used by the companies. Whatever the past misconduct may have been, we do not see how it can affect the value of the present right and ability to exercise the franchises. We think, however, that this liability to forfeiture arising from misconduct is to be distinguished from liability to legislative repeal to which we have already alluded. The latter is a limitation of the franchise which inheres in the franchise itself, from its creation. There is no franchise, except as so limited. It is the only kind of a franchise the companies ever held.

Plaintiff's request 13 asks that, if it be found that the companies have actually received more than reasonable rates for the services rendered since operations began, then the amount of such excess shall be deducted from the amount to which the companies would otherwise be entitled. It is not approved. It is sufficient to say that this is not a process of accounting, but one of condemnation of property, for which the owner is entitled by statute and Constitution to just compensation at its present value, without any deduction.

(2) Defendants' requests.

The first paragraph of the defendants' requests presents no question of law, and the second request has already been considered.

Their request 3 is "that any increase of pecuniary obligation or burden or duty, or any damage to or impairment of the value of its remaining property or franchises, in any way resulting to said Maine Water Company by reason of the exercise of the right of eminent domain contemplated by said act of 1899, should be considered by said appraisers, and just compensation therefor should be included." It seems to be assumed in argument, and we assume, that this request is based upon the fact that the Maine Water Company is the owner of other water systems situated at other places. Of course, it cannot refer to any remaining property at Waterville, for there will be none. The argument is that, by depriving the company of its Waterville plant, the general expense of supervision and management will still remain practically unchanged, and will be a proportionately heavier burden upon the remaining property. The language of counsel is that "the economy and efficiency of administration which are sought and obtained by the combination are inevitably more or less impaired by breaking it up, either in whole or in part." The compensation asked is not for property taken, but for incidental damages to other property having no physical connection with or contiguity to

that taken, and having no relations whatsoever with the property taken, except those which grow out of common ownership. The defendants rest their claim upon the familiar doctrine of damages for severance, namely, that, when a portion of a property is taken, the impaired value of the remainder, by reason of the severance, may and should be considered, and compensation awarded therefor. But we think this case cannot be brought within that rule. That rule applies only when the property taken and the property left may fairly be considered one property, and not when they are separate and distinct. In *Bangor & P. R. Co. v. McComb*, 60 Me. 290, Kent, J., after stating the reasons for allowance of damages for severance, uses this language: "The constitutional provision cannot be carried out, in its letter and spirit, by anything short of a just compensation for all the direct damages to the owner of the lot, confined to that lot, occasioned by the taking of his land. The paramount law intends that such owner, so far as that lot is in question, shall be put in as good a condition, pecuniarily, by a just compensation, as he would have been in if that lot of land had remained entire, as his own property. How much less is that lot . . . worth . . . than the whole lot, intact, was the day before such taking?" The implication of this language clearly is that the parcels must be of the same property,—in that case, the same lot. In 10 Am. & Eng. Enc. Law, 2d ed. p. 1166, title, *Eminent Domain*, it is said that, "to entitle an owner to recover damages to the whole tract when a part of his lands have been taken, there must have been a unity of contiguous parcels. The land must have been together. All of it must have been used as a single tract." In 3 Sedgw. Damages, 8th ed., at p. 413, the rule is laid down that, "in assessing damages or benefits, the inquiry is limited to the tract of land immediately affected. This is held to be so much as belongs to the proprietor whose land is taken, and is continuous with it, and used together for a common purpose. . . . When land is divided into blocks by the owner, and dealt with as such by himself and purchasers, it is held that each block is to be considered as a separate tract, in estimating damages." *Laflin v. Chicago, W. & N. R. Co.* 33 Fed. 415. Nor are the two cases which the learned counsel for the defendants say are the only ones found, in which the question of damages for the dismemberment of a public-service corporation by a compulsory taking has been raised, opposed to this doctrine. In *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622, the general government was proceeding to condemn, under the power of eminent domain, one of the seven locks and dams owned by the navigation company. The court, calling attention to the doctrine of damages by severance, said: "This is a question which may arise, possibly, in this case if the seven locks and dams belonging to the navigation company are so situated as to be fairly con-

sidered one property,—a matter in respect to which the record before us furnishes no positive evidence. It seems to be assumed that each lock and dam by itself constitutes a separate structure and separate property, and the thoughts we have suggested are pertinent to such a case." The other case so cited and referred to by counsel is *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427. But this case seems rather to be within the rule of the "single tract" cases. The court simply says: "If the part taken by the government is essential to enable the railroad corporation to perform its functions, or if the value of the remaining property is impaired, such facts might enter into the question of the amount of the compensation to be awarded." It was alleged by the company that the effect of the condemnation of the strip of land in question would be to cut off a particular branch railway or extension belonging to it, and destroy its continuity, and prevent its construction. It seems to us clear that the several parts of an electric railway system may properly be regarded as a single property. No other authority cited by the defendants upon this point aids them. The damages occasioned to the company by the taking of the Waterville property, considered with respect to its other and distinct property, if any, will be incidental and consequential. And such damages are not within the statutory and constitutional requirements of "just compensation." *Cushman v. Smith*, 34 Me. 247; *Brooks v. Cedar Brook & S. O. River Improv. Co.* 82 Me. 17, 7 L. R. A. 460, 19 Atl. 87.

The defendants' request 4 should be given. It relates to property not directly connected with the water system or plant. It should be appraised "at its fair market value, not at a forced sale, but at what it is fairly worth to the seller, under conditions permitting a prudent and beneficial sale." *Chase v. Portland*, 86 Me. 367, 29 Atl. 1104; *Somerville & E. R. Co. v. Doughty*, 22 N. J. L. 495; 10 Am. & Eng. Enc. Law, 2d ed. p. 1152; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Montgomery County v. Schuylkill Bridge Co.* 110 Pa. 54, 20 Atl. 407; *West Chester & W. Pl. Road Co. v. Chester County*, 182 Pa. 40, 37 Atl. 905. In *Chase v. Portland* our own court quoted with approval from *Laurence v. Boston*, 119 Mass. 126, the following: "'Market value' means the fair value of the property, as between one who wants to purchase and one who wants to sell any article; not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not value obtained from the necessities of another. It is what it would bring at a fair public sale, when one party wanted to sell, and the other to buy." *Palmer v. Penobscot Lumbering Asso.* 90 Me. 193, 38 Atl. 108. The statute provides for fixing the "just compensation" for the property taken at its fair and equitable value, but it does not pro-

vide for compensation for consequential damages.

Defendants' request 5 has already been discussed. It should not be given, except as already qualified. We hold that the construction cost is admissible, but not controlling, on the question of present value. It must be borne in mind, as said by Mr. Justice Brewer in *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853, that "'original cost' and 'present value' are not equivalent terms," and that besides the elements of wear and tear, and depreciation in physical structure or in value, the property may have cost more than it ought to have cost. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

Defendants' requests 6 and 7, as limited in their brief, are that neither the reproduction cost of the existing plant, nor the cost at present of a new one differently constructed, but equal or even superior in efficiency to the one now existing, is the legal criterion of the total values to be awarded, or even of the plant or structure value. This is undoubtedly true, if by "criterion" is meant a sole or controlling test of present value. There are other elements besides cost of reproduction or replacement which affect present value. The present value of the property is of vital importance, for, as we have seen, the value of the property at the time it is being used for the public is one of the elements essential in determining what are then reasonable rates, and question of franchise value depends upon the rates which may reasonably be charged. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804. We think it will be proper for the appraisers to consider what the existing system can be reproduced or replaced for, because evidence of cost of reproduction will have some tendency to show what is the present value. Such cost will not, however, be conclusive. There are other elements, still to be noticed, which should be considered in fixing present value. In *Newburyport Water Co. v. Newburyport*, the cost of the reproduction of all of that part of the physical plant used in pumping and delivering water, less any depreciation, was considered without objection and seems to have been approved by the court. *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977; *Smyth v. Ames*, 169 U. S. 486, 42 L. ed. 819, 18 Sup. Ct. Rep. 418. But the mere cost of reproduction is not enough. Judge Brewer, in *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853, calls attention to two additional elements,—one, that it is a completed structure, connected with buildings prepared for use; and the other, that the company is a going concern. He says (p. 827, 27 L. R. A., p. 685, 10 C. C. A., p. 177, 27 U. S. App., and p. 865, 62 Fed.): "Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not

take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets,—in other words, the cost of reproduction,—does not give the value of the property as it is to-day. A completed system of waterworks, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning in consequence thereof the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city,—not only with a capacity to earn, but actually earning,—makes it true that the 'fair and equitable value,' is something in excess of the cost of reproduction."

The court, in *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633, holds that the method of fixing present value by ascertaining cost of replacement is not applicable to property of this character, because, chiefly, the construction and development of waterworks is a matter of growth. At the outset the company owning them is a pioneer. It must keep pace with, or anticipate, municipal growth. The works must be constructed, and usually no reward can be realized by the constructors until some time has elapsed. In the meantime, as the city grows, the facilities of building such works are increased, and the cost of construction thereby diminished. But we think that, at the most, these considerations suggest only that other elements are also taken into account in fixing present value. So far as they relate to the original hazard, we have discussed them in an earlier part of this opinion. We think the inquiry along the line of reproduction should, however, be limited to the replacing of the present system by one substantially like it. To enter upon a comparison of the merits of different systems—to compare this one with more modern systems—would be to open a wide door to speculative inquiry, and lead to discussions not germane to the subject. It is this system that is to be appraised, in its present condition and with its present efficiency.

Defendants' request 8 is, in effect, that, in estimating even the structure value of the plant, allowance should be made, in addition to the value as otherwise established, for the fact, if proved, that the water system is a going concern, with a profitable business and good will already established, and with a present income assured and now being earned. We think this instruction, with a modification to be noted, should be given. *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533; *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977; *Bristol*

v. *Bristol & W. Waterworks*, 19 R. I. 413. But the term "good will" may be misleading. Lord Eldon said that good will is nothing more than the probability that the old customers will resort to the old place. *Crutwell v. Lye*, 17 Ves. Jr. 335. See *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 59 N. E. 667. Under any possible definition, it involves an element of personal choice. This phrase is inappropriate where there can be no choice. So far as the defendants' system is "practically exclusive," the element of good will should not be considered. *Bristol v. Bristol Waterworks*, *supra*.

The defendants, in request 9, ask that in determining the amount to be added to structure value, in consideration of the fact that the system is a going concern, the appraisers should consider, among other things, the present efficiency of the system, the length of time necessary to construct the same *de novo*, the time and cost needed after construction to develop such new system to the level of the present one in respect to business and income, and the added net incomes and profits, if any, which, by its acquirement as such going concern, would accrue to a purchaser during the time required for such new construction, and for such development of business and income. We think this instruction should be given. These are all proper matters for consideration "among other things." They are not controlling. Their weight and value depend upon the varying circumstances of each particular case. Of course a plant, as such, already equipped for business, is worth more, if the business be a profitable one, than the mere cost of construction.

The defendants' request 10 should also be given. It asks, in effect, that, in addition to structure values already considered, the appraisers should consider all the franchises, rights, and privileges now held by the Maine Water Company within the Kennebec water district and Benton and Winslow, and allow just compensation for them as such. This valuation, however, must be made with reference to the character and duration of the franchises. So far as appears, they are not exclusive, and they are subject to repeal. This we have already discussed. A franchise is property, and it has value. In this case the franchises have value in themselves, inasmuch as they give the owner the privilege of doing what is called a "profitable business." We have already shown that the existence of such franchises may also enhance the value of the plant by which they are exercised. It should be remembered, however, that a franchise has only one appraisable value, and care should be taken that that value is appraised only once.

The defendants' request 11 should be given in this case. It has been given in part already. It is that the value of a franchise depends upon its net earning power, present and prospective, developed and capable of development, at reasonable rates; that the value to be assessed is the value to the seller, and not to the buyer; and that "just com-

pensation" means full compensation for everything or element of value taken. *Monongahela Nav. Co. v. United States*, 145 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622. The appraisal must be made, having in mind what we have already said concerning the character and duration of the franchises and the reasonableness of rates. While, with these limitations, the owner is entitled to receive the value of the franchises, having reference to their prospective use as now developed, and to the future development of their use, consideration must also be had of the fact that further investment may be necessary to develop the use, and of the further fact that at any stage of development the owner of the franchise will be entitled to charge only reasonable rates under the conditions then existing. But subject to such limitations, we think it should be said that the owner is entitled to any appreciation due to natural causes—such as, for instance, the growth of the cities or towns in which the plant is situated. *Cotting v. Kansas City Stock-Yards Co.* 82 Fed. 850.

Defendants' request 12, "that the fact that the franchises, rights, and privileges of said Maine Water Company are to be taken under this act in no respect destroys or impairs their value to said water company, and cannot diminish or affect the amount to be awarded as just compensation therefor," is approved, and the instruction should be given.

Subject to the suggestions we have made under defendants' request 11, their request 13 is approved, and the instruction should be given. It is as follows: "That in estimating said franchises, and the present and future net earning power included therein, the appraisers should duly weigh the nature and extent of these franchises, rights, and privileges, whether the same are perpetual or otherwise; also, so far as proved, the rights of the Maine Water Company under all existing contracts, and the value thereof; the extent of existing business, and of the net incomes or revenues now derived or derivable therefrom; the existing demand for new and additional services, and for the development and increase of said business, incomes, and revenues; the past and probable future growth or decay of the territory now served, or capable of being served, under said franchises, in population, in wealth, and in needs and uses for water to be supplied by some water system; and the past and probable future increase or decrease in said net incomes and revenues as affected by these or other surrounding conditions; also the fact that by said taking said water company will be wholly and forever deprived of all said franchises, rights, privileges, earning power, incomes, and revenues, and that it is the duty of said appraisers to make, in their sound judgment, just and full compensation to said water company for all the same."

Defendants' request 14 is as follows: "That the true measure of value, under the terms of this act, and under the requirements of the Constitutions of this state and of the United States, is just and full compensation

to said water company for each and every thing of value of which it is to be deprived by this taking; that, in addition to the special property covered by request 4, the plant, property, franchises, rights, and privileges now held by said water company within the territory embraced by this act contain distinct elements of value—First, as an asset; and, second, as a source of income, having, or not, present and prospective net earning power; that by the taking under this act said water company will be deprived, wholly and forever, both of said asset and of said source of income; that just compensation to said company for what is thus compulsorily taken from it requires that the sum to be awarded as a substitute therefor shall be the full equivalent of everything taken, both in value as an asset, and in net earning power, and such a sum as, in the sound judgment of the appraisers, will be the full money equivalent of all the plant, property, franchises, rights, and privileges aforesaid, and at the same time, if prudently invested at fair current rates of interest, will yield to said company the same net incomes and revenues, and for the same term, that it will be deprived of by this taking; the net earning power, incomes, and revenues aforesaid to be determined under reasonable water rates, after due allowance, on the one hand, for operating expense and maintenance or depreciation, and, on the other hand, with due regard to the probable future increase or decrease thereof under all conditions affecting the same."

Some portions of this request have already been considered so fully that it is unnecessary to repeat. It is doubtless true that the property to be taken, both plant and franchises, are to be appraised, having in view their value as property in itself, and their value as a source of income. The physical property has value irrespective of the franchise, and the franchise without reference to the physical property. But these two kinds of value practically shade into each other. The value of the physical property is enhanced by the existence of franchises which make it usable. The value of franchises is enhanced by the existence of physical property by which they may be profitably exercised. There are these items of property, but only one entire system. There are all of these elements of value, from which is to be estimated the value of the entire property, tangible and intangible, as a whole. The plaintiff is not to take the physical property without the franchises, nor the franchises without the physical property. It will pay one gross sum as an entire value, and take all the property. The consideration of the elements will be useful only as it will enable the appraisers to fix the just compensation to be paid for the entire property as a whole.

But we cannot assent to the proposition that the capitalization of income, even at reasonable rates, can be adopted as a sufficient or satisfactory test of present value. Such a capitalization would fix at the present

time a specific value which would continue for all time to come, as a fixed and unvarying source of income, no matter how conditions may be changed.

Our attention has been called to no case, resting on the same principles as this one does, where the capitalization of profits has been adopted as the test of present value,—certainly not in this country. Take, for instance, the case of *Edinburgh Street Tramways Co. v. Edinburgh* [1894] A. C. 456, cited by defendants. It does not support the doctrine. In that case the arbitrator declined to value the tramway lines by capitalizing the rental, and upon appeal his assessment was affirmed, and the appeal dismissed. It was held that the statute under which the proceedings were had limited the appraisal to construction value, which the arbitrator had considered in the light of the fact that the tramways were then successfully constructed and in complete working condition; in other words, that the company was a going concern. Lord Watson, in the same case, at page 475, said that valuation by rental "is not a satisfactory method in the case of a tramway line which has never been let, and has no competing line within its district." How much importance is attributed to the last suggestion, is not stated. See *National Waterworks Co. v. Kansas City*, 27 L. R. A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533. If the franchises were exclusive, if they were perpetual, and if it could be known that what are reasonable rates now would continue to be reasonable, there would be more ground for sustaining such a test. But the franchises are not exclusive. Competition is possible,—even, as the event has shown, more than probable. They are not perpetual, but may be repealed. And what may be reasonable rates at any given time will depend upon conditions which not only may vary, but are likely to vary. Therefore the basis for capitalization is too uncertain to afford a satisfactory test of value. By this we do not mean to say that, while not a test, present and probable future earnings at reasonable rates are not properly to be considered in determining value. We have already stated that they are.

Defendants' request 15 raises no new question of law. It is sufficient to say the Constitution of the United States requires that just compensation should be made to said water company for all its property, of every nature, taken under the act in question, at its full value, not to the taker, but to the seller.

To conclude: The appraisers should be instructed to receive and consider all evidence offered, so far as admissible under the general rules of law, which is pertinent under the rules stated in these requests, so far as they have been approved by this court, and as limited or explained in this opinion.

So ordered.

MINNESOTA SUPREME COURT.

ALBERT LEA COLLEGE

v.

H. N. BROWN, Admr., etc., of Horatio D. Brown, Deceased, et al., Appts.

(.....Minn.....)

*B. in his lifetime made and delivered to plaintiff, an incorporated charitable educational institution, dependent for the most part upon voluntary contributions for its support (formed under title 3, chap. 34, Gen. Stat. 1894), his promissory note, by which he promised to pay it the sum of \$2,500 at a future date; the same to form, by itself, or with other like contributions, a permanent endowment fund for the college. Before it became due, B. died. Plaintiff, through its board of directors, by resolution, accepted the donation before the death of B.; and in reliance thereon, and upon other like donations, continued its work, when without the same it would have been necessary to suspend, and abandon the purposes for which it was incorporated. It was induced thereby to incur debts and obligations, and to solicit subscriptions from others, all of which was known to B. Held, that the promise was sufficiently supported by a consideration, was not revoked by the death of B., and is valid and enforceable against his estate.

(February 13, 1903.)

APPEAL by defendants from an order of the District Court for Freeborn County directing judgment for plaintiff in an action brought to enforce payment of a subscription. *Affirmed.*

The facts are stated in the opinion.

Messrs. Morgan & Meighen, for appellants:

The instrument in question was a complete and independent offer to make a gift, and could not be enlarged or extended by any act of the plaintiff. It was subject to withdrawal or revocation at any time until executed, and could only be executed by payment or some act of the donor in furtherance or execution of the gift; and it was completely annulled and revoked by the death of the donor before the time fixed for fulfillment.

Fink v. Cox, 18 Johns. 145, 9 Am. Dec. 191; *Schoonmaker v. Roosa*, 17 Johns. 301; *Pearson v. Pearson*, 7 Johns. 26; *Noble v. Smith*, 2 Johns. 52, 3 Am. Dec. 399; *Second Nat. Bank v. Williams*, 13 Mich. 282; *Simpson Centenary College v. Tuttle*, 71 Iowa, 596, 33 N. W. 74; *Beatty v. Western College*, 177 Ill. 280, 42 L. R. A. 797, 52 N. E. 432; *Pratt v. Baptist Society*, 93 Ill. 475, 34 Am. Rep. 187; *Beach v. First M. E. Church*, 96 Ill. 177; *Hudson v. Green Hill Seminary*

Corp. 113 Ill. 618; *Wesleyan Seminary v. Fisher*, 4 Mich. 515; *Amherst Academy v. Cowles*, 6 Pick. 427, 17 Am. Dec. 387; *Roberts v. Cobb*, 103 N. Y. 600, 9 N. E. 500; *Johnston v. Wabash College*, 2 Ind. 555; *Roche v. Roanoko Classical Seminary*, 56 Ind. 198; *Simpson Centenary College v. Bryan*, 50 Iowa, 293; *Vierling v. Horton*, 27 Ill. App. 263; *Pryor v. Cain*, 25 Ill. 292; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Kansas City School Dist. v. Sheidley*, 138 Mo. 672, sub nom. *Kansas City School Dist. v. Stocking*, 37 L. R. A. 406, 40 S. W. 656; *Spencer v. Vance*, 57 Mo. 429; *Tomlinson v. Ellison*, 104 Mo. 105, 16 S. W. 201; *Brooks v. Owen*, 112 Mo. 251, 19 S. W. 723, 20 S. W. 492; *Koch v. Lay*, 38 Mo. 147; *Steele v. Steele*, 75 Md. 477, 23 Atl. 959; *University of Des Moines v. Livingston*, 57 Iowa, 307, 42 Am. Rep. 42, 10 N. W. 738; *Methodist Episcopal Church v. Garvey*, 53 Ill. 401, 5 Am. Rep. 51; *Pitt v. Gentile*, 49 Mo. 74; *Richelieu Hotel Co. v. International Military Encampment Co.* 140 Ill. 248, 29 N. E. 1044; *Pope v. Dodson*, 58 Ill. 360; *Blanchard v. Williamson*, 70 Ill. 652; 1 Parsons, Bills & Notes, 202; 1 Parsons, Contr. 377 et seq.; *McClure v. Wilson*, 43 Ill. 356; *Kentucky Baptist Education Soc. v. Carter*, 72 Ill. 247.

The promissory note of a donor, as a gift, is a mere naked, revocable promise, without a sufficient valid consideration, and creates no obligation on the part of the maker or his representatives.

Hall v. Howard, Rice L. 310, 33 Am. Dec. 115; *Simmons v. Cincinnati Sav. Soc.* 31 Ohio St. 457, 27 Am. Rep. 521; *Flint v. Pattee*, 33 N. H. 520, 66 Am. Dec. 742; *Parish v. Stone*, 14 Pick. 198, 25 Am. Dec. 378; *Holley v. Adams*, 16 Vt. 206, 42 Am. Dec. 508; *Priester v. Priester*, Rich. Eq. Cas. 26, 23 Am. Dec. 191; *Shaw v. Camp*, 160 Ill. 425, 43 N. E. 608; *Williams v. Forbes*, 114 Ill. 167, 28 N. E. 463; *Richardson v. Richardson*, 148 Ill. 563, 26 L. R. A. 305, 36 N. E. 608; *Graves v. Safford*, 41 Ill. App. 659; *Sanborn v. Sanborn*, 65 N. H. 172, 18 Atl. 233; *Holmes v. Roper*, 141 N. Y. 64, 36 N. E. 180; 14 Am. & Eng. Enc. Law, 2d ed. pp. 1016, 1017, 1030; *Tracy v. Alvord*, 118 Cal. 654, 50 Pac. 757; *Raymond v. Sellick*, 10 Conn. 480; *Carr v. Silloway*, 111 Mass. 24; *Thresher v. Dyer*, 69 Conn. 404, 37 Atl. 979; *Curry v. Powers*, 70 N. Y. 212, 26 Am. Rep. 577; *Cloyes v. Cloyes*, 36 Hun, 145; *Smith v. Kittridge*, 21 Vt. 238; *Murphy v. Bordwell*, 83 Minn. 54, 52 L. R. A. 849, 85 N. W. 915.

A note of a drawer is not, like the note of a third person, the subject of a gift; it is a mere promise, and can no more be recovered upon as a gift than the unwritten promise of the donor.

Voorhees v. Combs, 33 N. J. L. 494; *Gam-*

NOTE.—For other cases in this series similar to the above, holding that a note given by a man in his lifetime for educational purposes may be enforced against his estate after his death, see *Irwin v. Webster* (Ohio) 36 L. R. A. 60 L. R. A.

239, and *School Dist. v. Stocking* (Mo.) 37 L. R. A. 406.

As to gifts of notes by subscription or otherwise generally, see *Richardson v. Richardson* (Ill.) 26 L. R. A. 305, and *note*.

*Headnote by BROWN, J.

mon Theological Seminary v. Robbins, 128 Ind. 85, 12 L. R. A. 506, 27 N. E. 341; *Egerton v. Egerton*, 17 N. J. Eq. 419; *Gano v. Fisk*, 43 Ohio St. 462, 54 Am. Rep. 819, 3 N. E. 532; *Penfield v. Thayer*, 2 E. D. Smith, 309.

The presumption that a note is given for a consideration fails when it shows upon its face that it is intended to pass a sum as a gift.

Rice v. Rice, 68 Ala. 216; 1 Parsons, Contr. 6th ed. p. 454.

Mr. H. C. Carlson, for respondent:

The instrument in question is a promise to pay upon condition that the payee undertake the obligation stipulated in the instrument.

In case it is accepted by the payee, there are certain obligations prescribed which must be performed by the payee.

Amherst Academy v. Cows, 6 Pick. 427, 17 Am. Dec. 387; *Williams College v. Danforth*, 12 Pick. 541; *Troy Conference Academy v. Nelson*, 24 Vt. 189; *Maine Cent. Inst. v. Haskell*, 73 Me. 140; *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427.

The acceptance of Mr. Brown's conditional offer constituted a promise for a promise, and made a valid contract, and the assuming of obligations and incurring of liabilities in reliance thereon were a valid consideration for Mr. Brown's promise.

Simpson Centenary College v. Bryan, 50 Iowa, 294; *Simpson Centenary College v. Tuttle*, 71 Iowa, 596, 33 N. W. 74; *Cottage Street M. E. Church v. Kendall* (Mass.) 16 Am. L. Reg. N. S. 550.

Where the subscription is coupled with a condition or request to be performed by the payee, and the payee has accepted the subscription so conditioned, or has complied with the conditions upon which the subscription is made, it constitutes a promise for a promise, and the instrument is held valid.

Helfenstein's Estate, 77 Pa. 328, 18 Am. Rep. 449; *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427; *Maine Cent. Inst. v. Haskell*, 73 Me. 140; *Troy Conference Academy v. Nelson*, 24 Vt. 189; *Amherst Academy v. Cows*, 6 Pick. 433, 17 Am. Dec. 387; *Ladies' Collegiate Inst. v. French*, 16 Gray, 196; *Williams College v. Danforth*, 12 Pick. 541; *Collier v. Baptist Education Soc.* 8 B. Mon. 68; *Cottage Street M. E. Church v. Kendall* (Mass.) 16 Am. L. Reg. N. S. 550; 24 Am. & Eng. Enc. Law, 1st ed. 326.

Although the original subscription paper was void for want of consideration, yet, if, relying thereon, the promisee had properly expended money for the common object, or incurred liabilities upon the faith thereof, it might recover.

Barnes v. Perine, 12 N. Y. 18; *Roberts v. Cobb*, 103 N. Y. 600, 9 N. E. 500; *Keuka College v. Ray*, 167 N. Y. 97, 60 N. E. 325; *Superior Consol. Land Co. v. Bickford*, 93 Wis. 220, 67 N. W. 45; *Cottage Hospital v. Merrill*, 92 Iowa, 649, 61 N. W. 490; *First Universalist Church v. Pungs*, 126 Mich. 670, 86 N. W. 235; *Cottage Street M. E.* 60 L. R. A.

Church v. Kendall (Mass.) 16 Am. L. Reg. N. S. 550.

The accomplishment of the objects for which the subscription is made is a consideration for the promise.

Collier v. Baptist Education Soc. 8 B. Mon. 68; *Amherst Academy v. Cows*, 6 Pick. 427, 17 Am. Dec. 387; *Troy Conference Academy v. Nelson*, 24 Vt. 194; *Irwin v. Lombard University*, 56 Ohio St. 9, sub nom. *Irwin v. Webster*, 36 L. R. A. 239, 46 N. E. 63; *Barnett v. Franklin College*, 10 Ind. App. 103, 37 N. E. 427; *Garrigus v. Home Frontier & Foreign Missionary Soc.* 3 Ind. App. 91, 28 N. E. 1009.

Brown, J., delivered the opinion of the court:

Action to recover against the estate of Horatio D. Brown, deceased, the amount of a promissory note by him delivered to plaintiff in his lifetime, by which he promised to pay plaintiff the sum of \$2,500 for the purposes and upon the terms and conditions therein specified. Plaintiff had judgment in the court below, and defendants, heirs of the deceased, appealed from an order denying their motion for a new trial.

The facts are as follows: Plaintiff, Albert Lea College, is a corporation formed January 13, 1881, under and pursuant to title 3, chap. 34, Gen. Stat. 1894, for the purpose of conducting a college for the education of young women, with power to establish and conduct a preparatory or academic department, on principles in sympathy with the religious teachings of the Presbyterian Church. Soon after its incorporation it acquired suitable buildings and other property for its accommodation, and has ever since carried on and conducted the college in all respects as required by law and its articles of association. It is charitable in its nature, and not conducted for a pecuniary profit to its members. The government of its affairs has been at all times vested in a board of trustees, one of whom, from the organization of the college until his death, was decedent, Brown, whose efforts in its support, pecuniary, and otherwise, from the time of its formation, were of substantial benefit, and contributed much to its success. On May 23, 1901, he executed and delivered to its trustees a promissory note, in form and effect, though not negotiable, in the following language: "On or before one year from date, for value rec'd, I promise to pay to the Albert Lea College twenty-five hundred dollars, to be used as an endowment,—either as a separate endowment, or toward a larger one. The income to be used as directed by the board of trustees. This does not draw interest either before or after date." Thereafter, on June 12th, following the delivery of the note, the board of trustees accepted the same, and, to that end, duly adopted a resolution in the following language: "Resolved, that the board of trustees hereby accept the donation of Hon. H. D. Brown of the sum of \$2,500 toward an endowment for Albert Lea College, and the board hereby extends to Mr. Brown its

hearty thanks for this manifestation of his generosity, which, in connection with his many previous contributions of time, money, and effort, will make possible a future for Albert Lea." Decedent was duly notified of the acceptance by a copy of the resolution being transmitted to him. On August 3, 1901, subsequent to the delivery of the note and its acceptance by the plaintiff, Brown died, but prior thereto no part of the note had ever been paid; it was not yet due; and the trustees presented the same to the probate court having jurisdiction of the administration of his estate for allowance. From the decision of that court an appeal was taken to the district court, where, after trial without a jury, plaintiff had judgment. The trial court found, among other matters of fact, that, in addition to the sums of money received from tuition from time to time, it has always been necessary to meet the expenses of the college, to a large degree, by voluntary donations from persons charitably disposed, who were interested in the perpetuation of the college and the accomplishment of its objects, without which it would have been obliged to abandon the purposes for which it was incorporated; that on the 23d of May, 1901, the trustees deemed it necessary, for the relief of the college from financial embarrassment, and for its continued existence, to authorize the solicitation of money for the purpose of paying outstanding indebtedness, and of establishing a permanent endowment fund for the college; that decedent, being a member of the board of trustees, and an active supporter of the college, was familiar with its condition, and with the purposes of the board in soliciting such subscriptions, and, to aid and assist this object, delivered to them the note in question. The court further found that if the said Brown and others had not contributed to the support of the college, either toward an endowment fund, or for the payment of its debts, it would have been necessary for the college to have suspended its work, and to have abandoned the objects for which it was incorporated, all of which was known to Brown at the time he made and delivered the note in question; that, relying upon this subscription, the trustees were encouraged to continue, and have since then continued, the work of the college, solicited other subscriptions, and expended money received therefrom in the payment of teachers' wages and other expenses of the institution. Upon these facts the court below ordered judgment for plaintiff. Three questions are presented to this court: (1) Whether certain evidence offered by plaintiff for the purpose of showing a consideration for the execution of the note was competent and admissible; (2) whether the findings of the trial court in the respects just referred to are sustained by the evidence; and (3) whether, upon the whole record, the note upon which the action is founded was a valid and binding obligation.

1. At the trial plaintiff offered certain testimony upon which it relied to establish consideration for the note. This testimony

tended to show that decedent was a trustee of the college; was familiar with its financial condition, and its inability to continue in its objects without voluntary contributions; that without such contributions it would have been necessary to suspend; and that the trustees relied upon this and other like contributions in the further prosecution of the work of the college. Defendants assign the admission of this evidence, which was properly objected to on the trial, as error. Whether this error is well assigned will depend, to a certain extent, upon the legal principles applicable to executory agreements of this character, which will be considered in connection with the third question. It may be observed, however, in passing, that, generally speaking, evidence to show the actual consideration of a written contract, when the writing does not fully and distinctly express it, is always admissible. The note given by Brown does not express the consideration of his agreement to pay the college the amount of money there mentioned, any further than the words "for value rec'd" may be said to disclose it; and it was clearly competent, in view of the fact that the principal question in the case was whether a consideration was received for the note, to offer any evidence which would tend to prove that fact. *Bolles v. Sachs*, 37 Minn. 315, 33 N. W. 802; *Keuka College v. Ray*, 167 N. Y. 98, 60 N. E. 325; 6 Am. & Eng. Enc. Law, 2d ed. 765.

2. As to the second proposition, namely, that the findings of the trial court are not sustained by the evidence, we have only to say that the record has been very carefully examined, and, though the evidence is not so clear and specific in some respects as might be desired, we regard it as sufficient to sustain them. And we pass to the principal question,—whether, upon the facts as found, in the light of the evidence as it appears in the record, the note in question is valid and enforceable against the estate of decedent. It was a promise to donate or give the amount stated in the note at a future day, but before the time for its performance the promisor died, and the question presented is whether his death revoked the promise. The contention of appellant is that the note was a complete and independent offer to make a gift, and could not be enlarged or extended by any act of the plaintiff, by resolution of acceptance or otherwise; that it was subject to withdrawal or revocation at any time until executed, and could only be executed by payment, or by some act of the donor in furtherance or execution of the gift; and that it was completely annulled and revoked by the death of the donor before the time fixed for its fulfillment.

3. The question as to the validity of executory agreements or contracts of the character of that here involved has often been before the courts, from the earliest period of reported cases to the present time. In the earlier cases such agreements were almost uniformly held invalid, for want of a sufficient consideration to support them. They were treated as mere naked promises of a

future gift, and subject to revocation, either by refusal to perform, or by the death of the promisor. But by some of the later authorities a very different view has been taken, and such contracts have been sustained upon broad and substantial grounds. Several distinct phases of the question are presented by the authorities, which are summed up in a note to *Cottage Street M. E. Church v. Kendall* (Mass.) 16 Am. L. Reg. N. S. 548. In most of the earlier reported cases such promises were held void for want of a consideration,—i. e., a pecuniary consideration moving to the promisor,—and this without regard to whether the promisee had expended money or incurred liabilities in reliance upon the promise. It is held in other cases that, where several persons sign a subscription paper by which they agree to pay a specified amount for a common public purpose, the promise of each is a consideration for the promise of the others, and the payee may enforce the promise against each and all. This class of cases can have no application to that at bar, for here the promise was by Brown alone, and was not induced by, nor dependent upon, the promise of any other person or persons. Still another class of cases, to which this case may properly be said to belong, holds that, though no consideration passed to the promisor at the time of his promise, yet if, relying thereon, the promisee incurred liabilities or expended money in furtherance of the purposes of the subscription, or assumed and became responsible for the performance of the conditions imposed by the donor, the promise is valid and enforceable. The liabilities incurred in reliance upon the promise, and the obligations assumed by its acceptance, are treated as a sufficient consideration to support the contract. The cases we have referred to involved donations or subscriptions to charitable, religious, or educational institutions, and disclose a very decided conflict of authority upon the question. They are cited in the note to *Cottage Street M. E. Church v. Kendall* (Mass.) 16 Am. L. Reg. N. S. 548. One of the first cases to depart from the earlier decisions, which held strictly to the necessity of a pecuniary consideration moving to the promisor, is *Collier v. Baptist Education Soc.* 8 B. Mon. 68. In that case a promissory note was given, whereby the maker promised and agreed to pay the Kentucky Baptist Educational Society the sum of \$250, to further the interests and aid in the payment of the expenses of its management. The maker refused to pay the note when due, and an action was brought against him to recover thereon. There was no pecuniary consideration moving to him, nor does it appear that the society to which it was given ever incurred any debts or obligations upon the strength of it; but the court held the maker of the note liable, on the ground that as the charter of the society authorized it to accept and receive such donations and gifts, and it was required, under the law, to carry out the directions of donor, 60 L. R. A.

a sufficient consideration was shown. A well-considered case (also a departure from the old rule) is *Troy Conference Academy v. Nelson*, 24 Vt. 180. In that case defendant, with others, signed a subscription paper, thereby promising to pay to the trustees of the academy the sum of \$100 for the purpose of enabling them to pay its debts, provided the sum of \$20,000 was subscribed for the same purpose by a certain date. This amount was fully subscribed. Defendant paid one half of his subscription, but refused to pay the balance. The court held that the obligations imposed upon and assumed by the trustees of the academy to make application of the money as directed by the subscribers to the fund so consummated the contract that defendant could not avoid payment on the ground that there was no consideration for his promise, and that, whether the relation each subscriber bore to the other, or the relation each bore to the academy itself, be considered, defendant was estopped from denying the obligation of the contract. It will be observed in that case that the executory promise of defendant was for the purpose of raising a fund to discharge a past-due indebtedness of the academy, and nothing appears to have been done by the officers in reliance on the promise. In the case of *Amherst Academy v. Cowle*, 6 Pick. 427, 17 Am. Dec. 387, the court held a promissory note by defendant, by which he agreed to pay plaintiff, an educational institution, a sum of money to further its objects and purposes,—viz., to educate indigent young men of promising talents and hopeful piety,—valid and enforceable, though it does not appear that any particular obligations were contracted by the officers of the institution on the faith of the promise. The court said: "Was there a consideration for this note? In one sense, there was not, that is, the promisor received nothing from the payees [at the time it was given] which was of a pecuniary value; but it is quite sufficient to create a consideration that the other party, the payee, should have assumed an obligation in consequence of receiving the note, which he was compellable, either at law or equity, to perform, unless the promisor should be able to show, when sued, that the payee had refused, or was unable, or had unreasonably neglected to perform the engagement on his part, in which case a defense might be raised on the ground of a failure of the consideration." The case of *Irvin v. Lombard University*, 56 Ohio St. 9, *sub nom. Irvin v. Webster*, 36 L. R. A. 239, 46 N. E. 63, sustains the validity of an executory agreement similar to that involved in the case at bar. The court there said, in part: "The general course of decisions is favorable to the binding obligation of such promises. They have been influenced, not only by such reasons as those already stated, but in some cases, at least, by state policy, as indicated by constitutional and statutory provisions. The policy of this state, as so indicated, is promotive of educa-

tion, religion, and philanthropy. In addition to the declarations of the Constitution upon the subject, the policy of the state is indicated by numerous legislative enactments providing for the incorporation of colleges, churches, and other institutions of philanthropy, which are intended to be perpetual, and which, not only for their establishment, but for their perpetual maintenance, are authorized to receive contributions from those who are in sympathy with their purpose and methods,—the only source from which, in view of their nature, their support can be derived. Looking to the plainly declared purpose of the law-making department, promises made with a view to discharging the debts of such institutions, to providing the means for the employment of teachers, to establish endowment funds to give them greater stability and efficiency, and whatever may be necessary or helpful to accomplish their purpose or secure their permanency, must be held valid. A view which omits considerations of this character is too narrow to be technically correct. It is not contemplated by the parties, nor is it required by the law, that in cases of this character the institution shall have done a particular thing in reliance upon a particular promise. . . . All promisors understand that the proceeds of their promises will be mingled with prior and subsequent donations, and together constitute the financial support of the enterprise." And the accomplishment of the purposes of the enterprise, and the binding obligation to devote contributions to the purposes intended by the donors, was held a sufficient consideration to support the promise. Some of the cases go so far as to spell out a consideration by implication. *Maine Cent. Inst. v. Haskell*, 73 Me. 140. In that case the promised gift or donation was for the purpose of aiding in the erection of a school building, and the promisor died before the time for its performance. His executors defended in an action to recover upon his promise, upon the ground that it was without consideration and void. But the court held that, as the trustees of the donee had accepted the donation, and entered upon the work of constructing the building, there was a sufficient consideration, and the estate was held liable. The court said: It is true that no consideration was actually received by the donor, "but one is plainly implied, if not expressed, from the language used. The promise was of money for a specified purpose, 'to make up a building fund for said institution.' . . . It is not, of course, binding upon the promisor until accepted by the promisee, and may, up to that time, be considered as a revocable promise. But when so accepted, and much more when the execution of the trust has been entered upon,—when money has been expended in carrying out the purpose contemplated,—it becomes a completed contract, binding upon both parties: the promise to pay, and at least the implied promise to execute, each being a consideration for the other."

60 L. R. A.

Many of the authorities cited by appellants sustain and support their position, but we prefer not to follow them. They apply with too much strictness the general principles of law applicable to ordinary contracts,—usual and everyday business transactions,—where a substantial pecuniary consideration or benefit to each of the parties is the object they have in view in entering into contracts. A legal consideration does not necessarily mean a pecuniary gain, and it is not essential to the validity of a contract that a benefit or gain of such a nature move to the person assuming an obligation. It is sufficient if any advantage or benefit result to him, or any detriment or injury to the other party, by his failure to keep his agreement. 6 Am. & Eng. Enc. Law, 2d ed. 677 *et seq.* In the case at bar the trustees, upon the delivery of the note to them, expressly accepted the same, and thereby assumed the obligations imposed by the terms of the promise; and upon the strength of this promise, and others, were enabled to continue the purposes of the college, when, without it, it would have been necessary that they suspend operations and dissolve the corporation. As already stated, plaintiff was incorporated as an educational institution, and depended for its support, and to enable it to carry out its purposes, upon donations of philanthropists, and other charitably disposed persons. Such institutions are expressly authorized, under the provisions of the statute under which plaintiff was incorporated, to accept and receive such donations, and may be compelled and required by the courts to carry out faithfully the purposes of a particular donation. Money contributed to it for the purpose of an endowment fund may not be diverted from that purpose, and its application may be compelled by proper judicial proceedings. Many of the colleges of the present day depend almost wholly upon voluntary contributions for their support, and philanthropists who contribute thereto are impelled to do so by their sentiments of charity, benevolence, and good will; and the opportunity amply repays the outlay, and to them is far greater than any considerations of a pecuniary nature.

The question whether the evidence received by the trial court over defendants' objection, before adverted to, was admissible, must be determined in the light of these considerations and the authorities cited. We have no difficulty in holding that a sufficient consideration is shown to support the agreement. It is true that the promise was to contribute the sum of \$2,500 toward an endowment fund for the college and that the amount if paid, could not, as suggested by appellants, be diverted by the trustees from that purpose. It could not be used in the payment of expenses. But the note expressly provided that the proceeds therefrom should be disposed of as the trustees should from time to time determine.

The order appealed from is affirmed.

STILLWATER WATER COMPANY, Appt.,

v.

H. C. FARMER, Resp't.

(.....Minn.....)

*1. Except for the benefit and improvement of his own premises, or for his own beneficial use, the owner of land has no right to drain, collect, or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect, or divert such waters for the sole purpose of wasting them.

2. An action may be maintained by an injured party to restrain and prohibit such waste.

(February 27, 1903.)

APPEAL by plaintiff from an order of the District Court for Washington County refusing to grant a motion for new trial after verdict in favor of defendant in an action brought to restrain interference with percolating waters. *Reversed*.

The facts are stated in the opinion.

Mr. J. N. Searles, for appellant:

The doctrine of reasonable use qualifies the otherwise absolute right of an owner to dispose of percolating water.

The question is not whether he acts maliciously, but, is he making a reasonable use of his property rights in view of the consequences to his neighbor or the public?

O'Brien v. St. Paul, 25 Minn. 335, 33 Am. Rep. 470; *Hogenson v. St. Paul, M. & M. R. Co.* 31 Minn. 224, 17 N. W. 374; *Olson v. St. Paul, M. & M. R. Co.* 38 Minn. 419, 37 N. W. 953; *Jordan v. St. Paul, M. & M. R. Co.* 42 Minn. 172, 6 L. R. A. 573, 43 N. W. 849; *Brown v. Winona S. W. R. Co.* 53 Minn. 259, 55 N. W. 123; *Sheehan v. Flynn*, 59 Minn. 436, 26 L. R. A. 632, 61 N. W. 462; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 179; *Forbell v. New York*, 47 App. Div. 371, 61 N. Y. Supp. 1005; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 278.

Defendant's excavation does already, and, if continued as threatened, will, increasingly lower the height of the surface of a surface stream by withdrawing water therefrom after it has reached the stream; and this cannot be done by percolation.

Delhi v. Youmans, 50 Barb. 316, 45 N. Y. 362, 6 Am. Rep. 100; *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 469, 82 Am. Dec. 179; *Chesley v. King*, 74 Me. 164, 43 Am. Rep. 569; *Aetna Mills v. Brookline*, 127 Mass. 69:

*Headnotes by Collins, J.

NOTE.—For right in subterranean waters, see also, in this series, *Southern P. R. Co. v. Dufour* (Cal.) 19 L. R. A. 92, and *note*; *Willis v. Perry* (Iowa) 28 L. R. A. 124, and *note*; *Tampa Waterworks Co. v. Cline* (Fla.) 33 L. R. A. 376; *Wheelock v. Jacobs* (Vt.) 43 L. R. A. 105; *Smith v. Brooklyn* (N. Y.) 45 L. R. A. 684; *Vineland Irrig. Dist. v. Azusa Irrig. Co.* (Cal.) 46 L. R. A. 820; *Forbell v. New York* (N. Y.) 60 L. R. A.

Grand Junction Canal Co. v. Shugar, L. R. 6 Ch. 483; *Emporia v. Soden*, 25 Kan. 608, 37 Am. Rep. 265; *Smith v. Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141, 32 App. Div. 257, 52 N. Y. Supp. 983.

Messrs. J. N. Castle and J. C. Nethaway, for respondent:

The facts that plaintiff is a corporation engaged in supplying the city of Stillwater with water, and that it is bound by contract so to do, and has expended large sums of money to erect a plant, do not give it any greater or additional rights to the aid of the court than any person using the water for domestic and private purposes.

Emporia v. Soden, 25 Kan. 588, 37 Am. Rep. 265; *Acquackanonk Water Co. v. Watson*, 29 N. J. Eq. 366; *Merrick Water Co. v. Brooklyn*, 32 App. Div. 454, 53 N. Y. Supp. 10.

The water company has no right to restrain the defendant from doing that which he lawfully might do on his premises, to wit, excavate and seek for water.

Acton v. Blundell, 12 Mees. & W. 324; *Dickinson v. Grand Junction Canal Co.* 9 Eng. L. & Eq. 513; *Chasemore v. Richards*, 7 H. L. Cas. 348; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Southern P. R. Co. v. Dufour*, 95 Cal. 615, 19 L. R. A. 92, 30 Pac. 783; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352; *Brown v. Illius*, 27 Conn. 84, 71 Am. Dec. 49; *Metcalf v. Nelson*, 8 S. D. 87, 65 N. W. 911; *Deadwood C. R. Co. v. Barker*, 14 S. D. 558, 86 N. W. 619; *New Albany & S. R. Co. v. Peterson*, 14 Ind. 112, 77 Am. Dec. 60; *Taylor v. Fickas*, 64 Ind. 167, 31 Am. Rep. 114; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419; *Greenleaf v. Francis*, 18 Pick. 117; *Davis v. Spaulding*, 157 Mass. 431, 19 L. R. A. 102, 32 N. E. 650; *Wilson v. New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Mosier v. Caldwell*, 7 Nev. 363; *Ocean Grove Camp Meeting Asso. v. Asbury Park*, 40 N. J. Eq. 447, 3 Atl. 168; *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 179; *Swett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276; *Delhi v. Youmans*, 45 N. Y. 362, 6 Am. Rep. 100; *Bliss v. Greeley*, 45 N. Y. 671, 6 Am. Rep. 157; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Bloodgood v. Ayers*, 108 N. Y. 400, 15 N. E. 433; *Frazier v. Brown*, 12 Ohio St. 294; *Klater v. Springfield*, 49 Ohio St. 82, 30 N. E. 274; *Taylor v. Welch*, 6 Or. 198; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511; *Coleman v. Chadwick*, 80 Pa. 81, 21 Am. Rep. 93; *Trout v. McDonald*, 83 Pa. 136; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Williams v. Lalew*, 161 Pa. 283, 29 Atl. 54; *Buffum v. Harris*, 5 R. I. 243; *Crescent Min. Co. v. Silver King Min. Co.* 17 Utah, 444, 54 Pac.

51 L. R. A. 695, and *Herriman Irrig. Co. v. Butterfield Min. Co.* (Utah) 51 L. R. A. 930.

As to appropriation of percolating waters, see, in this series, *Sullivan v. Northern Spy Min. Co.* (Utah) 30 L. R. A. 186, and *note*; *Bruening v. Dorr* (Colo.) 35 L. R. A. 640, and *Willow Creek Irrig. Co. v. Michaelson* (Utah) 51 L. R. A. 280.

244; *Willow Creek Irrig. Co. v. Michaelson*, 21 Utah, 248, 51 L. R. A. 280, 60 Pac. 943; *Chatfield v. Wilson*, 28 Vt. 49; *Whelock v. Jacobs*, 70 Vt. 162, 43 L. R. A. 105, 40 Atl. 41.

The importance of the ascertainability of the presence and location of an underground stream in order that it may escape being classed with percolating waters is emphasized in many cases.

Williams v. Ladew, 161 Pa. 283, 29 Atl. 54; *Lybe's Appeal*, 106 Pa. 626, 51 Am. Rep. 542; *Haldeman v. Bruckhart*, 45 Pa. 514, 84 Am. Dec. 511; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Ewart v. Belfast Poor-Law Guardians*, Ir. L. R. 9 Eq. 172; *Black v. Balymena Twp.*, Ir. L. R. 17 Eq. 459; *Taylor v. Welch*, 6 Or. 199; *Dickinson v. Grand Junction Canal Co.* 7 Exch. 282; *Saddler v. Lee*, 66 Ga. 45, 42 Am. Rep. 62; *Whelstone v. Borsier*, 29 Pa. 60; *Collins v. Chartiers Valley Gas Co.* 131 Pa. 143, 6 L. R. A. 280, 18 Atl. 1012; *Crescent Min. Co. v. Silver King Min. Co.* 17 Utah, 444, 54 Pac. 244; *Mosier v. Caldwell*, 7 Nev. 363; *Strait v. Brown*, 16 Nev. 317, 40 Am. Rep. 497; *Roath v. Driscoll*, 20 Conn. 533, 52 Am. Dec. 352.

Underground streams with well-defined channels will be treated as percolating waters if their existence and location are unknown and not reasonably ascertainable.

Haldeman v. Bruckhart, 45 Pa. 514, 84 Am. Dec. 511; *Williams v. Ladew*, 161 Pa. 283, 29 Atl. 54; *Greencastle v. Hazelett*, 23 Ind. 189; *Ellis v. Duncan*, 21 Barb. 230; *Taylor v. Welch*, 6 Or. 199; *Case v. Hoffman*, 100 Wis. 314, 44 L. R. A. 728, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945; *Chase v. Silverstone*, 62 Me. 175, 16 Am. Rep. 419.

The mere fact that underground water flows in a definite direction does not prevent it from being percolating water.

Gould v. Eaton, 111 Cal. 639, 44 Pac. 319; *Hanson v. McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Metcalf v. Nelson*, 8 S. D. 87, 65 N. W. 911; *Elster v. Springfield*, 49 Ohio St. 82, 30 N. E. 274; *Ocean Grove Camp Meeting Assn. v. Ashbury Park*, 40 N. J. Eq. 447, 3 Atl. 168; *Springfield Waterworks Co. v. Jenkins*, 62 Mo. App. 74; *Bruening v. Door*, 23 Colo. 195, 35 L. R. A. 640, 47 Pac. 290; *Kinnaird v. Standard Oil Co.* 89 Ky. 468, 7 L. R. A. 451, 12 S. W. 938.

That the acts of the defendant in excavating upon his land were done maliciously, and for the purpose of destroying the plaintiff's spring on this land, is immaterial.

Chatfield v. Wilson, 28 Vt. 49; *South Royallton Bank v. Suffolk Bank*, 27 Vt. 505; *Pickard v. Collins*, 23 Barb. 444; *Clinton v. Myers*, 46 N. Y. 511, 7 Am. Rep. 373; *Phelps v. Nourlen*, 72 N. Y. 39, 28 Am. Rep. 93; *Delhi v. Youmans*, 50 Barb. 320; *Frazier v. Brown*, 12 Ohio St. 294; *Jenkins v. Fowler*, 24 Pa. 308; *Porter v. Durham*, 74 N. C. 767; *Angell, Watercourses*, 6th ed. 114, p. 189; *Washb. Easements*, 3d ed. 75; *Benjamin v. Wheeler*, 8 Gray, 410; *Walker v. Cronin*, 107 Mass. 555; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Moran v. McClearn*, 60 Rrb. 388; *McCune v. Norwich City Gas Co.* 30 Conn. 521, 79 Am. Dec. 278; *Clark v. 60 L. R. A.*

Clapp, 14 R. I. 248; *Morrison v. Howe*, 120 Mass. 565.

Collins, J., delivered the opinion of the court:

This was an action brought to restrain the defendant from interfering with subsurface waters, which, percolating through the ground served in part to supply a spring situated upon plaintiff's property, which spring the latter uses to furnish its patrons, the people of Stillwater, with water for domestic use; the plaintiff's business under its charter being to provide the city and its inhabitants with water for both fire and domestic purposes. For other than domestic purposes water is taken from McKusick lake by plaintiff company, but it must rely upon this spring, which is quite large, and others, much smaller, for a supply for domestic use. The action was dismissed when plaintiff rested at the trial below upon the ground that it had failed to establish a cause of action. The case comes here upon a bill of exceptions on appeal from an order refusing to grant plaintiff's motion for a new trial.

Whatever may have been the issue tried in the court below, it is very evident, and both parties now concede, that there is but a single question here. It is a new and important one, not without difficulty of determination, and upon which there seem to be very few cases to which we may look for assistance. The plaintiff corporation owns and uses for its mains a narrow strip of land running from McKusick lake through a ravine which finally terminates in the vicinity of Lake St. Croix. At one time this ravine was the bed of a small brook, the outlet of McKusick lake, but a running stream no longer exists. Part way down this ravine is the spring around which the plaintiff has built a circular wall about 6 feet in diameter. On the south it is less than 1 foot from this wall to the line of land owned by defendant, and upon the east the line is only 3 feet distant. Some time ago, on his own land, near the boundary line and about 10 feet from the center of the spring, the defendant excavated a trench, into which percolating waters were drained and gathered in quantities sufficient to materially affect the supply at the spring itself. In this trench he placed a 3-inch pipe, which is used to supply water for his livery barn, some distance away. This supply comes from a small spring on one side of the excavation, which defendant has walled up so that its waters do not mingle with those gathered in the bottom of the trench. Of the pipe and its use plaintiff makes no complaint. In the bottom of the trench the defendant then placed a 10-inch tile pipe, and connected it with the city sewer. By means of the trench percolating waters were and are drawn away from plaintiff's spring, where they would naturally and otherwise go, are gathered in the bottom of the trench, and are then conducted to the city sewer through the 10-inch pipe. Therefore waters naturally supplying the big spring, and used by plaintiff for the public good, are drained and di-

verted, and, instead of serving the wants of the people, are dissipated and lost. By this draining and diversion the waters in the spring were lowered and reduced 1 or 2 inches. Upon discovering the effect of the 10-inch pipe upon the spring, plaintiff made some changes in the outlet through which the water ran and in its mains for its own protection and benefit, whereupon, defendant commenced to relay his 10-inch pipe on a lower level, beginning at its intersection with the city sewer, and working toward the trench. When a portion of this pipe had been relaid, and while defendant was engaged in the work, plaintiff secured a temporary injunction restraining him from further relaying upon this lower level. The defendant, according to the testimony, threatens to continue such work, and to bring the pipe into the trench, so that when it connects with the water it will be at least 15 inches below the outlet of the main used by plaintiff to secure its supply from this spring. The effect is evident and the court below found that, if the connection is made, as intended, there will be imminent danger that so large a portion of the waters, which now naturally flow into, and, in the absence of the trench, would continue to percolate and collect in, the plaintiff's spring, will be diverted therefrom, and drained into the trench, from thence through the pipe and into the city sewer, that plaintiff's water supply will be thereby diminished to such an extent as to wholly incapacitate and prevent it from furnishing the city and its inhabitants with sufficient water for domestic use, as it is obliged to do under its contract with the city, the result being to deprive the people of wholesome water, to destroy the plaintiff's business, and to render its plant valueless. Stated in a few words the plaintiff engaged in supplying the people of Stillwater with spring water for domestic purposes is seeking to prevent the defendant from digging a trench so close to its own means of supply as to divert and drain percolating waters, to ruin that supply and to deprive the people of pure water for domestic uses, for the sole purpose, so far as appears in this case, of wasting these waters into a city sewer.

The question in this case, reduced to its last analysis, involves the defendant's right to collect by drainage these fugitive subsurface waters, and then to waste them, to the annihilation of plaintiff's business, and to the great discomfort and injury of the people who depend upon the plaintiff for water for domestic use. The books are full of cases in which the rights of an owner of the soil to collect and control percolating waters are considered and determined. A brief and comprehensive general statement of the law pertaining to the subject is found in *Pixley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72, where it is said: "An owner of the soil may divert percolating water, consume or cut it off, with impunity. It is the same as land, and cannot be distinguished in law from land. So the owner of the land is the absolute owner of the soil and of percolating water, 60 L. R. A.

which is a part of, and not different from, the soil. No action lies against the owner for interfering with or destroying percolating or circulating water under the earth's surface." This doctrine and the reasons for it are well stated in *Frazier v. Brown*, 12 Ohio St. 294, in the following language: "In the absence of express contract and of positive authorized legislation, as between proprietors of adjoining land, the law recognizes no correlative rights in respect to underground waters percolating, oozing, or filtrating through the earth; and this mainly from considerations of public policy: (1) Because the existence, origin, movement, and course of such waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be therefore, practically impossible. (2) Because any such recognition of correlative rights would interfere to the material detriment of the commonwealth, with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building and the general progress of improvement in works of embellishment and utility." From this statement, which is really a synopsis of the reasons which have been given again and again for the established doctrine governing percolating waters, it is manifest that considerations of public policy have been of great and controlling weight in shaping the conclusions of the courts. Legal rules, it is said, would be involved in hopeless uncertainty if an attempt was made to administer them in respect to such waters, and any recognition of correlative rights would interfere, to the material detriment of the state, with the general improvement of the soil. In so far as the rules laid down in the opinions from which we have quoted are applicable to a given set of facts, there is no reason why they should not be followed in this court, for they are in harmony with all that has been said in the cases heretofore before us involving the rights of landowners with respect to running streams and surface waters. Nor do they conflict in the least with the doctrine which will uphold an owner of land in diverting and disposing of percolating waters for his own beneficial use, either as a water supply for himself or others or for the improvement and drainage of his own land. If, for illustration, the excavation had been made for any purpose useful to defendant, such as supplying his buildings with water, or as a means to drain or improve his own land, we should have a case altogether different, on the facts, from that now before us. If the collection of these waters was essential and necessary that defendant might use them for any reasonable purpose, or, even if, from the evidence, it could be found that he was competing with the plaintiff, and proposed to use the waters for a public purpose, or if it were necessary that the natural conditions of his land should be disturbed and subsurface wa-

ters drained in order to improve it, then there would be very little doubt as to the rule to be applied, and of the correctness of the conclusion reached by the court below. But such is not the situation presented by this record. The facts are not seriously in dispute, and they have compelled defendant's counsel to take the position that their client, as owner of the soil, has an absolute and unqualified right to collect, divert, and waste these percolations, although the plaintiff, by these apparently unnecessary and capricious acts, is and will be further, to a greater extent, and almost wholly, deprived of waters heretofore appropriated and used by it to supply the people of Stillwater with a pure article for domestic purposes, and to their great injury.

The acts which the defendant has performed, which he proposes to continue, and to render more obnoxious and injurious by further and unnecessary drainage of waters which naturally make their way into plaintiff's spring, have not been and are not done for his own benefit, or for the beneficial use and enjoyment of his own property, but for some purpose not apparent from the record, and which can only be surmised. If, however, he has the legal right to perform these acts, the authorities are abundant, and seemingly unanimous, to the effect that his motive and purpose are immaterial. But we have arrived at the conclusion that, irrespective and independent of his motive, he has no absolute legal right to collect these subsurface waters solely that they may be wantonly wasted, and that he may be restrained from so doing. It is true that this action must be disposed of upon principles involving natural rights of property, and, while we are first to look to the extent of the defendant's ownership in the land in which he has dug the trench, we are not to altogether lose sight of the fact that he has collected the water for no worthy purpose, and that he is squandering it, to the injury of the public. Having this very situation in mind, a learned text-book writer has suggested that the maxim, *Cujus est solum, ejus est usque ad cælum*, is not strictly and absolutely applicable to all of the relations of adjoining land proprietors. "It is obvious," he says, "that neighbors cannot be mutually indifferent to each other's doings." As applicable to their relations and their acts, this author further says: "The common law, otherwise so jealous of such interference between the owner and his property, imposes upon him the simple rule, *Sic utere tuo ut alienum non lædas*. Angell, Water Courses, 7th ed. §114. In *Haldeman v. Bruckhart*, 45 Pa. 517, 84 Am. Dec. 511, it was said, when commenting upon the maxim last quoted, that "confessedly the absolute dominion of a proprietor over his land to the center of the earth is restrained by it." This maxim has been repeatedly recognized in this court when considering the perplexing subject of surface waters, and it has been held that they must be used and disposed of so as not to unnecessarily injure another person. And an examination of the cases

in which the maxim, "Whose is the soil, his it is even to heaven and to the middle of the earth," has been applied, discloses that in nearly every one the person interrupting, collecting, and diverting percolating waters upon his own land was doing so that he might improve and benefit it, or was himself making some beneficial use of the fugitive waters with which he was interfering. We see no reason why the maxim, "So use your own property as not to injure another," should not be applied, in a proper case, to percolating waters, or why the limitation found therein is not pertinent when reason and justice suggest the need of it, or why the doctrine of reasonable use and correlative rights should not be applicable where the owner of the soil, for no beneficial purpose to himself or to his estate, and to the positive injury of his neighbor or the public, insists upon turning pure spring water into a city sewer, that it may be absolutely wasted. And this doctrine of correlative rights and obligations between landowners respecting the appropriation and use of percolating waters has been maintained in at least one state. *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569, 82 Am. Dec. 179; *Sweett v. Cutts*, 50 N. H. 439, 9 Am. Rep. 276—in which the maxim, *Sic utere tuo ut alienum non lædas*, was applied, and it was held that no good reason could be given why it should not be applicable in all cases where the rights of owners of adjoining lands to collect and use percolating waters are in apparent, although not real, hostility. The subject of wholesome water for domestic purposes in our cities is fast becoming one of overwhelming importance, and the courts may have to step forward and out of the beaten paths to formulate additional, and perhaps new, rules in order to protect our citizens and to preserve for their use a wholesome and sufficient supply. It may become absolutely necessary, in order to secure the public health, that noticeable departures be made from the doctrines which have heretofore prevailed, but which have become inefficient, inapplicable, or, possibly, radically wrong, under changed and developing conditions. When that time comes, and the subject is presented, no court should feel itself bound to adhere to a previously announced rule of law, for which no substantial reason can be given, or for which a good ground no longer exists. Great injury, distress, and disaster to the public must be prevented, although time-honored precedents, of no value are swept aside. The justification for such a course lies, as it often does in matters for legislative action, in the fact that the public is vitally and sufficiently interested and must be protected. In *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 19 L. R. A. 395, 5 Inters. Com. Rep. 545, 54 Fed. 751, the following language, which should meet the approval of every equity court, was used: "Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficial results fol-

low their enforcement, affording necessary relief to the one part without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief."

But in holding as we do, and in laying down a rule which confessedly is something of a departure from the general doctrine found in the books, and is an advanced position we are not really discarding the maxim, *Cujus est solum ejus est usque ad cælum*, or doing violence to any of the reasons which have been given for it. We are not involving any set of legal rules in hopeless uncertainty, and therefore rendering their application practically impossible, for the rule which we adopt is not only just, but it is exceedingly plain, certain, practical, and easy to apply to real conditions. Nor will our recognition of the doctrine of correlative rights interfere in any manner with material improvements, to the detriment of the state. On the contrary, it will tend to promote the prosperity and general welfare of all citizens whose necessities bring them within its influence. Nor are we entirely without authority for such a doctrine. We therefore formulate and announce the rule governing the facts here to be that, except for the benefit and improvement of his own premises, or for his own beneficial use, the owner of land has no right to drain, collect, or divert percolating waters thereon, when such acts will destroy or materially injure the spring of another person, the waters of which spring are used by the general public for domestic purposes. He must not drain, collect, or divert such waters for the sole purpose of wasting them. Briefly stated, a landowner must not collect and wantonly waste percolating waters which would otherwise be, or have theretofore been, appropriated by his neighbor for the general welfare of the people. If he does, an action to restrain and prohibit such waste may be maintained by the party injured.

Attention is here called, as an authority for this proposition, to *Smith v. Brooklyn*, 18 App. Div. 340, 46 N. Y. Supp. 141, an exceedingly well written and able opinion, affirmed in 160 N. Y. 357, 45 L. R. A. 664, 54 N. E. 787. It was there said, in substance, that it seemed clear from the reasoning in several cases, which were cited, that the right to collect and appropriate percolating waters, which right has always been upheld, relates to the beneficial use of the waters, or to the beneficial use of the land for some purposes for which it can be used connected with its enjoyment as land, for the ordinary purposes of agriculture, mining, domestic purposes, or improvement, either public or private; and it was held—going much further than necessary in this

case, and establishing a radical rule—that the owner of land could not gather percolating water by pumps, or by natural means, that it might be carried to a distant place for the use of strangers, having no right to it, in a case where the inevitable result would be to destroy a spring upon the land of an adjoining owner. The right, said the court, is predicated upon the right of the owner to benefit the land itself, or to himself enjoy the beneficial use of the waters found in the soil thereof. The doctrine we now lay down has been to some extent recognized in other cases, although the exact question was not presented. See *Chatfield v. Wilson*, 28 Vt. 49; *Pisley v. Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Frazier v. Brown*, 12 Ohio St. 294; *Burroughs v. Satterlee*, 67 Iowa, 396, 56 Am. Rep. 350, 25 N. W. 808; *Wheatley v. Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Collins v. Chartiers Valley Gas Co.* 131 Pa. 143, 6 L. R. A. 280, 18 Atl. 1012; and the New Hampshire cases before referred to. In no case brought under our observation has the right of the owner of the soil to collect percolating waters that he may dissipate and waste them been recognized or upheld. This doctrine also finds support in the reasoning found in the opinions filed in the somewhat noted case of *Ohio Oil Co. v. State*, 150 Ind. 698, 50 N. E. 1124, Affirmed in 177 U. S. 190, 44 L. ed. 729, 20 Sup. Ct. Rep. 576. The legislature of the state of Indiana had prohibited the wasting of natural gas and petroleum oil from wells by permitting the escape of either into the open air. An action was brought and successfully maintained by the state to enjoin and restrain an oil company from allowing natural gas to escape and waste in violation of the statute. The rules which govern subsurface waters, coal oil, and natural gas—all minerals—are the same under the authorities, and the arguments made in that case in behalf of the defendant and in support of the contention that the statute was unconstitutional were based upon the claim that, as the gas in or under the defendant's land is part of the land itself, which was conceded, the owner of the soil had the lawful right to assert absolute dominion over all that is found in or under it, including all minerals, to the center of the earth, and for an unlimited distance upwards from the earth's surface—the exact claim asserted here. It was there held that the statute was constitutional, and that the state, representing its citizens, had the right, as a matter of public policy, to maintain the action, and to forever restrain and enjoin the defendant from violating the prohibitory law. The learned arguments found in the opinions rendered in the state and Federal courts are pertinent to the present case.

Order reversed, and a new trial granted.

MISSOURI SUPREME COURT.

Clemanda GLADNEY *et al.*, *Appts.*,
v.
Thomas G. SYDNOR *et al.*, *Respts.*

(.....Mo.....)

1. The right of a man to convey or encumber his homestead without co-operation of his wife, as allowed by law, is a vested one, notwithstanding it may be defeated by the filing by the wife of a claim as prescribed by statute; and the legislature cannot destroy the right as to existing homesteads.
2. A vested right of a man to convey his homestead without the co-operation of his wife is impaired by a statute making him incapable of conveying it unless his wife joins in the conveyance.
3. A deprivation of right, and not merely a change in remedy or procedure, is effected by a statute which forbids a man to sell his homestead without the co-operation of his wife, where, therefore, he might do so unless the wife filed a claim as prescribed by statute.

(February 24, 1903.)

A PPEAL by plaintiffs from a judgment of the Circuit Court for Lincoln County in favor of defendants in a suit to enjoin the sale of property under a trust deed. *Affirmed.*

Statement by Fox, J.:

This was an action commenced by the appellants in the Lincoln county circuit court on the 3d day of October, 1899, to enjoin a sale under a certain deed of trust, and to cancel and hold for naught said deed. The petition contains substantially the following allegations: "First. Clemanda Gladney, the real plaintiff, stated that she was, and since 1859 had been, the wife of her coplaintiff, George W. Gladney; that Thomas G. Sydnor was the sheriff of Lincoln county, Missouri; that the land described in the petition, consisting of 173.74 acres, had been owned and occupied by George W. Gladney as a homestead for a great many years, all of it since 1884, and that during all that time plaintiff and George W. Gladney, as husband and wife, had owned and occupied the same as a homestead; that on the 25th day of May, 1897, George W. Gladney, without the knowledge and consent of plaintiff Clemanda Gladney, his wife, executed and delivered to George O. Hamilton, trustee, for the use and benefit of Ellen E. Wilson, a deed of trust, securing a note made payable to Ellen E. Wilson; that Clemanda Gladney, as the wife of George W. Gladney, did not join with George W. Gladney in the execution of said deed of trust, and that said deed of trust was on the land in plaintiff's petition described, being 173.74 acres composing

and comprising the homestead of George W. Gladney and Clemanda Gladney at that time; that the note described in said deed of trust was due, that George O. Hamilton, as trustee, had refused to act, and that defendant Thomas G. Sydnor, the then sheriff of Lincoln county, Missouri, under the provisions of said deed of trust, had the land advertised, and was threatening the sale of same. Plaintiff Clemanda Gladney further stated that since the 25th day of May, 1897, to wit, the 21st day of March, 1899, that the title to said land had been conveyed to her through mesne conveyance from George W. Gladney; that she, Clemanda Gladney, was now the sole owner of said land; that the deed of trust given by George W. Gladney to George O. Hamilton, trustee, was, under the laws as they now exist in the state of Missouri, absolutely void; but that, if Thomas G. Sydnor was permitted to sell and make a deed thereto, that it would cast a cloud over her title to the land, and that the deed of trust itself made by George W. Gladney, then on record, cast a cloud over her title. She therefore prayed for a judgment and decree of the court enjoining Thomas G. Sydnor, the acting trustee, from selling said land, and enjoining Ellen E. Wilson from attempting to carry into execution the said deed of trust made by George W. Gladney, and praying the court to cancel and hold for naught the said deed of trust. This petition was filed in the circuit court of Lincoln county, Missouri, and, the court not being in session, and no judge of the circuit court being in the county, a temporary injunction was issued on the 3d day of October, 1899, by the probate court of Lincoln county, Missouri. In the circuit court Ellen E. Wilson filed a separate answer, in substance as follows: Admitting that plaintiffs were husband and wife; admitting that George W. Gladney alone executed the deed of trust complained of on the 24th day of May, 1897, and admitting the record of the deed of trust as charged in the petition; denied the use of the land as a homestead; denied that Clemanda Gladney had become the bona fide owner of any portion of the land since the execution of the deed of trust; charging that, if Clemanda Gladney had obtained the title to any portion of the land from George W. Gladney, the same was without consideration, and the same was to defraud his creditors, and especially this defendant, admitting that defendant Sydnor was the sheriff of Lincoln county, Missouri, and had the land advertised for sale under the terms of said deed of trust; and denying each and every allegation in the petition; and, further answering, alleging that the deed of trust complained of was made to secure an indebtedness created by George W. Gladney prior to the 21st day of June, 1895, and alleging that up to the time of making said deed of trust George W. Gladney owned the land described therein, consisting of 173.74 acres, in his own right, and was then of the value

NOTE.—As to vested rights in estates by dower, curtesy, etc., see *McNeer v. McNeer* (Ill.) 19 L. R. A. 256, and note; *Spreckels v. Spreckels* (Cal.) 38 L. R. A. 497, and *Rose v. Rose* (Ky.) 41 L. R. A. 353.
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of \$4,000; alleging that Gladney owned the land prior to June 21, 1895, and as such owner and head of a family had and possessed a vested right and power, unrestricted by any act or deed or declaration of the said Clemanda Gladney, made or executed by her prior to the making of said deed of trust, to convey, alienate, or encumber the same, whether said land, or any part thereof, was a homestead or not; and that in the exercise of said right George W. Gladney made said deed of trust. Defendant Sydnor answered, stating that he was sheriff of Lincoln county, and at the request of defendant Ellen E. Wilson advertised the land for sale under the power of said deed of trust made by George W. Gladney to George O. Hamilton, trustee, said Hamilton having refused to execute said trust; and, further answering, said he had no knowledge or information as to the other allegations in plaintiff's petition. Plaintiffs' reply to the separate answer of Ellen E. Wilson was a general denial of all new matter therein contained. Defendant then filed a motion to dissolve the temporary injunction granted by the probate court." Upon the trial of this cause the court sustained the motion to dissolve the injunction, and dismissed plaintiffs' bill. From this judgment this cause is brought here for review.

Messrs. Norton, Avery, & Young for appellants.

Messrs. Martin & Woolfolk, for respondents:

Under the homestead law of this state prior to the amendment of 1895 George W. Gladney, as the owner of the land and the head of the family, had the right to sell or encumber, without the wife joining with him, except where the wife had filed her claim, as provided by § 5435, Rev. Stat. 1889, and the effect of such conveyance by the husband was to divest the wife of all interest except of dower.

Tucker v. Wills, 111 Mo. 399, 20 S. W. 114; *Greer v. Major*, 114 Mo. 145, 21 S. W. 481; *Kopp v. Blessing*, 121 Mo. 391, 25 S. W. 757.

The right of George W. Gladney to sell or encumber was a vested right.

Gilmore v. Bright, 101 N. C. 382, 7 S. E. 751; *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648; 6 Am. & Eng. Enc. Law, 2d ed. p. 956; *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788; *Arnold v. Willis*, 128 Mo. 145, 30 S. W. 517.

His right to encumber the land, being a vested right, could not be taken away by the act of 1895.

Leete v. State Bank, 141 Mo. 574, 42 S. W. 1074; *Bortlett v. Ball*, 142 Mo. 28, 34 S. W. 583; *Clay v. Mayr*, 144 Mo. 377, 45 S. W. 157; *Cranor v. School Dist. No. 2*, 151 Mo. 119, 52 S. W. 232; *Re Flukes*, 157 Mo. 125, 51 L. R. A. 176, 57 S. W. 545.

Fox, J., delivered the opinion of the court: There is no dispute as to the testimony in this cause. It substantially appears from the evidence introduced that appellants were

husband and wife, and had for many years been occupying the land in dispute, and were residing upon it at the time of the execution of the deed of trust in May, 1897. All the land involved in this suit was procured by the appellant Geo. W. Gladney prior to 1884, and he and his wife were occupying it continuously since 1884. Prior to June 21, 1895, Geo. W. Gladney borrowed two sums of money from the respondent Ellen E. Wilson, giving her two notes therefor. On the 24th of May, 1897, these two notes had not been paid, and amounted to \$428.67. Geo. W. Gladney on that day—24th of May, 1897—took up the two old notes, and executed to Mrs. Wilson one note, including the aggregate amount of the old notes, and to secure the payment of the renewed note executed the deed of trust which is the subject of this suit. The appellant Clemanda Gladney, wife of Geo. W. Gladney, did not join with her husband in the execution of this deed of trust. It further appears that, subsequent to the execution of the deed of trust by Geo. W. Gladney, he and his wife, on the 21st day of March, 1899, executed a deed, conveying this same land (except 10 acres) to O. H. Avery, and on the same day O. H. Avery and wife conveyed the same land conveyed to him by Geo. W. Gladney and wife to Clema Gladney. It is also disclosed by the record in this case that the land embraced in the deed of trust far exceeded the value of the "homestead," as defined by the statute. It is practically admitted that the deed from Geo. W. Gladney and wife to O. H. Avery was a voluntary conveyance, and without consideration. This is a sufficient reference to the testimony in order to indicate the vital questions involved in the controversy.

Under the well-settled law of this state, prior to the enactment of the statute of 1895, it is beyond dispute that the husband could sell or encumber the homestead, subject to the wife's inchoate right of dower, without the wife joining with him, except where the wife had filed her claim as provided by Rev. Stat. 1889, § 5435. This was clearly announced and determined in the cases of *Greer v. Major*, 114 Mo. 145, 21 S. W. 481; *Tucker v. Wells*, 111 Mo. 399, 20 S. W. 114; *Kopp v. Blessing*, 121 Mo. 391, 25 S. W. 757; *Markwell v. Markwell*, 157 Mo. 326, 57 S. W. 1078. In 1895 the legislature materially altered and changed the rights of the husband in respect to his right to encumber or sell the homestead. This change is embraced in these words: "The husband shall be debarred from and incapable of selling, mortgaging, or alienating the homestead in any manner whatever, and every such sale, mortgage, or alienation is hereby declared null and void." If we concede that this was a homestead as contemplated by the statute, which the husband was debarred and incapable of selling or encumbering, notwithstanding it far exceeded the value of the homestead defined by the statute, then there is only one question before us for determination, and that is, Was the right of husband, prior to 1895, to sell and encumber the homestead

without the wife joining with him, such a vested right as the act of 1895 could not deprive him of? This leads us to the investigation of this all-important question. It is not only a very important one, but equally as interesting, for it is the first time this question has been presented under this marked change in the statute. Vested rights may be created, either by the common law, by statute, or by contract. And it makes no difference as to the method of their creation; they are entitled to the same protection. If, in this case, the right of appellant Geo. W. Gladney to convey his homestead, prior to the act of 1895, without his wife joining with him in such conveyance, was a vested right, it becomes so by the operation of law, and is entitled to the same protection under the Constitution and laws of the land, as though it had been created by contract. A vested right was defined in the case of *Marshall v. King*, 24 Miss. 85, "to be an immediate fixed right of present or future enjoyment." In the case of *Calder v. Bull*, 3 Dall. 380, 1 L. ed. 648, Chase, J., says: "When I say that a right is vested in a citizen, I mean that he has the power to do certain actions, or to possess certain things, according to the law of the land." Judge Story, in the case of *Society for Propagation of Gospel v. Wheeler*, 2 Gall. 105, Fed. Cas. No. 13,156, held that "upon principle every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past, must be deemed retrospective." Article 2, § 15, of the Constitution of Missouri, provides "that no *ex post facto* law, nor law impairing the obligation of contracts or retrospective in its operation or making any irrevocable grant of special privileges or immunities, can be passed by the general assembly." The reference in this provision to *ex post facto* laws has special application to criminal cases; but the subdivision of this constitutional provision which is intended to protect every citizen against the impairment of vested rights is that inhibition against the passage of laws retrospective in their operation. The term "retrospective in their operation," as used in our Bill of Rights, is one which relates to civil rights and proceedings in civil causes. *Ex parte Bethurum*, 66 Mo. 545. Hence the well-settled rule deduced from all the authorities is that "acts of the legislature are not to be considered as retrospective, unless they impair rights that are vested, because most civil rights are derived from public laws." *Rich v. Flanders*, 39 N. H. 304, and cases cited and discussed. In view of this principle we are led to the conclusion that an additional question must be answered in this investigation. The first inquiry in this case is, Was the right of Geo. W. Gladney to convey or encumber his homestead without his wife joining in such conveyance a vested right, and as such could it be impaired by the act of 1895? The second inquiry is as to the act of 1895—Is it to be construed simply as prospective in its opera-

tion or, if it is intended to be retrospective, then is it not in conflict with the Constitution of this state, as quoted herein? It is clear that if Geo. W. Gladney had a vested right in dealing with his homestead prior to 1895, then, if the act of 1895 is intended to impair that right, it would truly be retrospective in its operation. As to the first proposition, we have reached the conclusion that the appellant Geo. W. Gladney had a vested right, in respect to conveying and encumbering his homestead, prior to the act of 1895, and that act cannot impair such right. To us it seems as one of the highest privileges and dearest rights that can be bestowed upon the citizen. The law that creates the right to deal with your property without being compelled to have someone unite with you in the conveyance truly confers an inestimable privilege. This land was his, and beyond question he had the right to convey it, subject to her inchoate right of dower, prior to the act of 1895, without having his wife join with him in the deed. The fact that his wife could file her claim as provided in § 5435, Rev. Stat. 1889, heretofore referred to, does not change the rule so far as being a vested right. The right to convey was clearly given him, and the law provided the method how he could be barred of that right, and that was a personal privilege vested in the wife,—a right she could exercise or refuse to exercise. The law that created the homestead also created a right in the wife by which she could divest the husband of his right to sell or encumber it: but this by no means contemplated that the legislature could by enactment bar or impair the right given the husband in respect to his property. It may be said by appellants that this right to convey was merely conditional upon the failure of the wife to file her claim under the statute. The right to convey was not conditional; it was vested. Its duration was optional with the wife. This does not alter or change the principle that the legislature cannot, by a law retrospective in its operation, impair vested rights. It has no more power under the Constitution to impair this right than it has to impair rights that are not subjected to any limitation as to its duration. No one, under the law, had the right to impair or interfere with his right of alienation, except his wife, and the legislature cannot step in and exercise that privilege for her. She, and she alone, could exercise it.

Does the act of 1895, if construed as being retrospective in its operation (in other words, as being operative upon persons who were married, and who had acquired the homestead before its passage), impair the vested right of the husband? It certainly does. Before the passage of the act, he could convey himself. After the passage, he is not only barred, but the act says he "shall be incapable of conveying without his wife joins in the conveyance." "Impair" means to "make worse, to lessen the power, to weaken, to enfeeble, to deteriorate." This is as Webster defines it. Is not the power of the husband in respect to this homestead lessened,

weakened, and deteriorated by the act of 1895, *supra*? As was said by the court in the celebrated case of *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648: "When I say that a right is vested in a citizen, I mean that he has the power to do certain actions, or to possess certain things, according to the law of the land." Did not the husband in this cause have the power to do certain acts in respect to the property in dispute that the present law prohibits him from doing? That able and illustrious jurist, Judge Story, very tersely places the test when he said in the case of *Society for Propagation of Gospel v. Wheeler*, 2 Gall. 105, Fed. Cas. 13,156: That "upon principle every statute which . . . creates a new obligation imposes a new duty or attaches a new disability, . . . must be deemed retrospective." Apply this test to the case at bar. The statute of 1895 imposes upon the husband the new duty, if he desires to convey, of having his wife join in the conveyance. It attaches a new disability, for the very words of the present statute are that the husband is incapable of alienating his property. It is no answer to this question to say that his right to convey is not absolutely destroyed; that it is only partially so. In the case of *Planters' Bank v. Sharp*, 6 How. 301, 12 L. ed. 447, the doctrine is clearly announced that "one of the tests that a contract has been impaired is that its value has, by legislation, been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force." The conclusions reached in this case that Geo. W. Gladney had a vested right prior to the act of 1895, and that such right cannot be impaired by a subsequent statute, and that, if the act of 1895 was intended to apply to him, it is retrospective in its operation, and is in conflict with the organic law of this state, are supported by principles announced by this court in analogous cases, and by conclusions reached in other states in cases identical in principle with the one before us. In the case of *Arnold v. Willis*, 128 Mo. 145, 30 S. W. 517, Burgess, J., very clearly announced this doctrine as to the vested rights of the husband: "Prior to the revision of the statutes in 1889, a husband, by virtue of his marital rights, was entitled to the possession of his wife's lands, held by her as at common law, and could sue therefor in his own name; and the enactment of Rev. Stat. 1889, §§ 6869, and 6864, providing that real estate belonging to the wife should be her separate property, and under her sole control, and empowering her to sue and be sued at law or in equity as a *feme sole*, did not deprive the husband of such rights in his wife's property which had become vested prior to 1889." In the case of *Leete v. State Bank*, 115 Mo. 184, 21 S. W. 788, the authorities are collated and reviewed. That case settles the law in this state that the legislature has no power to pass laws retrospective in their operation, so as to affect vested rights. The statute under consideration in the *Leete Case* was 60 L. R. A.

the married woman's act of March 25, 1875. It was held that the act "creating a separate estate in the wife's personality, inclusive of her rights of action, and providing that the same shall not be deemed to have been reduced to the possession of the husband by his use, occupancy, or care, but only by her express assent in writing, is to be construed prospectively, and does not apply to marriages in existence at the time of its passage, or to rights which had then accrued." It was further held that "an application of said statute to marriages then in existence, or to rights which then had accrued, would be violative of the constitutional provision prohibiting the enactment of a law retrospective in its operation." The conclusion reached in that case was that the married woman's act of 1875 could only operate prospectively, and did not apply to marriages in existence at the time of its passage, or to rights that accrued to such existing marriages. So we say in this case that the act of 1895 could only operate prospectively, and is not to be applied to husbands who had acquired homesteads prior to the passage of the act. Geo. W. Gladney, prior to the enactment of this statute of 1895, had the right to convey his homestead without his wife joining him; and, as was very appropriately said by the learned judge in the *Leete Case*: "These were his rights. . . . But when he woke up on the morning the section mentioned went into operation he found himself, if plaintiff's position be correct, completely divested of his former vested rights, laboring under a 'new disability.'" It is now the settled law of this state that an act of the legislature "is to operate prospectively only, and not otherwise, unless upon the face of the act itself the exceptions to the prospective rule do plainly and unmistakably appear."

It may be argued that, even though the right of Geo. W. Gladney, prior to the present statute, was a vested one, yet, as he had not availed himself of that right, the present law would be applicable, and that he could not exercise such right after the change in the statute. Perry on Trusts—a work of recognized authority—announces the doctrine upon a question identical in principle with the one before us. He says: "On principle it would seem that the right to reduce the wife's choses in action to possession vested in the husband at the time of the marriage, and could not be divested by a statute passed after the marriage, although the husband had not, at the time of the passage of the act, reduced the choses to possession; and so it has been ruled in several cases." Perry, Tr. § 676. This is a complete answer to that argument, for in the doctrine announced by Perry, as above quoted, the principle is the same if the right existed—it makes no difference about the exercise of it—before the passage of the subsequent statute that undertakes to divest it. Upon the question, involved in this case, as to the right of Geo. W. Gladney, prior to the act of 1895, being a vested right, we are of the opinion that the unbroken line of deci-

sions of North Carolina upon a point which in principle is identical with the one at bar are decisive of this question. That all may fully appreciate the application of the cases to which we hereafter in this opinion direct attention, it would be well in a brief way to refer to the provisions of the Constitution and law of that state. In 1868 the state of North Carolina adopted and ratified its Constitution. The Constitution itself created a homestead defining the amount of land and value, etc., which was exempted from levy of execution. It also provided for the conveyance of the homestead, but declared that no deed executed by the owner of the homestead should be valid without the voluntary signature and assent of his wife. Prior to the adoption of this Constitution, land occupied by the owner and his wife could be conveyed by the husband alone. In the case of *Gilmore v. Bright*, 101 N. C. 382, 7 S. E. 751, in passing on the question as to the right of the husband to convey the land subsequent to the adoption of the Constitution, the court says: "The case shows that the lands in dispute were the property of Samuel Gilmore long prior to the adoption of the Constitution of 1868, and that he and his wife Thany were married long prior to that time. There never was any allotment of the said lands as a homestead, nor was there ever any petition by the said Gilmore to have such an allotment made, nor was there ever any act of his indicating any purpose voluntarily to have said lands, or any portion thereof, dedicated to the purposes of a homestead. He had, prior to the adoption of the Constitution of 1868, the absolute right to sell or dispose of these lands as he pleased, without the concurrence of his wife, and, if he chose to do so, without her consent; . . . and it is too well established by the authorities, Federal and state, that this right was not divested by art. 10, § 8, of the Constitution, to be questioned now. The state could not, by its Constitution, or its laws subsequently adopted or enacted, deprive him of his vested right to sell or dispose of the land in question, without contravening that provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts." The learned judge cites in support of that principle announced the cases of *Eduards v. Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Sutton v. Askew*, 66 N. C. 172, 8 Am. Rep. 500; *Bruce v. Strickland*, 81 N. C. 267; *Murphy v. McNeill*, 82 N. C. 221; *Reeves v. Haynes*, 88 N. C. 310; *Fortune v. Watkins*, 94 N. C. 304; *Castlebury v. Maynard*, 95 N. C. 281; and the numerous cases cited in these authorities. In the case of *Bruce v. Strickland*, 81 N. C. 267, the learned judge, after reviewing all the authorities upon the question as to the application of the enactment of subsequent statutes lessening the power of the husband, under former statutes, in respect to his lands, and reaching the conclusion that such subsequent acts do not affect rights secured under former laws, says: "These decisions rest upon the sanctity of vested rights under the protection of GO L. R. A.

the Constitution, among which is embraced the *jus disponendi*, or right of alienation. The principle is too deeply imbedded in the fundamental law of free government to require vindication."

It may be said that these North Carolina cases are based upon the fact that, prior to the adoption of the Constitution, there was no homestead, and the land, not being a homestead, could be alienated by the husband without the wife joining in the deed. That does not alter or change the principle announced as applicable to the case at bar, for in this case the homestead, prior to 1895, could be alienated by the husband alone, subject to her dower, the same as the land mentioned in the Carolina cases; and it is apparent from an investigation of all those cases that they clearly announce the principle that the right of a husband to sell or encumber his land without his wife joining in the conveyance is a vested right, which a subsequent statute, which imposes upon him a new disability, and undertakes to prevent him from performing this act alone, cannot impair.

This brings us to the last contention of appellants. Appellants insist that the statute of 1895 did not impair any vested right of Geo. W. Gladney, but that it simply changed the remedy or procedure of the wife in respect to the homestead. The statute of 1895 does not require a single step to be taken by the wife. She is not required to proceed in any way. But it simply imposes upon the husband a new disability, rendering him incapable of doing an act which, under the prior law, he had a perfect right to do. If the statute had provided that the wife should adopt some other method of preventing the sale or encumbrance of the homestead, then it might be said that it was simply a change in the course to be adopted by her, to prevent the husband from acting. But it must be remembered that this change of the statute does not require her to proceed at all. In effect, the legislature says in the act of 1895: "Under the former law we provided a remedy for you to prevent the exercise of certain rights of your husband in respect to the homestead. We will now exercise this right for you, irrespective of the fact whether you desire it done or not. We will simply divest your husband of the power to sell or encumber the homestead." We emphatically hold that this alteration and change in the statute is not simply a change in the remedy or procedure, but is, in the clearest terms possible, a deprivation of a right which the husband had prior to the enactment of the statute. We may add that a law which, even if intended simply to change the remedy or procedure, if, in fact it impairs vested rights, is just as obnoxious to the constitutional inhibition as if it in the clearest terms violated the constitutional provision. We have examined the cases cited by the learned counsel for appellants upon this question, and we are of the impression that they are not based upon similar grounds, and, hence, are insufficient to change the conclusions reached upon this contention.

Entertaining the views as herein expressed as to the vested rights of Geo. W. Gladney in respect to the land in controversy, we are of the opinion that the action of the trial court in sustaining the motion to dissolve the injunction and dismissing plaintiffs' bill was correct, and it is ordered that *the judgment be affirmed.*

All concur.

Samuel GOODMAN *et al.*, Doing Business as
Harrington & Goodman, *Appts.*,
v.

D. H. HERMAN.

(.....Mo.....)

1. The record of a judgment based on an account for goods sold cannot be impeached, and evidence offered that the debt was in fact created by fraud, in order to prevent the release of the debtor from liability on it by a discharge in bankruptcy under a statute providing that such discharge shall release all debts except the judgments in actions for fraud.
2. An affidavit for attachment in an action upon an account for goods sold and delivered cannot be looked to in determining whether or not the action was for fraud, so that a discharge in bankruptcy will not release liability on the judgment therein.
3. No fiduciary relation exists between persons negotiating for the sale and purchase of goods, within the meaning of the section of the bankruptcy act of 1898, which prevents a release from affecting debts created by fraud while acting in any fiduciary capacity, so as to prevent the release from being operative in case the goods were obtained by the purchaser through fraud and false representations.

(February 24, 1903.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Greene County in favor of defendant in an action brought to revive a judgment. *Affirmed.*

Statement by Fox, J.:

This cause was tried by the circuit court of Greene county, Missouri, the result of which was a judgment for defendant from which judgment plaintiffs, in due time and form, have prosecuted their appeal.

This is an ordinary proceeding to revive a judgment heretofore rendered in favor of the plaintiffs and against the defendant. The respondent, as a defense thereto, pleads a discharge in bankruptcy. The appellants, by way of replication, plead that defendant's discharge in bankruptcy is no bar to the revival of their judgment against the

NOTE.—On the question, What constitutes a fixed liability as evidenced by a judgment under the bankruptcy law? see *note to Cobb v. Overman* (C. C. App. 4th C.) 54 L. R. A. 369.

As to what judgments are within the exception of the bankruptcy act providing that a discharge shall not release judgments for willful and malicious injuries, see *Colwell v. Tinker* (N. Y.) 58 L. R. A. 765, and *McDonald v. Brown* (R. I.) 58 L. R. A. 768.
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defendant; alleging that the judgment was for goods sold to the defendant, and obtained by defendant from the plaintiffs by false pretense and false representations. The court treated respondent's discharge as a complete release of all his indebtedness, of every character whatsoever, and rendered judgment against the plaintiffs for costs, and discharging the respondent from the obligations of the judgment. From this judgment, and after an unsuccessful motion for new trial, the plaintiffs appealed to this court.

In order to fully understand the disputed questions in this case, it would be well to examine the pleadings, and see precisely what is in issue. The petition to revive the judgment is as follows:

Harrington & Goodman, a Firm Composed of Samuel Goodman, Wm. E. Goodman, and Jos. Goodman, Plaintiffs,
v.

Daniel H. Herman, Defendant.

In the Circuit Court of Greene County, Missouri, May Term, 1899.

Come the above-named plaintiffs, Harrington & Goodman, a firm composed of Samuel Goodman, William E. Goodman, and Joseph Goodman, and represent to this honorable court that on the 2d day of February, 1891, plaintiffs recovered in this court a judgment against Daniel H. Herman, the above-named defendant, said judgment being founded upon the sale by plaintiffs of merchandise to the firm of Herman Bros., of which the above-named defendant, D. H. Herman, was a member, amounting at said time to seven thousand one hundred and twenty-nine dollars, and therefore the said plaintiffs recovered against said Daniel H. Herman a judgment for said amount, with interest thereon at the rate of six per cent per annum from said February 2, 1891, to this date, and for costs of said suit, which said judgment was duly entered upon the records of this court, in Judgment Record 38, at page 259; that no part of said judgment has been paid, and the whole amount thereof is due and unpaid; that no part of the costs of said suit has ever been paid by said defendant; and that the lien of said judgment on the lands and tenements of said Daniel H. Herman has expired. Wherefore plaintiffs pray that said judgment thereof be revived against the said Daniel H. Herman, and that the lien be revived against the lands and tenements of said Daniel H. Herman, and that a writ of seire facias issue to the said Daniel H. Herman, his tenants, and the occupants of his lands, commanding him and them to appear before this court at the next term thereof to show cause, if any he has, why this judgment, in form as rendered aforesaid, and the lien thereof on the real estate of the said Daniel H. Herman, be not revived, and for such other and further relief as may be proper.

Heffernan & Heffernan,
Attorneys for Plaintiffs.

Defendant files answer to this petition as follows:

Harrington & Goodman, Plaintiffs,

v.

Daniel H Herman, Defendant.

In the Circuit Court of Greene County, Missouri, May Term, 1899.

Comes now the defendant in the cause above entitled, and, for answer to plaintiffs' amended petition, denies each and every allegation in said petition contained, and so, having answered, prays to be discharged, with costs. And for another and further answer to petition of plaintiffs, defendant said that heretofore, to wit, on the 22d day of November, 1898, he filed a petition in the district court of the United States for the southern division of the western district of Missouri, to be adjudged a bankrupt; that thereafter, in the course of said bankruptcy proceedings, the plaintiffs in this case, as well as the other creditors of this defendant, proved up their judgments before the said court and the referee in bankruptcy, George S. Rathbun, against the defendant and against his estate; that afterwards, in due course in said proceedings, the petition of this defendant to be adjudged a bankrupt, and discharged as such, came on to be heard before the judge of said court, and on such hearing the plaintiffs in this case, as well as certain other creditors of the defendant, filed objections to the defendant being adjudged a bankrupt, and discharged as such; that said objections were heard in due course in said United States district court, and were on the 10th day of April, 1899, by said court, overruled, and thereupon, on the said day, this defendant was adjudged a bankrupt, and judgment was entered finally discharging him as such bankrupt. That by the force and effect of said judgment the defendant was discharged and relieved from further liability on the account of the alleged indebtedness of the plaintiffs against him, and is no longer responsible therefor. Wherefore, having so fully answered, defendant prays to be discharged, with costs.

R. L. Goode,
Attorney for Defendant.

The replication of plaintiffs was in the nature of a confession and avoidance of the new matter alleged as a defense to the action. It is admitted that the defendant was discharged, as alleged, in the bankrupt proceedings, from all debts against his estate, under said bankrupt act, but it is averred that the debt evidenced by the judgment sought to be revived is excepted by law from such discharge, for the reason it is alleged that the merchandise purchased by the defendant, for which plaintiffs recovered judgment against the defendant, was by the defendant, D. H. Herman, obtained and procured from the plaintiffs by false pretenses and false representations. The replication of plaintiffs fully sets forth the manner of obtaining the merchandise, and avers in detail in what the fraud in securing the goods

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consisted. As to the original suit, in which the judgment was recovered for merchandise sold defendant by plaintiffs, a writ of attachment was issued in aid of the suit. One of the grounds in the affidavit which was filed in procuring the attachment was "that the debt sued for was fraudulently contracted for on the part of the defendant." A plea in abatement was filed by defendant, which put in issue the grounds alleged in the affidavit for attachment. This plea was withdrawn, and the attachment was sustained.

Messrs. Heffernan & Heffernan for appellants.

Mr. W. D. Tatlow for respondent.

Fox, J., delivered the opinion of the court:

It will be observed that in this controversy there is but one issue, and that is sharply presented by the pleadings in this cause. Plaintiffs offered in evidence the judgment obtained against the defendant, which is sought to be revived; also the affidavit in attachment, and the judgment in case of *McNally v. Herman*, Record No. 38, page 265; also the affidavit in attachment and judgment in case of *Lippincott, Johnson & Co. v. Herman*—to all of which testimony defendant objected as irrelevant, incompetent, and immaterial. This evidence was admitted subject to objection. This was the prima facie showing as made by plaintiffs. "Defendant offered in evidence certified copy of discharge of D. H. Herman from bankruptcy, together with the objections and exceptions thereto, to which plaintiffs objected because said discharge is not a discharge in a case of the character that is sought to be revived, because the United States court failed and refused to consider the objections made by Harrington & Goodman; stating at the time that it wasn't a proper defense to his discharge, and that, if the facts were true as stated, it would have to be brought up in a different way. (Objections overruled, to which plaintiffs then and there duly excepted at the time.)" Which discharge in bankruptcy is as follows:

Discharge of Bankrupt.

District Court of the United States, Southern Division of the Western District of Missouri.

Whereas, Daniel H. Herman, of Springfield, in Greene county, and state of Missouri, in said district, has been duly adjudged a bankrupt under the acts of Congress relating to bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by this court that said Daniel H. Herman be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the 22d day of November, A. D. 1898, on which date the petition for adjudication was filed by him; excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.

Witness the Honorable John H. Rogers, Presiding Judge of said District Court at said April term, A. D. 1899, and the seal thereof, this 10th day of April, A. D. 1899.

[Signed] John H. Rogers, Presiding Judge.

This was all the evidence offered by the defendant. Plaintiffs, in rebuttal, offered a volume of testimony tending to show that the defendant procured the credit for the merchandise for which they obtained judgment by false and fraudulent representations. It is unnecessary to burden this opinion with the details of the testimony for it is apparent from the record in this cause that, under the view of the law adopted by the trial court, this testimony was excluded, or, at least, was not considered. The only issue in this cause was very aptly and appropriately presented by the declaration of law prayed for by the plaintiffs, as follows: "The plaintiffs' judgment against the defendant should be revived, notwithstanding defendant's discharge in bankruptcy, because the merchandise sold and delivered by plaintiffs to the defendant, for which said judgment was rendered, was secured from plaintiffs by false and fraudulent representations, for the purpose of 'obtaining property by false pretenses and false representations,' which declaration of law the court refused to give, to the refusal of which the plaintiffs excepted to at the time. The defendant, upon his behalf, asked no declaration of law."

Plaintiffs' contention is that the trial court, upon this state of the record, should have entered judgment for plaintiffs, reviving the judgment upon which this action is predicated. It will be observed that the discharge in bankruptcy pleaded as a defense to this action was procured under the provisions of the bankrupt law of 1898. In order to reach a proper conclusion in this cause, it is necessary to carefully examine the provisions of that act. 30 U. S. Stat. at L. 550, chap. 541, § 17 (U. S. Comp. Stat. 1901, p. 3428), provides: "Sec. 17. Debts not Affected by a Discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district, or municipality in which he resides; (2) are judgments in actions for frauds or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity." Plaintiffs' contention is that the evidence offered by them in this cause placed the judgment sought to be revived within the exceptions as mentioned in subdivisions 2 and 4 of § 17, *supra*. Under subdivision 2 "judgments in actions for frauds or obtaining property by false pretenses or false representations," are

not released by a discharge in bankruptcy; and subdivision 4, it will be observed, provides that debts "created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity," are not released. The judgment sought to be revived in this cause was based upon an account for merchandise sold the defendant by plaintiffs. The recitation in the judgment shows, beyond question, that fact. It recites, "and their cause of action being founded upon a written instrument, to wit, an account;" hence it cannot be contended that this was an action for fraud, or obtaining property by false pretenses or false representations. It is, however, insisted by plaintiffs that they have the right to go beyond the record in this cause, and show that the creation of the debt upon which the judgment is based was by fraud and false representations. This we do not think plaintiffs have the right to do, under the provisions of the bankrupt law in force at the time of the entry of the discharge of the defendant in the bankruptcy proceedings. The provisions of the bankrupt act of 1898 are materially different from the act of 1867. The last-mentioned act provides "that no debt created by the fraud of the creditor shall be affected by the discharge." The term used under the former act (being the act of 1898) is that "no judgment in an action for fraud" shall be affected. In the one there is no importance placed upon the form of the action. In the other, it expressly provides that the action upon which the judgment is predicated shall be one for the fraud perpetrated in the transaction. This distinction is very aptly drawn in the case of *Argall v. Jacobs*, 87 N. Y. 110, 41 Am. Rep. 357, where the court, in discussing the act of 1867, says: "It is not provided that no cause of action for fraud shall be discharged, but that 'no debt created by fraud' shall be discharged." In this case we will say that the provisions of the statute do not apply to debts "created by fraud," but substantially contain the provision which the court says in the case of *Argall v. Jacobs*, 87 N. Y. 110, 41 Am. Rep. 357, the statute of 1867 did not contain. In that case the suit was upon two promissory notes, not upon a judgment, as in this case. The defense was a discharge in a bankrupt proceeding. Plaintiffs in that case, in their reply, alleged that the debt, as evidenced by the notes, was "created by fraud," and the court very properly held that the fraud in the creation of the debt might be shown, to the end that the discharge in bankruptcy might be inoperative, so far as this particular debt was concerned. The case of *Bank of North America v. Crandall*, 87 Mo. 208, is nearly identical with the New York case above mentioned. This case was upon promissory notes, and the defense was a discharge in bankruptcy, both of which were tried under the provisions of the act of 1867. These cases were entirely different from the case at bar. The discharge was under a statute materially different, and the actions were upon the or-

iginal debt. Even under the strong provisions of the act of 1867, we are of the opinion that the plaintiffs are not entitled to go behind the judgment and the pleadings to show that the debt upon which the judgment was based was fraudulently incurred. In the case of *Shuman v. Strauss*, 52 N. Y. 404, while the court fails to positively assert in its opinion that this cannot be done, for the reason that the question was not legitimately before it, yet it does say that the contention of plaintiff that he could go behind the judgment and record, and show that the debt was "created by fraud," is not supported by the authorities cited, and that the cases cited by plaintiff fall far short of the claim of the plaintiff. The court proceeded in that case to examine the decisions cited, and demonstrated that the judgments and record supplied the proof that the debts upon which the judgments were based were created by fraud. Our attention is earnestly directed to the case of *Forsyth v. Vehmeyer*, 177 U. S. 177, 44 L. ed. 723, 20 Sup. Ct. Rep. 623. An examination of that case will demonstrate that the judgment and record proved beyond question that the debt upon which the judgment was based was created by fraud. It will further be observed that the discharge in bankruptcy in that case was in pursuance of the bankrupt act of 1867. It will not be contended that, if the action is based upon fraud, the fraud is merged in the judgment, but it must appear from the record and judgment that the action was based upon a fraudulent transaction. See case of *Forsyth v. Vehmeyer*, 176 Ill. 359, 52 N. E. 55, where this question is fully discussed. In the case of *Stern v. Meyer*, 9 Misc. 102, 29 N. Y. Supp. 34, the conclusions reached in case of *Shuman v. Strauss*, 52 N. Y. 404, are fully approved. And in *Palmer v. Preston*, 45 Vt. 154, 12 Am. Rep. 191, the doctrine is clearly announced that "the recovery of a judgment upon a contract induced by fraud is a waiver of the fraud, and the judgment is not a debt created by fraud, within the meaning of the bankrupt act, and the plea of a discharge in bankruptcy is a good defense to an action of debt founded upon such judgment." So far as this contention is concerned, the action of the trial court in the case at bar does not need the support of the doctrine heretofore announced. Its action is fully supported by the very terms of the statute—"no judgment in an action for fraud or obtaining property by false pretenses or false representations shall be affected." The judgment sought to be revived was based upon an ordinary suit on account for goods sold and delivered. The action for fraud or obtaining property by false pretenses or representations, as mentioned in the bankrupt act of 1898, must be construed as contemplating the common-law form of action for fraud and deceit. The form of the action must be determined by the petition; hence, the affidavit for an attachment in aid of the suit forms no part of the petition, and cannot be looked to in determining the form of action. The provision of the bankrupt act of 1898 must be

construed to mean what it says,—that it is judgments in actions for fraud, and not debts created by fraud, as in the act of 1867, which are not to be affected by the discharge in bankruptcy. The conclusions as herein expressed upon this contention having been reached by this court, the error urged by the appellants in this respect must be ruled against them.

This leads us to the last contention, based upon subdivision 4, § 17, of the bankrupt act of 1898, which provides that no fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity shall be discharged. Was there any fiduciary relation existing between plaintiffs and defendant at the time of the sale of the goods upon which their judgment sought to be revived is based? We think not. Our attention is called to the cases of *Lemcke v. Booth*, 47 Mo. 385, 4 Am. Rep. 326, and *Brooks v. Yocum*, 42 Mo. App. 516. We will say as to those cases, if they are cited in support of the theory first treated of in this opinion, "that the plaintiffs had the right to go behind the judgment, and show that the debt upon which the judgment was founded was created by fraud;" that they are not applicable, because that question was not involved. These cases were suits upon the original debts, and not upon judgments, as the case at bar. We have no doubt as to the correctness of the doctrine, under the act of 1867, that in a suit upon an account or note, or any other evidence of debt, where the defendant would plead a discharge in bankruptcy, plaintiffs in such suit upon the debt would be entitled to show it was created by fraud; but that is not this case. If the cases are cited in support of the contention that a fiduciary relation existed between the plaintiffs and defendant at the time the merchandise was sold to defendant, we will say that the facts as to the relationship in those cases and the facts in the one before us are not at all similar. In the *Booth* and *Yocum* Cases, the defendants were commission merchants, and consignments of goods were made to them, to sell. In this case it was a plain sale and delivery of goods and wares in the ordinary course of business. As has been very appropriately said: "In almost all of the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of the trust." But it is apparent that this is not the "fiduciary capacity" spoken of in the bankrupt act. This contention is settled adversely to the plaintiffs in the very able and exhaustive review of all the authorities in the case of *Bracken v. Milner*, 5 Am. Bankr. Rep. 23, 104 Fed. 522. In that case, Phillips, J., very clearly demonstrated how the conflict in the different cases originated in respect to the application of the terms "fiduciary capacity." Under the bankrupt act of 1841, the provision in respect to the subject now under discussion was that "debts created in consequence of defalcation" as a public officer, or as executor, administrator, guardian, or

trustee, or while acting in any other fiduciary capacity, would not be affected by the discharge in bankruptcy. And this provision was the subject of controversy in the case of *Chapman v. Forsyth*, 2 How. 202, 11 L. ed. 236. It was held in that case "that a factor who had defaulted in accounting for a balance due his principal was not acting in a fiduciary capacity." Subsequently this statute was amended by the act of 1867, in which the enumerations of classes were omitted; that is to say, executors, administrators, etc. Judge Pardee, in the case of *Fulton v. Hammond*, 11 Fed. 291, drew the distinction between the statutes of 1841 and 1867, and, by reason of this change in the statutes, held that there was an intention to enlarge the comprehension of the terms "fiduciary capacity," and that the *Chapman Case* was no longer to be followed in that respect. But in the cases of *Neal v. Clark*, 95 U. S. 704, *sub nom. Neal v. Scruggs*, 24 L. ed. 586, and *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576, the cases making the distinction between the acts of 1841 and 1867 are discussed, and the conclusion finally reached that the *Chapman Case* was the law, even under the statute of 1867. Without passing on the soundness of the doctrine, it might not be amiss here to say that the rule announced in the Missouri cases heretofore mentioned was laid down by reason of the distinction drawn by the cases

holding that the *Chapman Case* was not applicable to the bankrupt act of 1867. This doctrine was departed from in the cases of *Neal v. Clark*, 95 U. S. 704, *sub nom. Neal v. Scruggs*, 24 L. ed. 586, and *Hennequin v. Clews*, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576. The reason of the rule in the cases of *Lemcke v. Booth*, 47 Mo. 385, 4 Am. Rep. 326, and *Brooks v. Yocum*, 42 Mo. App. 516, under the act of 1867, having been abandoned, the rule itself would fall. After a full discussion by the learned judge in the case of *Bracken v. Milner*, 5 Am. Bankr. Rep. 23, 104 Fed. 522, this very appropriate and intelligent application of the terms "fiduciary capacity" was reached: "That the phrase implies a fiduciary relation existing previously to, or independently of, the particular transaction from which the debt arises." In the case before us for determination it might be claimed that the plaintiffs, as has heretofore been said, in a commercial sense, reposed a trust in the punctuality and integrity of the defendant at the time they sold him the goods, yet we are unable to reach the conclusion that such a trust in a simple, plain sale and delivery of merchandise created a "fiduciary relation," such as is contemplated by the bankrupt act of 1898. Finding no error in the action of the trial court, the judgment will be affirmed.

All concur.

NEBRASKA SUPREME COURT.

CRAWFORD COMPANY, *Appt.*,

v.

Leroy HALL *et al.*, Impleaded, etc.

(.....Neb.....)

- *1. The doctrine of the civil law with respect to the right of acquiring an interest in the use of water by prior appropriation and the application thereof to a beneficial use has never become a part of the laws of this state, and this without regard to whether the doctrine was ever in existence as a part of the laws in force in the territory acquired by the United States known as the "Louisiana purchase."
2. The common-law rule with respect to the rights of private riparian proprietors has been a part of the laws of the state ever since the organization of a state government.
3. It cannot be said that the common-

*Headnotes by HOLCOMB, J.

law rule defining the rights of riparian proprietors is inapplicable to the conditions prevailing in the state because irrigation is found essential to successful agriculture in some portions thereof.

4. A riparian's right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right, and entitled to protection as such, the same as private property rights generally.
5. The legislature has not abolished, nor does it possess the power to abolish, the rights of riparian proprietors which have become vested, except as such rights be taken or impaired for a public use in an exercise of the powers of eminent domain, for which compensation must be made for the injury sustained.
6. The provisions of Comp. Stat. 1901, § 41, art. 2, chap. 93a, and of § 21, art. 1, of the Constitution, authorizes the condemnation of the right of a private riparian

NOTE.—As to right of prior appropriation of water, including right under special statutes or customs, see, in this series, *Isaacs v. Barber* (Wash.) 30 L. R. A. 665, and *note*; *Benton v. Joancox* (Wash.) 39 L. R. A. 107; *Carson v. Gentner* (Or.) 43 L. R. A. 130; *Cache La Poudre Reservoir Co. v. Water Supply & Storage Co.* (Colo.) 46 L. R. A. 175; *Smith v. Deniff* (Mont.) 50 L. R. A. 737; *New Loveland & G. Irrig. & Land Co. v. Consolidated Home Supply Ditch and Reservoir Co.* (Colo.) 52 L. R. A. 60 L. R. A.

266; *Water Supply & Storage Co. v. Larimer & W. Irrig. Co.* (Colo.) 46 L. R. A. 322, and *Longlire v. Smith* (Wash.) 58 L. R. A. 308.

As to right to divert water for use on non-riparian lands, see *Gould v. Eaton* (Cal.) 38 L. R. A. 181; *Smith v. Deniff* (Mont.) 50 L. R. A. 737; and *Jones v. Conn* (Or.) 54 L. R. A. 630.

As to correlative rights of upper and lower proprietors, see the following case, and *foot-note* thereto.

proprietor to the use and enjoyment of a natural stream flowing past his land, or its impairment by an appropriation of such water for irrigation purposes; and such riparian proprietor may recover damages in the same way and subject to the same rules as a person whose property is affected injuriously by the construction and operation of a railroad.

7. The irrigation act of 1895 authorizes and regulates the appropriation of the waters of the state for irrigation and other purposes which are declared to be a public use; and, in making appropriations of water as contemplated by the act, a riparian owner whose property rights are appropriated or impaired is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action or proceeding instituted for that purpose.
8. As to those streams of water flowing through the state which may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey of the public lands, the question is left open as to whether or not the waters of such streams may not be treated as waters of navigable rivers, and to which riparian rights of an adjoining landowner would not attach as against the right of the public to use the waters thereof by its appropriation and application to beneficial purposes.
9. While, as an abstract proposition of law, a riparian proprietor has the right to the ordinary natural flow of a stream, this rule would furnish no basis for compensation where water is appropriated for irrigation purposes. In order to entitle a riparian owner to compensation, he must suffer an actual loss or injury to his riparian estate, which the law recognizes as belonging to him by reason of his right to the use and enjoyment of the water of which he is deprived.
10. Ordinarily, a riparian proprietor's right to the use of water of a stream is limited to its use for domestic purposes, and, if applied to the irrigation of riparian lands, a reasonable use for such purpose in view of an equal right to use belonging to all other riparian proprietors.
11. The right of a riparian proprietor as such to use water for irrigation purposes is limited to riparian lands.
12. The right cannot be extended to lands contiguous to the riparian land, nor can water be diverted to nonriparian lands which might be used on riparian lands, but is not.
13. Land, to be riparian, must have the stream flowing over it or along its borders.
14. The extent of riparian land cannot, in any event, exceed the area acquired by a single entry or purchase from the government; and whether, in view of the policy of the government in the disposition of its public lands, such riparian land may exceed the smallest legal subdivision of a section,—that is, 40 acres,—or, in lieu thereof, if an irregular tract, a designated numbered lot, which is bordered by a natural stream, or over which it flows,—*quære*.
15. The two doctrines of water rights, one the right of a riparian proprietor, and the other the right of appropriation and application to a beneficial use by a nonriparian owner, may exist in the state at the same time, and both do exist concurrently in this state.
16. The common-law rule of riparian

rights is underlying and fundamental, and takes precedence of appropriations of water if prior in time.

17. The riparian owner acquires title to his usufructuary interest in the water when he secures the land to which it is an incident, and the appropriator acquires title by appropriation and the application of the water to some beneficial use; the time when either right attaches determining the superiority of title as between conflicting claimants.
18. Irrigation acts of 1889 and 1895 abrogated the law of private riparian rights as theretofore existing, and substituted in its stead a law providing for the appropriation of the public waters of the state, and their application to the beneficial uses therein contemplated.
19. The legislative enactments referred to did not have the effect of abolishing vested rights of riparian proprietors, but affected only such rights as might have been acquired in the future under the law as theretofore existing.
20. The court will take judicial notice of the fact that since the early settlements of the western portions of the state, where irrigation has been found essential to successful agriculture, a custom or practice has existed of appropriating and diverting waters from the natural channels thereof into irrigation canals, and the application of such waters to the soil for agricultural purposes. Whether vested rights have been acquired thereby must depend on the facts and circumstances as disclosed in any particular case.
21. The right to the use of water, when acquired by appropriation, is, in its nature, a property right, and becomes a superior and better title to the use and enjoyment of such water than that of a riparian proprietor whose right attaches subsequently.
22. The act of Congress of July 26, 1806, granted to those appropriating water on the public domain for agricultural purposes a right in and to the use of such waters when made according to local customs, or when such right is recognized by the laws of the state or the decisions of the courts.
23. The act of 1877 (Sess. Laws 1877, p. 168) was an implied recognition of the right to appropriate the waters on the public domain according to the custom prevailing in the arid states immediately west of us, and the irrigation acts of 1889 and 1895 expressly recognized and preserved the rights of those who had appropriated the public waters and applied them to agricultural uses.
24. The duties of the state board of irrigation, as provided for in the irrigation act of 1895 (Sess. Laws, chap. 69), are administrative, and not judicial. The sections of the statute creating such board are not unconstitutional, as conferring judicial powers on executive officers.
25. Where a large number of persons claim rights to use or divert the waters of a stream by virtue of riparian rights, appropriations, prescription, or otherwise, a suit in equity to determine such rights, and enjoin infringement, under color thereof, of rights acquired under the irrigation act, may be maintained to avoid multiplicity of suits.
26. The plaintiff in such a suit may offer to do equity by compensating riparian owners whose rights are affected by the construction and operation of a canal without leaving them to their actions at law;

and in that way the amounts due the several parties by way of damages may become a proper subject of inquiry and adjudication therein.

27. The term "domestic purposes," as used in Comp. Stat. 1901, § 43, art. 2, chap. 98a, has reference to the use of water for domestic purposes, permitted to the riparian proprietor at common law, which ordinarily involves but little interference with the water of a stream or its flow, and does not contemplate diversion of large quantities of water in canals or pipe lines.

28. The common law does not give to a riparian owner an absolute and exclusive right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land, so far as consistent with a like right in all other riparian owners.

29. A riparian owner having a superior title to the use of the water of a stream as against an appropriator is not entitled to maintain an injunction to prevent the diversion of the storm or flood waters of the stream, and thereby prevent its application to a beneficial use, as contemplated by the statute.

30. There is no such thing as a prescriptive right of a lower riparian owner to receive water as against upper owners. Receiving the full flow of a stream for more than ten years does not give a prescriptive right that will prevent reasonable use of its waters by an upper owner.

(February 4, 1903.)

A PPEAL by plaintiff from an order of the District Court for Dawes County dismissing a proceeding brought to adjudicate the rights to certain water in White river. *Reversed.*

The facts were stated upon a former hearing of the case as follows:

This is an appeal from the district court of Dawes county on the part of the Crawford Company, a corporation, which was the plaintiff below. We think no clearer or fairer statement of this case can be made than that contained in the brief of Judge Maxwell, the venerable counsel for Leroy Hall, and we therefore copy it verbatim: "The appellant brought an action in the district court of Dawes county against Leroy Hall and others to adjudicate certain rights of the parties, and to enjoin Hall, who was charged with making threats to tear down a dam erected by the appellant in White river, in Dawes county, by which nearly all the water in the river was diverted from its channel, and caused to flow through plaintiff's ditch. Issues were made up, and the cause submitted to the court, which found that no threats had been made by Hall to tear down or injure the dam, and therefore the injunction against him was unauthorized and without just cause, and thereupon the court finds that the plaintiff is not entitled to an injunction, and that the defendant Leroy Hall is entitled to an injunction against plaintiff, as specified therein. And the court, for the purposes only of the injunction herein allowed, further finds that the defendant Leroy Hall is a riparian proprietor upon the White river, as alleged in his said answer, and that he and his grantors

have been such riparian proprietors for a period of ten years and upward immediately preceding the bringing of this suit, and he is entitled to all the rights of a riparian proprietor thereon, including the flow of the waters of said stream as they were wont to do from time immemorial; that the said plaintiff on or about the — day of January, A. D. 1896, by means of a dam, ditch, headgate, reservoirs, aqueducts, flumes, and other appliances then in its possession, did divert the waters of said stream from the natural bed and channel thereof, at a point above the riparian lands of said defendant Leroy Hall, and have continued to so divert them until this moment, claiming the right to so divert them under and by virtue of the irrigation laws of the state of Nebraska, which right has not yet been adjudicated by the state board of irrigation. And the court further finds: that the said plaintiff and the said defendant, the Harris & Cooper Irrigation Company, are not entitled to the relief prayed in the amended supplemental petition and cross petition, respectively, at this time; that the defendant Leroy Hall is entitled only to an injunction against the plaintiff, prohibiting it from diverting the water of said stream by means of its dam, headgate, ditches, and appliances aforesaid, until its right to the waters of said stream for the purposes of irrigation shall be adjudicated by the state board of irrigation, or until the further order of this court, and is entitled to have the temporary injunction heretofore granted herein vacated, dissolved, and set aside, and is entitled to recover his costs herein expended, as against the said plaintiff and against the said Harris & Cooper Irrigation Company.' The court thereupon dismissed the petition, 'without prejudice to any further adjudication which may be made by the state board of irrigation, or any court having jurisdiction of the right of the plaintiff to the waters of said stream for irrigation and power purposes.' The same decree was made in regard to the cross petition of Harris & Cooper Irrigation Company, and in the Crawford Company-Hall case 'it is further ordered, adjudged, and decreed by the court herein that the said plaintiff be and it is hereby prohibited and enjoined from further diverting the waters of said stream from the bed and channel thereof, by means of its dam, headgate, ditches, and appliances aforesaid, until its right thereto shall have been adjudicated by the board of irrigation or other proper tribunal, until the further order of this court in that behalf granted: Provided, that said injunction shall not restrain the plaintiff from arresting and storing flood waters, or any excess above the usual flow. And the court further finds that it has no jurisdiction of the several causes of action set forth in the several cross petitions of the defendants herein stated. And the court further finds that the state board of irrigation has exclusive jurisdiction over the several causes of action set forth in plaintiff's petition and the several cross petitions. And the court having determined that the court has no original jurisdiction to

hear, determine, and adjudicate the rights of the plaintiff and defendants claimed under the statutes of Nebraska governing the manner of acquiring water rights for the irrigation, power, domestic and other purposes, the court refuses, in this action and litigation, to finally determine and adjudicate any question of law, fact, or right."

Messrs. Hamer & Hamer, Allen G. Fisher, Justin E. Porter, and W. D. Oldham, for appellant:

The use of water for the purpose of irrigation is a public use within the meaning of the Constitution.

Paxton & H. Irrig. Canal & Land Co. v. Farmers' & M. Irrig. & Land Co. 45 Neb. 884, 29 L. R. A. 853, 64 N. W. 343.

Under the act of the legislature touching the common law of England, the courts were at liberty at any time they saw fit to disavow the doctrine of riparian rights, and, under statutes almost exactly like ours, they have done so in the states west of us.

Neb. Comp. Stat. 1897, chap. 15, § 1.

The legislature of this state has made three specific and vigorous efforts to wipe out the doctrine of riparian rights: First, the act of 1877; second, the act of March 27, 1889; third, the act of April 4, 1895.

In the commencement the court might have said, under the statute of Nebraska, pertaining to the common law, that the common law was not applicable in so far as it affected riparian rights.

Reno Smelting, Mill & Reduction Works v. Stevenson, 20 Nev. 269, 4 L. R. A. 60, 21 Pac. 317; *Curtis's Commentaries*, § 16; 1 Washb. Real Prop. p. 86; *Van Ness v. Pacard*, 2 Pet. 144, 7 L. ed. 377; 1 Kent, Com. 473; *Bogardus v. Trinity Church*, 4 Paige, 198; *Seely v. Peters*, 10 Ill. 142; *Boyer v. Sweet*, 4 Ill. 120; *People ex rel. Loomis v. Canal Appraisers*, 33 N. Y. 461; *Stout v. Keyes*, 2 Dougl. (Mich.) 184, 43 Am. Dec. 465; *Lorman v. Benson*, 8 Mich. 18, 77 Am. Dec. 435; *Morris v. Vanderen*, 1 Dall. 67, 1 L. ed. 40; *Report of the Judges*, 3 Binn. 595; *Shewell v. Fell*, 3 Yeates, 21; *State v. Cawood*, 2 Stew. (Ala.) 360; *Inge v. Murphy*, 10 Ala. 885.

The government of the United States has never attempted to sell riparian rights after the government of the state has attempted to declare the doctrine of prior appropriation.

Sturr v. Beck, 6 Dak. 71, 50 N. W. 486.

The state may "appropriate the water of any stream to any purpose which will subserve the public interest."

Clark v. Cambridge, & A. Irrig. & Improv. Co. 45 Neb. 807, 64 N. W. 239.

The law of riparian proprietorship was destroyed as to all lands subsequently acquired from the United States by the act taking effect June 1, 1877, and, as Mr. Hall's land was acquired from the United States after that time, he is not, and cannot be, a riparian proprietor.

While the prior appropriator has the right to have the water flow down the stream to the head of his ditch, it is an incorporeal 60 L. R. A.

hereditament appurtenant to his ditch, and coextensive with his right to the ditch itself; but he can have no property rights in or to the water itself until it enters his ditch from the natural stream.

Ortman v. Dixon, 13 Cal. 33; *McDonald v. Askev*, 29 Cal. 200; *Los Angeles v. Baldwin*, 53 Cal. 469; *Lower Kings River Water Ditch Co. v. Kings River & F. Canal Co.* 60 Cal. 408; *Parks Canal & Min. Co. v. Hoyt*, 57 Cal. 46; *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 807, 64 N. W. 239.

The United States never undertook to pass a law determining priority of right to the use of water.

The legislature cannot pass a law which prevents a man from farming in the only way in which it can be done in the county in which he lives.

Cummings v. Missouri, 4 Wall. 325, 18 L. ed. 363; *Ex parte Garland*, 4 Wall. 338, 18 L. ed. 366.

If farming may not be done in any considerable portion of this state except by the application of the water running in the streams in that section, then the legislature has no right to take the water, or to permit it to be taken, and used for a comparatively insignificant use or purpose, thereby denying the right to use it to produce crops from the soil for the sustenance of life.

Under the act of 1877 each appropriator is entitled to a reasonable use of the water, and each man may divert water from the stream as it goes by his ditch, and no mill man near the lower end of the stream, or any place else on the stream, can say that he is entitled to a monopoly of the water as against his neighbors, who live above him, and who wish to irrigate their lands.

Union Mill & Min. Co. v. Ferris, 2 Sawy. 176, Fed. Cas. No. 14,371; *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 450, Fed. Cas. No. 14,370; *Ellis v. Tone*, 58 Cal. 289; *Anaheim Water Co. v. Semi-Tropio Water Co.* 64 Cal. 185, 30 Pac. 623; *Luz v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Swift v. Goodrich*, 70 Cal. 103, 11 Pac. 561; *Coffman v. Robbins*, 8 Or. 278; *Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078; *Learned v. Tangeman*, 65 Cal. 334, 4 Pac. 191; *Ferrea v. Knipe*, 28 Cal. 343, 87 Am. Dec. 128; *Peregoy v. McKissick*, 79 Cal. 572, 21 Pac. 967; *Sharp v. Hoffman*, 79 Cal. 404, 21 Pac. 846; *Kinney, Irrigation*, § 273; *Jones v. Adams*, 19 Nev. 78, 6 Pac. 442; *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678.

The proper mode of using water in at least three fourths of the state of Nebraska is by applying it to the irrigation of the soil.

Union Mill & Min. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370; Washb. Easements, 2d ed. p. 240; *Luz v. Haggin*, 69 Cal. 255, 10 Pac. 674.

It is the common law in all the western states where water is scarce that the proper use of water is for domestic purposes and irrigation, and that every riparian proprietor is entitled: (1) To take out of the stream all the water that he needs for domestic use and for watering stock, even if it takes the

full volume of the stream, and leaves none to go down. (2) He is entitled to a reasonable use of the water for the purpose of irrigating his riparian lands, and what is a reasonable use depends upon the circumstances of each case.

Kenney, Irrigation, § 275; *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 450, Fed. Cas. No. 14,370; Washb. Easements, 2d. ed. p. 240; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674.

Mr. Hall has not obtained title to this water by prescription.

Mills v. Traver, 35 Neb. 292, 53 N. W. 67; *Carroll v. Patrick*, 23 Neb. 847, 37 N. W. 671; *Steele v. Boley*, 6 Utah, 308, 22 Pac. 311; *Nichols v. Council*, 51 Ark. 26, 9 S. W. 305; *Sparks v. Pierce*, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102; *Gibson v. Chouteau*, 13 Wall. 92, 20 L. ed. 534; *Slater v. Gunn*, 170 Mass. 509, 41 L. R. A. 268, 48 N. E. 1017; *Bear River & A. Water & Min. Co. v. New York Min. Co.* 8 Cal. 327, 68 Am. Dec. 325.

It has been the policy of the United States to encourage the diversion of water upon the public lands for the purpose of irrigation and mining, and one of the purposes of the act of Congress of July 26, 1866, was to declare the existence of such a policy, and to protect the rights of appropriators, acquired prior to the passage of the act.

Jones v. Adams, 19 Nev. 78, 6 Pac. 442; *Keno Smelting Mill & Reduction Works v. Stevenson*, 20 Nev. 269, 4 L. R. A. 60, 21 Pac. 317; *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240; *Broder v. Natoma Water & Min. Co.* 101 U. S. 274, 25 L. ed. 790; *Atchison v. Peterson*, 20 Wall. 507, 22 L. ed. 414; *Basey v. Gallagher*, 20 Wall. 670, 22 L. ed. 452; *Forbes v. Gracey*, 94 U. S. 762, 24 L. ed. 313; *Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; *Wood v. Etiwanda Water Co.* 122 Cal. 152, 54 Pac. 726; *Williams v. Harter*, 121 Cal. 47, 53 Pac. 405.

The right of the Crawford company relates back to the 16th day of June, 1891, when Charles J. Grable posted his notice. Although his appropriation was not complete until the actual diversion of the water, still, if he prosecuted the work with reasonable diligence in view of the obstacles which he met, the right relates back to the time when the first step was taken to secure it.

Ophir Silver Min. Co. v. Carpenter, 4 Nev. 544, 97 Am. Dec. 550; *Larimer County Reservoir Co. v. People*, 8 Colo. 617, 9 Pac. 794; *Wheeler v. Northern Colorado Irrig. Co.* 10 Colo. 588, 17 Pac. 487; *Kelly v. Natoma Water Co.* 6 Cal. 105; *Nevada Ditch Co. v. Bennett*, 30 Or. 59, 45 Pac. 478; *Conant v. Jones*, (Idaho), 32 Pac. 251; *Smith v. Hope Min. Co.* 18 Mont. 432, 45 Pac. 632; *Sieber v. Frink*, 7 Colo. 154, 2 Pac. 901; *Farmers' Highline Canal & Reservoir Co. v. Southworth*, 13 Colo. 115, 4 L. R. A. 767, 21 Pac. 1029.

Of natural right flowing water, the air, the sea, and the shores of the sea, are common property.

Gould, Waters, § 47; *Royal Fishery of the* 60 L. R. A.

Banne, Davies, 140, 150; *Blundell v. Catterall*, 5 Barn. & Ald. 268; *Bagott v. Orr*, 2 Bos. & P. 472.

Of things that are common to all anyone may take such a portion as he pleases.

Sandar's Justinian, lib., tit. 1, § 2; *Mason v. Hill*, 5 Barn. & Ad. 1; *Kiuney, Irrigation*, § 16.

Under the civil law, and under the French law, anyone who saw fit might divert the water and thereby appropriate it.

If the plaintiff, which diverts the water on its own land, is to be accorded the same treatment that would be given a riparian proprietor, then it is not to be allowed to consume all the water; but it may use it all, and, if it turns it back into the stream before it reaches Hall's mill reduced in quantity only by the amount absorbed and evaporated, Hall has no cause of complaint. This would be a reasonable use; and, while the volume might be somewhat lessened, it would be so small that the maxim *De minimis non curat lex* would be held to apply.

Embrey v. Owen, 6 Exch. 353; *Wood v. Waud*, 3 Exch. 746.

Mr. Hall is entitled to no compensation because no right was conferred upon him which prevented the taking of the water for domestic use and irrigation. In contemplation of law, he bought the land and built the mill knowing what the needs of the community would be, and knowing that the water in White river would be needed to a large extent for irrigation and domestic use.

Morse v. Worcester, 139 Mass. 389, 2 N. E. 694; *Washburn & M. Mfg. Co. v. Worcester*, 116 Mass. 458; *Merrifield v. Worcester*, 110 Mass. 216, 14 Am. Rep. 592; *Barnard v. Shirley*, 151 Ind. 160, 41 L. R. A. 737, 47 N. E. 671; *Richmond v. Test*, 18 Ind. App. 482, 48 N. E. 610; *Pennsylvania Coal Co. v. Sanderson*, 113 Pa. 126, 57 Am. Rep. 455, 6 Atl. 453; *Scranton v. Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Sage v. New York*, 154 N. Y. 61, 38 L. R. A. 606, 47 N. E. 1096; *Webber v. Pere Marquette Boom Co.* 62 Mich. 636, 30 N. W. 469; *Furman v. New York*, 5 Sandf. 16, 10 N. Y. 567; *People v. New York & S. I. Ferry Co.* 68 N. Y. 71.

On motion for rehearing.

The right to use water for domestic purposes has always been recognized as paramount to the right to use it for any other purpose.

Arnold v. Foot, 12 Wend. 330; *Evans v. Merricweather*, 4 Ill. 495, 38 Am. Dec. 100; *Slack v. Marsh*, 11 Phila. 543; *Miner v. Gilmour*, 12 Moore, P. C. C. 131; *Hazeltine v. Case* 46 Wis. 391, 32 Am. Rep. 715, 1 N. W. 66; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674.

The use of water for the purpose of irrigation in Dawes county is a natural want.

Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631; *Evans v. Merricweather*, 4 Ill. 495, 38 Am. Dec. 106; *Tolle v. Correth*, 31 Tex. 362, 98 Am. Dec. 540; *Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078.

The waters subject to appropriation for

beneficial purposes are the property of the state.

White v. Farmers' Highline Canal & Reservoir Co. 22 Colo. 191, 31 L. R. A. 828, 43 Pac. 1028; *Farm Invest. Co. v. Carpenter*, 9 Wyo. 119, 50 L. R. A. 747, 61 Pac. 258.

Hall could get no right to the exclusive water of the stream as against any irrigator diverting the water above his mill.

Brossard v. Morgan (Idaho) 61 Pac. 1031; *Boyce v. Cupper*, 37 Or. 256, 61 Pac. 642.

It is too late for this court to retreat. It has already declared in favor of irrigation.

Slattery v. Harley, 58 Neb. 575, 79 N. W. 151; *Cummings v. Hyatt*, 54 Neb. 35, 74 N. W. 411.

If England can adopt one custom and make it a part of the common law, then Nebraska can adopt another custom and make it a part of the common law. If irrigation is a good custom in Nebraska, it is as much a part of the duty of the courts to declare it a part of the common law of the state as it is the duty of the English courts to declare any useful custom in England to be a part of the common law of England. The best interests of the Englishman is the first and last consideration of the English court.

Cooley's Bl. Com. 4th ed. § 3, *64, *68.

There is no presumption that the common law exists in any part of the territory formerly included in Louisiana.

Norris v. Harris, 15 Cal. 226; 1 Bl. Com. 107; 1 Story, Const. Lim. p. 150.

The state controls the water.

Castle Rock Irrig. Canal & Water Power Co. v. Jurisch (Neb.) 93 N. W. 690.

Hall has no rights as against the state unless the state, by its constitutional representatives, has said so by some "instrument showing a clear and undoubted intention to that end."

Sage v. New York, 154 N. Y. 61, 38 L. R. A. 606, 47 N. E. 1096; *People v. New York & S. I. Ferry Co.* 68 N. Y. 71; *Webb v. Bird*, 13 C. B. N. S. 841.

The policy of the law is to promote the progress of cities, towns, and villages, and to provide for the comfort and enjoyment of their inhabitants.

Los Angeles v. Pomeroy, 124 Cal. 597, 57 Pac. 585; *Watuppa Reservoir Co. v. Fall River*, 147 Mass. 548, 1 L. R. A. 466, 18 N. E. 465.

Messrs. J. W. Deweese and John S. Kirkpatrick, also in support of motion for rehearing:

We have adopted only such portions of the common law as were applicable to conditions in the territory of Nebraska.

Delaney v. Erickson, 10 Neb. 492, 35 Am. Rep. 487, 6 N. W. 600.

The power of the legislature is plenary. The legislature can do anything not prohibited by the Constitution.

People ex rel. Wood v. Draper, 15 N. Y. 532; *Thorpe v. Kuttland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Cresap v. Gray*, 10 Or. 349.

The very nature of water in lakes and running streams is such that the legislature 60 L. R. A.

might, with perfect propriety, declare all such waters, so far as not appropriated, public property.

Messrs. Albert W. Crites, W. H. Fanning, and Samuel Maxwell, for appellees:

This court on numerous occasions has sustained the common-law doctrine of riparian rights, except when in conflict with some statutory or constitutional provision.

Clark v. Cambridge & A. Irrig. & Improv. Co. 45 Neb. 798, 64 N. W. 239; *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 28 L. R. A. 581, 60 N. W. 717; *Slattery v. Harley*, 58 Neb. 575, 79 N. W. 151; *Culver v. Garbe*, 27 Neb. 312, 43 N. W. 237.

All that part of the act relating to the state board as a tribunal is null and void, and that invalidates the whole act.

State ex rel. Jones v. Lancaster County, 6 Neb. 474; *Trumble v. Trumble*, 37 Neb. 340, 55 N. W. 869; *Low v. Rees Printing Co.* 41 Neb. 127, 24 L. R. A. 702, 59 N. W. 362; *State ex rel. Constock v. Stewart*, 52 Neb. 243, 71 N. W. 998; *German-American F. Ins. Co. v. Minden*, 51 Neb. 870, 71 N. W. 995; *State ex rel. Smyth v. Magney*, 52 Neb. 508, 72 N. W. 1006; *Warren v. Charlestown*, 2 Gray, 84; *Copeland v. St. Joseph*, 126 Mo. 417, 29 S. W. 281; *State v. Sinks*, 42 Ohio St. 345; *Johnson v. State*, 59 N. J. L. 271, 35 Atl. 787; *State ex rel. Law v. Blend*, 121 Ind. 514, 23 N. E. 511; *Black v. Trower*, 79 Va. 123; *Slauson v. Racine*, 13 Wis. 399; *Poindester v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *State ex rel. Huston v. Perry County*, 5 Ohio St. 497.

Riparian rights are part of the laws of this state.

Lammers v. Nissen, 4 Neb. 245; *Bissell v. Fletcher*, 19 Neb. 726, 28 N. W. 303; *Wiggenhorn v. Kountz*, 23 Neb. 691, 37 N. W. 603; *Stewart v. Schneider*, 22 Neb. 286, 34 N. W. 640; *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104; *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550; *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396; *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 38 L. R. A. 581, 60 N. W. 717; *Slattery v. Harley*, 58 Neb. 575, 79 N. W. 151; *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N. W. 239; *Plattsmouth Water Co. v. Smith*, 57 Neb. 579, 78 N. W. 275; *Jenal v. Green Island Draining Co.* 12 Neb. 163, 10 N. W. 547.

Holcomb, J., delivered the opinion of the court:

An opinion prepared in this cause by the then chief justice, with one in its nature supplementary thereto, have heretofore been handed down by the court. 60 Neb. 754. 84 N. W. 271, and 61 Neb. 317, 85 N. W. 303. The importance of the questions involved in a decision of the controversy, vitally affecting, as they do, the material interests of the state, and especially that portion of it where irrigation is necessary to successful agriculture, has induced us to grant a further hearing, and again to examine and consider the principal controverted points arising in the

case. A full statement of the nature of the litigation is found in the opinion first filed, and we need not here restate it. Briefly, the appellant, who was plaintiff below, began an action equitable in character to have adjudicated the rights of different persons, made parties to the action, to the use of the water flowing in a stream called "White river," and to enjoin the defendant Hall from a threatened interference with plaintiff's headgate and works connected with an irrigating canal being constructed by it. The plaintiff claimed the right to divert the waters of the stream mentioned for irrigation purposes and to supply the town of Crawford, situated near its proposed canal, with water for municipal purposes. Defendant Hall, owning and operating a mill adjacent to the stream which had been utilized for power purposes denies plaintiff's alleged right of appropriation, and claims a right to the continued use of the water ordinarily flowing in the stream as a riparian proprietor. Numerous other defendants, claiming some right to the use of the water as riparian owners or by appropriation, were also made defendants, with a view of having adjudicated the rights of all the parties to the litigation. The trial court refused to take jurisdiction and try the cause on its merits, for the reason that the water rights of the respective parties had not first been determined by the state board of irrigation, under the provisions of the irrigation act of 1895. On defendant Hall's application on a cross petition an injunction was granted against plaintiff restraining it from diverting the water of the stream into its irrigation canal, and the temporary injunction granted in its favor and against Hall was dissolved. From these several orders the plaintiff appeals.

The argument in this court has taken an exceedingly broad range. Narrowed to its simplest terms, the matters in dispute relate to conflicting rights and interests as between riparian owners and those claiming as appropriators of the waters in the streams of the state for irrigation and other beneficial purposes. Incidental to the main question thus stated, there is involved the constitutionality of the irrigation act of 1895, creating and providing for a state board of irrigation, defining its duties, powers, and authority, and especially the portion of the act which empowers such board to determine and adjust the amount and priority of right to the use of water by appropriation for irrigation purposes. There is also presented for consideration the correctness of the ruling of the trial court in dismissing the action begun by plaintiff without a hearing and judgment on its merits. Appreciating the fact that great interests are affected, and the far-reaching consequences of a decision regarding the matter in controversy when finally determined, more than the usual time has been taken, in order that such full consideration might be given the case as the importance of the question presented seems to demand. In the former opinions we decided, in substance, that the plaintiff could not rely upon a statute for the purpose of enforce-

ing his alleged right as appropriator, and at the same time urge the invalidity of a material portion thereof on the ground of its alleged unconstitutionality, it being obvious that the invalid portion, if found invalid, formed an inducement to the passage of the entire act, upon which its rights must rest if sustained; and that the act of the legislature of February 9, 1877, did not abrogate the common-law rights of riparian owners as they then existed in this state. It is also held that Comp. Stat. 1897, §§ 47, 48, art. 2, chap. 93a, constituted no acceptance of any supposed grant to the state by the Federal government of the waters on the public domain. While some other questions of a minor character were determined, those just referred to are the only ones having a material bearing on the principal propositions we shall consider in the further examination of the case.

Much of the several briefs of counsel for plaintiff, whose rights are to be decided by the law relating to the right of appropriation of water for irrigation, is devoted to an argument in support of the contention that the doctrine of the rights of riparian owners, as known and enforced at common law, is inapplicable to, and has never legally become a part of, the laws of this state, and is not in force therein. It is insisted that the waters of the state, by virtue of the laws and ordinances in force when it was admitted to the Union are *publici juris*, always have been, and may lawfully be diverted from any stream where naturally flowing, appropriated by nonriparian owners, and employed for any beneficial use; that the law of prior appropriation of water as defined by the civil law is in force in this state, and not the common-law rule of riparian proprietorship. The argument is constructed on the theory that the civil-law doctrine of appropriation of water in natural streams as belonging to the public became a part of the laws of the territory and state by reason of the Louisiana territory purchase from France, and that nothing since the acquisition of that territory has transpired which has had the effect of displacing the law as it then existed. It is said that, while the enabling act for the admission of the state provided that the people inhabiting the territory forever disclaimed all right and title to the unappropriated public lands lying within the territory, and that the same shall be and remain at the sole and entire disposition of the United States, yet the provision contained in the first state Constitution declaring that the people of the state in their right of sovereignty are to possess the ultimate property in and to all lands within the jurisdiction of the state, and all lands the title to which shall fail from a defect of heirs shall revert or escheat to the people, preserved to them and to the state sovereignty and jurisdiction over the waters of the streams flowing therein, and left in force the doctrine of appropriation as theretofore existing. The scope and effect of the provisions referred to as we view the subject, accorded to the government the primary

right of disposal of the public lands, the state maintaining its sovereignty in the exercise of the powers of eminent domain and right to property resulting from escheats and forfeitures.

Without conceding or controverting the proposition of the civil law of appropriation ever being in force in the territory now comprising the state, we feel altogether clear that in the organization of its government, the common-law rule of riparian proprietorship was established as a part of its laws. By the argument along the lines indicated we are asked to overrule the many prior decisions of this court on the subject of water and water rights as relates to riparian proprietors, and declare the law to be as it is applied in the arid states immediately west of us, where the waters of all the streams flowing in and through the states are held to belong to the state, in trust for the people, and subject to appropriation by any person or corporation for a beneficial purpose; the act of appropriating the water being the test of the right thereto and the use thereof, rather than the ownership of the banks between which the stream flows. The argument is not convincing, nor will it justify us in departing from sound and well-recognized principles of law in the decision of the cause. To adopt the doctrine contended for would be a most violent and radical departure from the trend of judicial decisions heretofore prevailing, and would overturn many well-settled and generally accepted principles respecting property rights, and result in an invasion of vested private property interests which is beyond the lawful power of the court or the legislature. To say there is no such thing as a property right of a riparian owner to the use of the stream flowing along or by his land is to work a revolution in the jurisprudence of the state, and violate fundamental principles which lie at the very foundation of the system. In *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N. W. 239, it is held that, except as abrogated or modified by statute, the common-law doctrine with respect to the rights of private riparian proprietors prevails in this country, and that such right is property, which when vested, can be impaired or destroyed only in the interests of the general public upon full compensation, and in accordance with established law. In speaking of the subject, the court says: "Although the contrary has been asserted in some of the arid Pacific states (see *Reno Smelting Mill. & Reduction Works v. Sterenson*, 20 Nev. 269, 4 L. R. A. 60, 21 Pac. 317; *Stowell v. Johnson*, 7 Utah, 215, 26 Pac. 290), the common-law doctrine with respect to the rights of private riparian proprietors, except as modified by statute, prevails in this country. *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 28 L. R. A. 581, 60 N. W. 717, *Black's Pom. Waters*, §§ 127, 130, and authorities cited. At the common law every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams, . . . undiminished in quantity and unimpaired in

quality, although all have the right to the reasonable use thereof for the ordinary purpose of life (3 Kent, Com. 439; Angell, *Water-courses*, § 95; Gould, *Waters*, § 204; *Black's Pom. Waters*, § 8), and any unlawful diversion thereof is an actionable wrong." And further on: "The right of a riparian proprietor, as such, is property, and, when vested, can be destroyed or impaired only in the interest of the general public, upon full compensation, and in accordance with established law. *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Potomac S. B. Co. v. Upper Potomac S. B. Co.* 109 U. S. 672, 27 L. ed. 1070, 4 Sup. Ct. Rep. 15; *Delaplaine v. Chicago & N. W. R. Co.* 42 Wis. 214, 24 Am. Rep. 386; *Bell v. Gough*, 23 N. J. L. 624; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335. That the state may, in the exercise of the right of eminent domain, appropriate the water of any stream to any purpose which will subserve the public interests, is not doubted, and that the reclamation of the inarable lands of the state is a work of public utility within the meaning of the Constitution is a proposition not controverted in this proceeding. But even the state in its sovereign capacity is, as we have seen, within the restrictions of the Constitution, and can take or damage private property only upon the conditions thereby imposed." In *Plattsmouth Water Co. v. Smith*, 57 Neb. 579, 78 N. W. 275, in a contest between riparian proprietors, where the water company was obtaining water from a water course flowing over its land to supply the city for domestic purposes, fire protection, etc., the doctrine is thus broadly stated: "Riparian owners upon streams of water are entitled in the absence of grant, license, or prescription, to the usual natural flow of water in the streams without material alteration." In *Slattery v. Harley*, 58 Neb. 575, 79 N. W. 151, it is again held: "The common-law rules relative to the rights of private riparian proprietors are of force in this state with the exception of statutory abrogation and changes." With these explicit declarations respecting the rights of private riparian proprietors, made after mature deliberation, clear, indeed, should appear the soundness of a proposition which is advanced with a view of securing judicial sanction when the effect would be to overturn all the cases referred to, and many others we might cite. We do not feel justified in departing from a position so generally recognized and accepted as being correct, so well supported by reason and authority, and which it is believed is in soundness impregnable.

One branch of the argument pertaining to the subject proceeds upon the theory that, notwithstanding the different expressions of the court regarding riparian rights, only so much of the common law as is applicable, and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the legislature thereof, has

been adopted and is in force in this state (Comp. Stat. § 1, chap. 15a) and that the common-law rule with respect to the rights of riparian proprietors is inapplicable to the conditions prevailing here, and for that reason riparian rights cannot be said to have ever existed. To support this view of the law it is said that, because of the arid or semiarid conditions prevailing in the western portions of the state, and the consequent necessity for the appropriation and application of water artificially to the soil in order that agriculture may be carried on successfully, the doctrine of the rights of riparian proprietors has no application, and should be so declared by the court. The law of necessity is appealed to, and it is urged the appropriation of water and its application to the soil for irrigation purposes is absolutely indispensable, in order that the wants of the people in the regions referred to may be supplied, agriculture carried on with success, and the country made productive, and capable of sustaining the inhabitants now residing there, and the thousands yet to come. The court is mindful of the great importance of the subject as affecting the most vital interests of the people of the localities where irrigation has, by experience, been found essential to successful agriculture, and its direct bearing on the material welfare of the state at large. Nor can it be doubted that it has been the policy of the legislature for many years past to encourage the development of the irrigation interests of the state by all legitimate methods which it found within its power to call into existence. In solving the problems arising in the development of this most important industry, and extending to it all legitimate encouragement and recognition which may properly come from the judiciary, we cannot lose sight of the fundamental principles which should control our action, and govern in the disposition of all matters coming before the court for adjudication. Property rights, when vested, must be jealously guarded and upheld, or we do violence to the most rudimentary principles of justice. Admitting, for the sake of argument, that the law of public ownership of waters and the right of appropriation thereof for beneficial use by individual citizens and corporations is preferable to the private ownership of riparian proprietors in the western portion of the state, where irrigation is necessary, it is at once obvious that these conditions can be held to apply only to a portion of the state, and in fact to a lesser area than where irrigation is proved to be not essential to successful agriculture. As is pertinently said in the first opinion, 60 Neb. 762, 84 N. W. 273: "But can anyone tell at what particular point in the state the common-law rule applicable to riparian owners would cease, and the rule said to be better applicable to the less favored portions of the state would begin? Such a rule would merely tend to breed 'confusion worse confounded,' and would be an assumption of

legislative powers by this court inhibited by the Constitution." But it cannot be said that common-law rule of riparian ownership is inconsistent with the use of water for irrigation purposes for, as we shall see later on, the right to the use of water for irrigation purposes is one of the elements of property belonging to the riparian owner along with that of its use for domestic and water-power purposes. If the common-law rule as to real property, when the rights of riparian proprietors are involved, is to be abrogated, then why not say that the common-law doctrine as to other elements of real property or appurtenances belonging thereto, such as emblements, fixtures, and easements, shall also be abrogated? The same reason for the rule exists in the one as well as the other, and can be denied in either only by the assumption of arbitrary power based on neither tenable grounds nor sound principles, and which should find no lodgment in the juridical branch of government. On the same subject the supreme court of Washington,—where climatic conditions are somewhat analogous to those prevailing here,—in the case of *Benton v. Johnson*, 17 Wash. 277, 39 L. R. A. 107, 49 Pac. 495, says: "But how it can be held that that which is an inseparable incident to the ownership of land in the Atlantic states and the Mississippi valley is not such an incident in this or any other of the Pacific states, we are unable clearly to comprehend. It certainly cannot be true that a difference in climatic conditions of geographical position can operate to deprive one of a right of property vested in him by a well-settled rule of common law. The mere fact that the appellants will not be able to occupy or cultivate their lands as they heretofore have done unless they can irrigate them with water taken from the Ahtanum river is no sufficient reason for depriving the respondents, who settled upon that stream in pursuance of the laws of the United States, of the natural rights incident to their more advantageous location. The necessities of one man, or of any number of men, cannot justify the taking of another's property without his consent, and without compensation." And says McKinstry, J., in *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674: "Aridity of the soil and air being made the test, the greater the aridity the greater the injury done to the riparian proprietors below by the entire diversion of the stream, and the greater the need of the riparian proprietor the stronger the reason for depriving him of the water. It would hardly be a satisfactory reason for depriving riparian lands of all benefit from the flow that they would thereby become utterly unfit for cultivation or pasturage, while much of the water diverted must necessarily be dissipated." We cannot, for the reasons given, lead ourselves to believe that there is any justifiable ground upon which we can deny the common-law rule of riparian proprietors to be in force in all portions of the state, except as it may be modified or supplemented by legislation of the state or of

the Congress of the United States, of which we will speak hereafter.

It is quite apparent to those who have investigated that the lawmaking branch of the government of the state, for the purpose of advancing the material interests and welfare of the people, has sought to provide for the building up of a great system of irrigation in those portions of the state where the rainfall is regarded as insufficient to successfully engage in agricultural pursuits, and has authorized, so far as it is empowered so to do, the appropriation of the waters of the state, and their diversion from natural channels, to be used by applying them artificially to the soil for beneficial uses. To uphold and assist in carrying forward this avowed legislative policy is our duty in so far as the same may be done by having due regard for the property rights and interests of all, which is to be determined by those well-settled and recognized rules of general application found essential to the maintenance and protection of property rights and the adjustment of conflicting interests between all who are affected by the operation and enforcement of the law. The riparian proprietor, say all the books and the authorities, has a right to the flow of the water of the natural stream passing through or by his land; such right being inseparably annexed to the soil, and passing with it, not as an easement or appurtenance, but as a part and parcel of the land. This property right can be regarded only as a corporeal hereditament belonging to and incident to the soil, the same as though it were stones thereon, or grass, or trees springing from the earth. Gould, *Waters*, § 204, and authorities there cited. The riparian right to the use of the water flowing in a natural water course is a property right, which should be regarded as such, and to protect which the owner may resort to any or all instrumentalities which may be employed for the protection of private property rights generally. *Gould v. Boston Duck Co.* 13 Gray, 442; *Ashley v. Pease*, 18 Pick. 268; *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504; *Keency & W. Mfg. Co. v. Union Mfg. Co.* 39 Conn. 582; *Beissell v. Sholl*, 4 Dall. 211, 1 L. ed. 804. The court could as properly say that, in the prosecution of some important enterprise classed as works of internal improvement, such as the construction of irrigation canals, railroads, establishing public highways or other similar undertakings, the property rights of the individual which are invaded or impaired must be ignored because of the necessity and advantage of the public enterprise as to say that the property right of a riparian proprietor may be sacrificed in order that the public welfare generally shall be advanced by promoting a system of irrigation where that method of moistening the soil is found necessary for successful agriculture. The question we are now dealing with has arisen in many of the states where resort to irrigation has been found beneficial and essential in some portions thereof to those engaging in agricultural pursuits, and in all such

states, except those in the extreme arid portions of the country, it is held, as we have here held, that the common-law rule of the rights of riparian proprietors is not inapplicable because of the local conditions there prevailing, but is and has been in full force throughout all parts of such states. *Sham-leffer v. Peerless Mill Co.* 18 Kan. 24; *Lone Tree Ditch Co. v. Cyclone Ditch Co.* 15 S. D. 519, 91 N. W. 352; *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *Benton v. Johnson*, 17 Wash. 277, 39 L. R. A. 107, 49 Pac. 495; *Luz v. Ilaggin*, 69 Cal. 255, 10 Pac. 674. We can, therefore, for the reasons given, perceive of no tenable ground for adopting the view contended for, and hold the law of riparian rights, as determined by the principles of the common law, to be inapplicable to the conditions prevailing in the whole or in any part of this state.

It is also urged that, by virtue of the legislation enacted, the common-law rights belonging to riparian proprietors have been abolished. This position cannot be, we think, successfully maintained. The legislature has not, as we construe the several acts of that body relating to the subject, attempted to abolish the common-law rule defining existing rights of riparian proprietors, or to deprive them of such rights when once vested. On the contrary, such rights have been distinctly recognized. Nor is it believed that an attempt to abrogate such rights could be construed as other than an unconstitutional exercise of legislative power, and therefore invalid. In the irrigation act of 1889 the legislature sought to classify the streams in this state, and restrict riparian rights to those owning lands bordering on streams not exceeding a certain width; but this attempted restriction proved abortive as an unwarranted act calculated to deprive riparian proprietors of vested property rights without due compensation, contrary to constitutional provisions in that regard. *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N. W. 239. Otherwise, rights of riparian proprietors have, in the different irrigation acts passed by the legislature, been respected and recognized. What the legislature has done with a view of promoting irrigation, as we understand and construe the different laws enacted on the subject, is to provide for the appropriation of the unappropriated waters in the streams of the state, and to authorize the condemnation of the property in and to the use of the waters belonging to riparian proprietors wherever required, in order that the whole of the waters of a natural stream, when found necessary, may be used for irrigation purposes. The law, when so construed, violates no fundamental principle of property rights, nor interferes unlawfully with the property of another. Legislation of this character provides for an orderly and legal method for the appropriation of the waters of the state, and their diversion from the streams where flowing for the purpose of irrigation and for other purposes contemplated by law, and makes provisions for the compensation to be made where pri-

vate property rights are taken or damaged for a public use. This the legislature may lawfully do, and on account of which none may rightfully complain. That the common-law rule pertaining to the rights of riparian proprietors has been modified in many material respects under legislation by the United States Congress and by this state will appear further on in this opinion. We are now speaking of the general rule pertaining to rights of riparian proprietors, and not of its exceptions and modifications, which we shall hereafter speak of. We conclude, therefore, that in this state, under any view we may take of the subject, the rights of riparian proprietors to the use of the waters flowing in the streams to which their lands are adjacent, when once attached, is, in its nature, a vested right of property, a corporeal hereditament, being a part and parcel of the riparian land which is annexed to the soil, and the use of it is an incident thereto, which the owners cannot rightfully be deprived of or divested except by grant, prescription, or condemnation, with compensation by some of the means and methods recognized by law for the taking or damaging of private property for public use.

The development of a system of irrigation, and the appropriation and application of the waters of the streams of the state for that purpose, is obviously a work of internal improvement. It is so regarded and expressly declared by the legislature since its first enactment on the subject, and affirmed by this court in more than one of its decisions. By the act of the legislature approved February 19, 1877, the organization of corporations for the purpose of constructing and operating canals for irrigation was authorized, and such corporations were given power to acquire right of way, and to condemn property necessary to the construction of such canals, in the same manner as railroad corporations might acquire property and right of way for railroad purposes; and the law applicable to an exercise of the right of eminent domain by railroad companies was made to apply to such irrigation companies. It was also expressly declared that canals constructed for irrigation purposes were works of internal improvements, and all laws applicable to such enterprises should apply to such irrigating canals. Laws 1877, p. 168. The irrigating act of 1877, with powers more amplified, was merged in and became a part of the irrigation law passed by the legislature of 1899. Laws 1899, chap. 68, p. 503. The law of 1899 was superseded by the more comprehensive act of 1895. The substance of the provisions of the two sections of the act of 1877 being embraced in §§ 39 to 48, as found in Comp. Stat. 1901, art. 2, chap. 93a. Indeed, § 2 of the act of 1877 has been re-enacted in each succeeding law on the subject almost verbatim, while the substance of the other section of that act has been incorporated in several different sections of the act of 1895. It is manifest by a casual inspection of the different laws passed by the legislature, that since the original act of 1877, above referred to, the construc-

tion of irrigation canals has been recognized and treated by the legislature as works of internal improvement, to construct and operate which the right to take private property for a public use has been found necessary, and provisions, although at first somewhat obscure in their application, have been made by the legislature to accomplish that end. While §§ 39 and 41 of the act of 1895 (Comp. Stat. 1901, art. 2, chap. 93a), are framed chiefly with a view to authorize the condemnation of rights of way for such enterprises, there appears to exist no substantial reason why they should not be construed as embracing within their scope and effect the same powers and privileges that are given to corporations organized under the district irrigation law which are expressly authorized to condemn the riparian proprietors' right to the use of the water, and divert it for irrigation purposes. Comp. Stat. 1901, § 10, art. 3, chap. 93a. We are of the opinion the broad provisions of § 41 of article 2, when fairly construed, suffice for the purpose of authorizing condemnation for irrigation purposes, as contemplated by article 2, to the same extent as is authorized by § 10 when the irrigation business is conducted under the provisions of article 3. The concluding words of § 41, art. 2, which is a substantial re-enactment of the provisions contained in the latter part of the 1st section of the act of 1877, are as follows: "Upon the filing of said petition [for condemnation] the same proceedings for condemnation of such right of way . . . for railroad corporations, the payment of damages and the rights of appeal, shall be applicable to irrigating ditches, canals, and other works provided for in this act." If the construction and operation of a ditch or irrigating canal results in injury to the rights of riparian proprietors, or takes from them private property for a public use, the provisions of the law with respect to the recovery of damages where property is taken or injured by railroad companies in the exercise of the right of eminent domain become applicable, and may be resorted to by the riparian owner for the recovery of the compensation secured to them by the Constitution. If the authority of § 41 seems insufficient, further authority is found in § 48 of the same chapter, wherein it is provided that irrigation and water-power canals are works of internal improvement, and all laws applicable to works of internal improvement are applicable to such canals and irrigation works. Under these comprehensive provisions the legislature could have intended nothing less than that, in the construction and operation of irrigation enterprises, private property reasonably necessary for the conduct of the business could be taken and appropriated on due compensation by the exercise of the power and right of eminent domain. Water for the irrigation canals contemplated by the act is absolutely indispensable for the successful prosecution of the enterprise. In fact, water to flow in the ditches to be constructed for the purpose of irrigating the soil for the production of crops was the overshadowing

and all-controlling factor, without which the law, so far as promoting the public welfare, would be but a hollow mockery, suggestive of a highly absurd situation,—an anomalous condition of affairs. Water, and the necessity of diverting it from its natural channels, and appropriating it for irrigation purposes, as a public use, being of the very essence of the act authorizing the construction and operation of irrigation enterprises, can there exist any rational doubt that, under the provisions we have referred to, the right and authority to condemn property belonging to a riparian proprietor was given to those constructing such works of internal improvement for the purpose of putting the water to the public and beneficial uses contemplated and intended by the passage of the act? By § 81 of chapter 16, entitled *Railroads*, these corporations are authorized to take, hold, and appropriate so much real property as may be necessary for the construction and convenient use of their roads. The power of eminent domain, which may be exercised under the provisions of this section of the statute, has by the legislature been referred to and become a part of the irrigation statute,—as much so as though actually incorporated therein. There are other sections of the law with reference to internal improvements of other kinds than that of railroads which might also be resorted to, and which are fairly susceptible of the construction, when considered in connection with the irrigation acts, which in terms refer to such laws as giving to irrigation canal companies power to condemn property necessary and essential to their use in the conduct of the business engaged in as contemplated by statute. The property in water belonging to a riparian proprietor, and his right to the reasonable use thereof, as we have seen, is a part and parcel of the land, inseparably annexed to the soil, and is property within the meaning of that word, of which the owner cannot be divested save and except by some lawful method, which would apply alike to all species of real property and appurtenances belonging thereto. This property right, like any other part of his realty, is subject to condemnation and appropriation for public uses in the manner provided by law. It may also be lost by grant or prescription. In *McGhee Irrig. Ditch Co. v. Hudson*, 85 Tex. 591, 22 S. W. 967, it is held that while, in that state, the irrigation act provides for the condemnation of a right of way only for an irrigation canal, still, under Sayles's Civ. Stat. art. 628, § 6, authorizing canal companies to condemn any land necessary for their use, an irrigation company formed under the act of 1889 of the laws of Texas may divert water which a riparian proprietor had the right to have flow in a certain channel, and to the use thereof as such owner, since such diversion is, in effect, taking land, which may be done under the right to take private property for public uses. Says the court in the opinion by Stayton, Ch. J.: "The general law providing for the incorporation of canal companies contains the following, among the 60 L. R. A.

powers conferred on such corporations: 'To enter upon, and condemn and appropriate any land of any person or corporation that may be necessary for the uses and purposes of said company; the damages for any property thus appropriated to be assessed and paid for in the same manner as is provided by law in case of railroads.' Rev. Stat. art. 628, § 6. The law first quoted evidently only provides for condemnation of ground over which an irrigation ditch might run, and, in the absence of a law providing for the condemnation of every property necessarily taken in such an enterprise, no right to condemn would exist. The act of March 19, 1889, in so far as it provides for condemnation, however, is not in conflict with article 628, Revised Statutes. The provisions of the latter are broader than the former, and, under the power therein given to enter upon, condemn, and appropriate lands, we are of opinion that any property belonging to plaintiffs, and necessary for the uses and purposes of defendant in the business for which it was created, may be condemned, if it will pass, or may be included, under the term 'lands.' The word 'land' includes, not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings and fences." In this state the court has repeatedly held that § 21, art. 1, of the state Constitution, is of itself a sufficient basis to justify an action for the recovery of all damages arising from an exercise of the right of eminent domain which causes a diminution in the value of the private property of another. *Chicago, K. & N. R. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93; *Burlington & M. River R. Co. v. Reinhackle*, 15 Neb. 279, 48 Am. Rep. 342, 18 N. W. 69. In the cases cited the question of damages arose, not for the taking of property, but for damage to abutting property by railroad companies, resulting from obstructions of streets and highways, and other incidents of their construction and operation of railways, causing a depreciation in the value of abutting property. The right of the property owner to the benefit and advantage of a street and highway adjacent to his land, and the right of the riparian owner to the reasonable use and enjoyment of the water in the flowing stream over or adjoining his land, are not without features rendering them in a measure analogous. Speaking of the right to the use and enjoyment of the privilege and advantage attaching to abutting property on the public streets, it is said by the Michigan supreme court such owner has "a peculiar interest in the adjacent street, which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament legally attached to his contiguous grounds; an incidental title to certain facilities and franchises which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be the owner." *Grand Rapids & I. R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306. It

is thus apparent that as to the property right of a riparian proprietor to the reasonable use of the water naturally flowing in the stream, provisions effective in character by virtue of the Constitution and the statutes exist for the appropriation of such property and the diversion and use of the water for irrigation purposes, and that upon payment of adequate compensation for the property taken or damaged no substantial reason can be urged why the same may not be done without violating any principle governing property rights known to our system of jurisprudence. The right of a riparian proprietor to the reasonable use of water flowing in a natural channel is property, which is protected by the ægis of the Constitution, and of which he cannot be deprived against his will, except for public use, and upon due compensation for the injury sustained. If the legislature had undertaken to sweep away and abolish this right, we would not be warranted in giving the act judicial sanction. Where, by any possible construction of a reasonable nature, legislation can be upheld, it is our duty to give it such a construction as will uphold, rather than destroy, it. The irrigation act of 1895 is valid when construed as not interfering with vested property rights which have been acquired by riparian proprietors. Such a construction, we are satisfied, is justified by a fair interpretation of the act in its entirety, and considering its tenor, purport, and the object intended to be accomplished by its enactment.

The statute authorizes and regulates the appropriation of the waters of the state for irrigation and other purposes, and in making such appropriations as contemplated by the act the riparian owner whose property rights are appropriated or impaired is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action or proceeding instituted for that purpose. The construction given renders the act effective as providing a method for the development of the semiarid portions of the state by means of a system of irrigation including the appropriation and application of the waters flowing in the streams to the more useful and beneficial purposes of fructifying the soil for the comfort and blessing of mankind.

Our discussion on the rights of riparian owners has extended only to those streams of water where the bed over which it flows is included within the survey of the public lands as made by the United States government, from whom the riparian owners obtain title. Such is the character of the stream the water of which is the subject of the present controversy. In the case at bar the stream is a narrow one, ordinarily flowing but a small volume of water, the bed thereof belonging to the contiguous landowner. Whether the common-law rule fixing the rights of riparian proprietors applies to the larger streams of the state, such as may be classed as interstate rivers, and along the banks of which meander lines have been run by the government in its survey of the pub-

lic lands, presents an entirely different question, and it would seem that riparian rights would not attach to the waters of such rivers. A final determination of the question, however, is not here made, as this should be left to be decided in a proper case where the subject is fairly presented and considered after opportunity for thorough investigation, aided by the researches and arguments of counsel. As to those streams whose banks form the boundary lines of the estates adjoining, there are forcible reasons, well grounded on authority, for holding to the view that the rules of the common law applicable to navigable streams as therein designated and classified should be held applicable to all such rivers, even though in fact non-navigable. *Wood v. Fowler*, 26 Kan. 40 Am. Rep. 330; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *St. Louis, I. M. & S. R. Co. v. Ramsey*, 53 Ark. 314, 8 L. R. A. 559, 13 S. W. 931; *Gould, Waters*, § 78. While this subject received slight attention in the case of *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N. W. 239, it was not determined, as a decision of the case turned on another point. As to navigable streams, the doctrine seems to be that the water and the soil thereunder belong to the state, and are under its sovereignty and domain, in trust for the people, and cannot, therefore, be the subject of a claim of property therein, or the right to the use thereof by an adjoining landowner. When the government, in its survey, runs meander lines along the banks of a stream, and parts with its title to the adjoining land, the boundary of which would be high-water mark, then it would seem permissible to classify the stream as navigable, in which case the waters thereof and the bed thereunder would belong to the state, and be held by it in trust for the people. The waters in such streams would be held to be *publici juris*, and not subject to riparian claims by the adjoining landowner. *Shively v. Bouclby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Packer v. Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *Martin v. Waddell*, 16 Pet. 367, 10 L. ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *Richardson v. United States*, 100 Fed. 714.

The extent of the riparian proprietor's rights in and to the use of the waters of a natural channel is material to a satisfactory disposition of the subject we now have in hand. This right, stated in its broadest terms, is that "every proprietor of land on the bank of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has the prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere, ut currere solebat*, is the

language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction; and he must return it to its ordinary channel when it leaves his estate." 3 Kent, Com. 439; *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393. While, as an abstract rule of law, a riparian proprietor is entitled to the full flow of the stream as it is wont to flow by nature, yet the rule has so many exceptions, and has been so modified as the law has progressed, that the nature and extent of a riparian proprietor's pecuniary interests or property in a stream cannot be measured by such a rule, nor can the rule now be said to be a full and accurate statement of the law. The law does not recognize a riparian property right in the corpus of the water. *Vernon Irrig. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. 762. The riparian proprietor does not own the water. He has the right only to enjoy the advantage of a reasonable use of the stream as it flows by his land, subject to a like right belonging to all other riparian proprietors. *Kinney, Irrigation*, § 59; *Gould, Waters*, § 204; *Embrey v. Owen*, 6 Exch. 353. The property interest in the water is usufructuary, and his right thereto is subject to many limitations and restrictions, and always depends upon its reasonableness when considered in connection with a like right as belonging to all other riparian proprietors. His use must be reasonable, whatever may be its purpose; and he may not, under any circumstances, by his use, materially damage other proprietors, either above or below him. *Union Mill & Min. Co. v. Dangberg*, 81 Fed. 73; *Williamson v. Lock's Creek Canal Co.* 78 N. C. 156. The mere fact that the riparian proprietor is deprived of the full flow of the stream adjacent to his land would furnish no basis for compensatory damages. Merely diminishing the volume of water in the stream would not deprive the owner of property for which he could lay claim to a pecuniary compensation. At most, the naked right to the full flow of the stream, and its loss by diminishing the volume of water when appropriated for irrigation purposes, could result only in *damnum absque injuria*. In order to entitle the riparian owner to compensation, he must suffer an actual loss or injury to the use of the water which the law recognizes as belonging to him, and to deprive him of which is to take from him a substantial property right. It is for an interference with or injury to his usufructuary estate in the water for which compensation may rightfully be claimed where the water of the stream is diverted and appropriated for the use of irrigation. It is such a taking of or damage to property as materially and substantially depreciates the value of the real estate of which it forms a part. Ordinarily, the riparian property right would be limited to the use of the water of the stream for domestic purposes, and, if applied to the irrigation of riparian lands, a reasonable use for such purposes in view of an equal right of use belonging to all other riparian proprietors, which would 60 L. R. A.

fix the basis for compensation where there has been a deprivation of such right by the appropriation of the water for a public use. *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678. A riparian proprietor's right to the use of water for irrigation purposes must be understood as applying to riparian lands only. He would have no rights as a riparian owner which could extend to nonriparian lands. This raises the question as to extent or area of lands bordering on a stream, or over which it flows, which may properly be classed as riparian land. A riparian owner's right to the reasonable use of water exists solely by virtue of his ownership of the lands over or by which the stream flows. It is obvious that this right cannot be enlarged or extended by acquisition of title to lands contiguous to the riparian land; nor can a riparian owner, as such, rightfully divert to nonriparian lands water which he has a right to use on riparian land, but which he does not so use. *Chauvet v. Hill*, 93 Cal. 407, 28 Pac. 1066; *Gould v. Eaton*, 117 Cal. 539, 38 L. R. A. 181, 49 Pac. 577; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442. Land, to be riparian, must have the stream flowing over it or along its borders, and the vital question is how far away from the stream it may be considered to extend. The subject is considered in the case of *Lux v. Haggin*, 69 Cal. 424, 425, 10 Pac. 773, 774. It is there held that a riparian tract of land (in that case the title to which had been obtained from the state) would include all the sections or fractional sections mentioned in any one certificate of purchase bordering on a natural water channel, and through which it had its course; but says the court: "If, however, lands have been granted by patent, and the patent was issued on the cancellation of more than one certificate, the patent can operate by relation (for the purpose of this case) to the date of those certificates, only, the lands described in which border on the stream." In *Boehmer v. Big Rock Irrig. Dist.* 117 Cal. 19, 48 Pac. 908, it was held that, where quarter sections of land are granted by separate patents based on separate entries, and therefore constituting distinct tracts of land, mere contiguity cannot extend a riparian right incident to only one quarter section, although both are owned by the same person. The rule in California seems to be that, where riparian lands are acquired by an entryman or purchaser by any entry or purchase, the boundary of the riparian land would be restricted to the land the title of which was acquired by the one transaction; that each tract thus acquired would be treated as an independent tract, beyond which riparian rights could not extend. It is the policy of the government in the disposition of the public lands in this state, as it has been the policy of the state regarding her school lands, to have the land surveyed into townships, sections, and subdivisions of sections, in order that the land may be disposed of in limited quantities in legal subdivisions not less than one sixteenth of a section, comprising a 40-acre tract, and usually not exceeding a quarter section of 160 acres.

The 40-acre tract, or one fourth of a quarter section,—or, if an irregular tract, it is designated as a certain numbered lot,—may be, and usually is, taken as the unit of measurements in the acquisition of title to the public lands within the state. As an illustration, the government authorizes the disposition of the public lands under the pre-emption, homestead, or timber-culture laws in tracts of not less than 40 acres nor more than 160 acres. Where more than 40 acres is taken, it is not required that it be in any particular form, or located within one particular section or quarter section; but, if the 40-acre tracts adjoin each other, and do not exceed the maximum acreage allowed in one entry, a party may thus acquire a good title to the land. Within the limits of railroad grants homestead entries were limited to tracts not exceeding 80 acres, while the railroad grants of land by the government are usually by sections of 640 acres each. Where a homestead of 80 acres has a water course through it, which also runs through a section of railroad land adjoining, there appears no sound reason for saying that the riparian land in one instance would include but 80 acres and in the other 640. If the riparian proprietor's right is incident to the soil, is a part and parcel of the real estate, like the trees and the grass, then it would seem that in this state, at least, in view of the policy of the government in the disposition of its public lands, riparian rights would attach only to those legal subdivisions of a section ordinarily described as 40-acre tracts, or, in lieu thereof, where the tracts are irregular, as a certain designated lot, which border on a stream, or through which it flows. There is neither reason nor logic for saying that, when one acquires a 40-acre tract with the riparian rights belonging thereto, such is the limit of the riparian lands in that case, but where, on the same stream, an entire section is acquired by grant from the government, the whole of the 640 acres, for that reason, becomes riparian lands. It being the policy of the government to dispose of its public domain in tracts of not less than 40 acres each, why, then, may it not be said that riparian rights are limited to such tracts, even though several of them may be joined together in one certificate of purchase or instrument of conveyance? It is not decided that such should be the rule in this state, as it is deemed preferable to leave the question open for maturer investigation and consideration.

From what has been said it must not be inferred that the rights of an appropriator for beneficial purposes contemplated by statute are not as sacred and as much entitled to the equal protection of the law as is the property right of riparian proprietors. Indeed, the property right of an appropriator in water diverted from natural channels and applied to irrigation uses is distinctly recognized in the case of *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N.W. 239, where the doctrine of estoppel was applied to the acts of the riparian owner, and 60 L. R. A.

it was held that, because of his laches, he could not maintain an injunction suit to restrain the diversion of the water by an appropriator and its application to the soil by means of irrigation, and that he would be left to his ordinary remedy at law for compensation for the injury sustained. The two doctrines of water rights—one the rule of priority of appropriation, and the other the common-law doctrine of riparian ownership, whose basis is equality between all those who own lands upon the stream—may, in our judgment, both exist at the same time, as both have existed in this state, as we shall endeavor hereafter to demonstrate. We have spoken of the common-law rule, made so by the legislative adoption of the principles of the common law when applicable and not inconsistent with the laws of the state. Valid vested rights have also been acquired by reason of the prior appropriation of the public waters of the state which have received sanction and recognition by the legislature and by the Congress of the United States, which places the title of the appropriator on an equality with riparian owners. The fundamental hypothesis of prior appropriation of water for the development of the arid or semiarid portions of the country is the recognition of the right of the people, or those desiring, to appropriation, and apply to beneficial uses any unemployed waters of the natural streams, and that such rights, when so acquired, are to be determined according to the date of appropriation; priority of acquisition giving the better right. The two doctrines are not necessarily so in conflict with each other as that one must give way when the other comes into existence. The common-law rule of riparian rights is underlying and fundamental, and takes precedence of appropriations of water if prior in time. The two doctrines stand side by side. They do not necessarily overthrow each other, but one supplements the other. The riparian owner acquires title to his usufructuary interest in the water when he appropriates the land to which it is an incident, and when the right is once vested it cannot be divested except by some established rule of law. The appropriator acquires title by appropriation and application to some beneficial use, and of which he cannot be deprived except in some of the modes prescribed by law. The time when either right accrues must determine the superiority of title as between conflicting claimants.

The irrigation act of 1889 abrogated in this state the common-law rule of riparian ownership in water, and substituted in lieu thereof the doctrine of prior appropriation. This legislation could not and did not have the effect of abolishing riparian rights which had already accrued, but only of preventing the acquisition of such rights in the future. The law of 1895 but continued in force the act of 1889 in so far as that act abrogated the common-law rule as to the rights of riparian proprietors, and since the taking effect of the act of 1889 those acquiring rights to the waters flowing in the natural channels of the state are to be tested and deter-

mined by the doctrine of prior appropriation. That it was competent for the legislature to abrogate the rule of the common law as to riparian ownership in waters as to all rights which might have been acquired in the future, and substitute a system of laws providing for the appropriation and application of all the unappropriated waters of the state to the beneficial uses as therein contemplated, there exists, it would seem, no reasonable doubt. In *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770, it is held that it is within the power of a state legislature to change the common-law rule of riparian proprietors, and authorize the appropriation of the flowing waters within its dominion for such purposes as it deems wise and proper. The substitution of the law of prior appropriation, instead of the common-law rule of riparian ownership, is applicable only to those waters in the state which are unappropriated; or, in other words, which have not become the property of riparian proprietors. In our view of the subject, the rights of the appropriators of water who have applied the same to the soil for agricultural purposes by means of irrigating canals antedates the passage of either of the irrigation acts of the legislature of which we have just made mention. This right has grown out of the necessities of the case, and has been sanctioned by the acts of Congress, and recognized by the laws of the state. It is a matter of common knowledge, historical in character, that in the development of the state in the higher altitudes in the western portions, because of the arid or semiarid climatic conditions which prevail, it has been found impossible to successfully engage in agricultural pursuits, save by applying to the soil, by the process known as irrigation, waters diverted and drawn from natural streams, thereby rendering highly productive a land otherwise valuable only for grazing. It is a fact, so common and notorious that we may properly take judicial notice of it, that since the early settlement of the western portions of the state it has been the custom of the settlers to appropriate the waters of the streams flowing therein by means of irrigating canals, and apply them to the soil in prosecuting the business of agriculture in all its varied branches. We do not mean to say that there has grown up in the section of the state referred to a custom adopted by the people which has been perfected into a system or code of laws respecting the appropriation of water for agricultural purposes, nor do we find this necessary in the present case. What is said is that from the earliest settlement of the semiarid portions of the state, and before the enactment of any irrigation statute providing for the appropriation of water, there has existed a practice or usage of diverting water from the natural channels of the streams into irrigation canals constructed for that purpose, and the appropriation and application of such water for agricultural purposes. Whether or not, under this practice or custom, appropriators have acquired rights

which are in their nature property, and which, when once acquired, become a superior title, and give the better right to the use of such water than that of a riparian owner whose title is acquired subsequently, must depend on facts and circumstances as disclosed in any particular case. Where such custom has been so generally recognized as to have the force of law, it can only be regarded as a substantial adoption of the doctrine of prior appropriation of water which obtains in the arid states immediately west of us. Says Mr. Justice Miller, in speaking of the United States statute (act July 26, 1866, 14 Stat. at L. 253, chap. 262, § 9, U. S. Comp. Stat. 1901, p. 1437), recognizing the right of those who have appropriated water for agricultural purposes: "This section . . . was rather a voluntary recognition of a pre-existing right to possession, constituting a valid claim to its continued use, than the establishment of a new one." *Broder v. Natoma Water & Min. Co.* 101 U. S. 274-276, 25 L. ed. 790, 791. The section just alluded to is contained in an act of Congress of July 26, 1866, and provides "that whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested right shall be maintained and protected in the same; and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed: provided, however, that whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage." In the decision by the United States Supreme Court, in *Bailey v. Gallagher*, 20 Wall. 670, 22 L. ed. 452, in which the opinion was prepared by Mr. Justice Field, the section we have just quoted was under consideration. It is there said by the author, after speaking of another case decided prior thereto (*Atchison v. Peterson*, 20 Wall. 507, 22 L. ed. 414): "Ever since that decision it has been held generally throughout the Pacific states and territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour mills and sawmills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say 'within reasonable limits,' for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an

absolute monopoly in a single individual. The act of Congress of 1866 recognizes the right to water by prior appropriation for agricultural and manufacturing purposes, as well as for mining. . . . It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs or by the legislation of the state or territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control." In *Lua v. Haggin*, 69 Cal. 446, 10 Pac. 674, it is observed by the California supreme court: "From the foundation of the state, waters pertaining to the public lands of both the Federal and state governments have been appropriated and used for mining, agriculture, and other useful purposes. Such appropriation and use were first sanctioned by custom, next by the decisions of the courts, and finally by legislative action on the part of the United States as well as the state. It thus became a part of the law of the land, of which every citizen was entitled to avail himself, and of which every purchaser from the United States as well as the state was bound to take notice. In protecting, therefore, the rights of the appropriators of water upon the public lands of the state and of the United States, no wrong is done to the purchasers from either government. That from the very beginning it has been the custom of the people of the state to divert from their natural channels the waters of the streams upon the public lands, and appropriate the same to the purposes of mining, agriculture, and other useful and beneficial uses, is a part of the history of the state." See also *Isaacs v. Barber*, 10 Wash. 124, 30 L. R. A. 665, 38 Pac. 871, where it is held that judicial notice will be taken of the fact that at least that portion of the state east of the Cascade mountains was included in the territory where the customary law of miners was in force, and the right of appropriating water for agricultural and manufacturing purposes existed, although the common-law rule of riparian ownership was a part of the law of the state.

Recognizing the necessity for the appropriation of water and its application to the soil for agricultural purposes, the legislature of this state in 1877 passed an act having for its object the formation of corporations for the construction and operation of canals for irrigation, and for that purpose gave them the right to acquire right of way for such canals, and declared the canals to be works of internal improvement. Sess. Laws 1877, p. 168. It is manifest from a reading of the act, brief though it is, that the legislature, recognizing the conditions existing in

the semiarid portions of the state where the tide of emigration was then beginning to flow, and the necessity of appropriating the public waters for agricultural purposes by means of irrigating canals, passed the act with the view of providing effective means for the appropriation of such waters and their application to the soil in order that agriculture might be successfully engaged in, and the resources of the state developed. Without irrigation the country was principally of use for grazing; with it, and a soil for fertility unsurpassed which it possessed, and a favorable climate, the country could be made to blossom as the rose, and to sustain a population of thousands, where but hundreds had previously found a means of livelihood. Who can doubt that by the passage of this act the legislature, composed as it was of intelligent men, intended to and did recognize the right of the inhabitants of the public domain—those settling there for the purpose of building permanent homes—to construct irrigation canals, and appropriate the waters of the natural streams for the purpose of promoting agriculture and developing the country? It would be the height of absurdity to say that the construction of irrigation canals was authorized for any other purpose and with any other view than the appropriation of the public waters flowing in the streams. Congress had authorized and sanctioned the appropriation of water for the purposes contemplated by the legislative act. It had declared by the act of 1866 that in the disposition of the public domain riparian proprietors took title to their lands subject to the rights of appropriators who had acquired title to the use of water by appropriation for agricultural purposes, where such rights were recognized by local customs, by the legislature, or by the courts. Practically all the lands in the semiarid portions of the state at the time belonged to the government. It was the riparian proprietor, and it authorized the appropriation and diversion of the water for agriculture, mining, and manufacturing purposes. The state recognized and encouraged the appropriation of water for agricultural purposes by the passage of the act of 1877. There were no riparian proprietors except the general government, or at most but a few, who were or could be affected by the act. It contemplated the appropriation of the waters of the streams and their use for irrigation to meet the necessities of the case in conformity with the custom and usages prevailing in arid portions of the western country, where irrigation was essential to agriculture. The congressional act of 1866 authorized this to be done, and lands thereafter disposed of by the United States were subject to prior rights acquired by appropriation. The act of 1889 (Sess. Laws 1889, chap. 68, p. 503), in which was merged the act of 1877, especially recognizes the rights acquired by prior appropriators, and treated them as it would any other vested property right. Section 13 thereof declares that "all ditches, canals, and other works heretofore made, constructed, or pro-

vided, by means of which the waters of any stream have been diverted and applied to any beneficial use, must be taken to have secured the right to the waters claimed to the extent of the quantity which said works are capable of conducting and not exceeding the quantity claimed without regard to, or compliance with, the requirements of this chapter." And the act of 1895 preserved all rights acquired by appropriation prior to its passage. Sess. Laws 1895, chap. 69, p. 244. By § 49 it is provided: "Nothing in this act contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of this act."

In the light of the provisions of the act of Congress as construed by the Supreme Court of the United States, the different acts of the legislature of this state relating to the appropriation of the waters flowing in the streams thereof, and taking notice of those historical facts connected with its development of which we have made mention, the conclusion appears to us irresistible that every appropriator of water who has applied it to the beneficial uses contemplated by these several acts has acquired a vested interest therein, which gives him a superior title to the use of the water over the riparian proprietor whose right has been acquired subsequent thereto, or who has lost his right, once acquired by either grant or prescription. Assuming, then, as we think should be done, that the right of acquiring an interest in the use of water by appropriation, when applied to the beneficial purposes of agriculture has existed in this state since its early settlement in those portions where irrigation is found to be necessary, the decisive question in all cases as between riparian proprietors and those claiming as appropriators is, Who first secured the right to the use of the water in controversy? Has the riparian proprietor, who appropriates his riparian water right as an incident to and a part of the land obtained from the government, and whose right then attaches, a superior claim, or has the appropriator a better right because prior in time? The answer in each case must depend upon the facts and circumstances as developed therein. As to the law applicable to controversies between those claiming as riparian proprietors and those claiming by right of prior appropriation, see *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *Speake v. Hamilton*, 21 Or. 3, 26 Pac. 855; *Kuler v. Campbell*, 13 Or. 596, 11 Pac. 301; *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41; *Judkins v. Elliott* (Cal.) 12 Pac. 116.

In support of its right to maintain an action of the character of the one at bar it is argued by the plaintiff that those sections of the irrigation statute constituting the state board of irrigation with authority to ascertain and determine the priority and amount of past appropriations and allow further appropriations when it is determined there is unappropriated water in any natural stream from which it is sought to divert it, and with other powers as therein defined, 60 L. R. A.

are unconstitutional, because conferring judicial powers upon a tribunal not authorized by the Constitution, and in contravention of its provisions. As we have heretofore made mention, the lower court in the trial of the case refused to entertain jurisdiction and try the merits of the controversy, holding that the state board of irrigation had exclusive original jurisdiction of the matters set out in the petition, and that, as to all issues raised by the pleadings, save those pertaining to an injunction, to hold matters *in statu quo* pending a determination of such rights of the respective parties as they might be found entitled to. It is no doubt true, as pointed out by counsel, that the sections in question are borrowed from the statutes of Wyoming, in which state constitutional provisions authorize the creation of such a board, while our Constitution is silent on the subject. But it is to be noted that the Wyoming Constitution has not provided for a board of irrigation with judicial functions in the sense that it is a judicial tribunal. The duties of the board there, as here, are supervisory and administrative in character, and not judicial. While it may be true that they are given powers of a quasi judicial character, this of itself does not constitute them a judicial body, nor does it have the effect of conferring upon administrative bodies the exercise of judicial functions in contravention of constitutional provisions. The Wyoming statute, from which ours is borrowed, has been subjected to judicial construction, and is upheld by the supreme court of that state on the express ground that the powers authorized therein are not judicial, but administrative. *Farm Invest. Co. v. Carpenter*, 9 Wyo. 110, 50 L. R. A. 747, 61 Pac. 258. With this authoritative construction of the statute, and a decision of the very question raised in the case at bar upon reasoning quite convincing and satisfactory, it would seem that the question should be regarded as at rest. The primary object of the board is for the purpose of supervising the appropriation, distribution, and diversion of water. This is obviously an administrative, rather than a judicial, function. Says the Wyoming supreme court in the case just cited: "It is a matter of public concern that the various diversions shall occur with as little friction as possible, and that there shall be such a reasonable and just use and conservation of the waters as shall redound more greatly to the general welfare, and advance material wealth and prosperity." And, quoting from *White v. Farmers' High Line Canal & Reservoir Co.* 22 Colo. 191, 31 L. R. A. 828, 43 Pac. 1028: "From the very nature of the business, controversies with reference to the use of water naturally led to unseemly breaches of the peace; and to avoid these it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the state, and regulating its distribution to those entitled thereto,"—as it were, a sort of policing of the waters capable of use for irrigation, as necessary

and required, as well to preserve and procure proper use of the water as to prevent breaches of the peace. In order to accomplish this object, it is necessary and expedient to provide for certain preliminary investigations. Again quoting from *Farm Interest. Co. v. Carpenter*, 9 Wyo. 110, 50 L. R. A. 747, 61 Pac. 258: "Any effort to supervise and control the waters of the state, their appropriation and distribution, in the absence of an effective ascertainment of the several priorities of rights, must result in practical failure in times when official intervention is most required. . . . In the development of the irrigation problem under the rule of prior appropriation perplexing questions are continually arising of a technical, but practical, character. . . . The board is not required to await the occurrence of controversies, but it to proceed, on its own motion, to ascertain the various rights, conflicting or not, and thereupon see that the water is properly divided." Such functions, it would seem, are clearly administrative in character, and not judicial. It is a judicial function to administer justice between litigants in cases where disputes arise, and to settle these disputes according to law as administered in courts of justice. The board of irrigation, however, in many cases acts in advance of any dispute, and whether there is or will be a controversy in no way affected its powers. The courts can act only as controversies arise between litigants, and then only by determining the questions presented by the litigation. While there are some questions affecting property rights which grow out of the administration of the law by the state board of irrigation, and in which are involved matters in dispute calling for action of a quasi judicial character, yet as to all these ample provisions are made for recourse to the courts. Powers of the same general nature and character are conferred upon almost every administrative body known to the statute, and regarding which it has frequently been decided they are of a quasi judicial nature; and yet such bodies are invariably held to be administrative, and to in no way conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. The state board of transportation, as heretofore organized in this state, the constitutionality of which has been invariably upheld, when attacked, in all respects, save as to the manner of passing the law providing for its creation, is a fair illustration of the validity of legislation of this character. Numerous other boards and offices created by statutes of an administrative character, and yet possessing powers of a quasi judicial nature, might also be referred to if thought to serve any useful purpose. For the reasons given, we are of the opinion that the sections of the act in question are not obnoxious to the Constitution on the objections raised by counsel, and that the authority of the board of irrigation to make the determinations contemplated by the act, and the requirement of its approval as a condition to the right of appropriation 60 L. R. A.

under its provisions, is a valid exercise of legislative power.

It does not, however, necessarily follow from the conclusion just reached as to the powers and duties of the board that the courts are in any way ousted of their jurisdiction over actual controversies. The board is possessed of powers of an administrative character. The courts have judicial powers, and, while the board may make all needful preliminary determinations to enable it to regulate the distribution of water, and may determine whether or not proposed appropriations shall be allowed, and in what order, in pursuance of the provision of the statute, subject to the right of appeal, whenever a controversy arises over the substance of the rights of various parties making use of a stream, such controversies are proper for the courts to take judicial cognizance of. The courts cannot administer the statute nor regulate the use of the streams, but they can and should adjudicate disputes based on the rights of parties acquired under the statute. The statute does not create a mere license to the use of the water appropriated. It creates a right in and to the use of the water, and expressly provides for its sale and disposal in the same manner as real property. Comp. Stat. § 63, art. 2, chap. 93a. See also *Strickler v. Colorado Springs*, 16 Colo. 61, 26 Pac. 313; *Frank v. Hicks*, 4 Wyo. 502, 35 Pac. 475, 1025. Whenever it becomes necessary to vindicate or support such a right by judicial proceedings, the courts should be open and available therefor as in the case of a controversy regarding any other property right; hence it is that all controversies over water rights arising under the statute are not necessarily for the board of irrigation alone. If a controversy has been submitted to that board and by it adjudicated, and no appeal taken, an entirely different question is presented. But where the board has made no determination, and a large number of persons are claiming the right to divert and use the water of a stream, some by appropriation under the statute, some under prior acts, some by prescription, and others as riparian owners whose rights have accrued prior to the statute, and have not been divested, we know of no sound reason why a suit in equity to determine and adjust such rights and enjoin interference of those rights by others under a claim of right may not be maintained. Such suits are permitted everywhere where the system of appropriation adopted by our statute obtains. In some states they have been provided by statute, but, in the absence of statutes, they have been upheld under general principles of equity jurisdiction. *Frey v. Lowden*, 70 Cal. 550, 11 Pac. 838. In our opinion, it is altogether proper to permit such suits in this state where riparian rights exist, and have long existed, but are subject to be divested or impaired by appropriations of water under the statute upon due compensation therefor. The litigation involved in the appropriation of water from a stream, the banks of which are thickly settled, would be

endless if the jurisdiction of a court of equity to prevent multiplicity of suits could not be invoked. This principle has been appealed to frequently over litigation of water rights, and has been held to permit of a single suit by plaintiff against all of a large number of persons having or claiming rights in the water of a stream which infringed on the rights of such plaintiff. Gould, Waters, § 564. The chief difficulty in such cases arises from the fact that the several defendants have several rights and interests, and are not so connected in interest that a determination as to one would include them all. There is to be found in the reported cases and in the text-books authority for a limitation of the jurisdiction to prevent a multiplicity of suits in such cases, but the weight of authority, following the leading case of *York v. Pilkington*, 1 Atk. 282, holds to a contrary doctrine. *Miller v. Highland Ditch Co.* 87 Cal. 430, 25 Pac. 550; *Hillman v. Newington*, 57 Cal. 56; *Woodruff v. North Bloomfield Gravel Min. Co.* 8 Sawy. 628, 16 Fed. 25; *Meyer v. Phillips*, 97 N. Y. 485, 49 Am. Rep. 538. See also *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592; *Thorpe v. Brumfitt*, L. R. 8 Ch. 656; *Western Land & Emigration Co. v. Guinault*, 37 Fed. 523; *United States v. Flounoy Live Stock & Real Estate Co.* 69 Fed. 886; *Ham-montree v. Lott*, 40 Mich. 190; 1 Pom. Eq. Jur. §§ 252-260. For such reasons we are of the opinion that plaintiff might properly bring such an action as the one before us, so far as it comes within the scope of a bill of peace, to avoid multiplicity of actions.

There is much in the petition to indicate that the action was intended as a general condemnation proceeding as well, and that some sort of administrative proceeding in parceling out and distributing the waters of the stream in controversy was contemplated, as well as the determination of the rights of the several parties. All this administrative work is for the board of irrigation, and, so far as relief of that nature is sought, the lower court acted correctly in remanding the parties to their remedies by a proper application to the board. It is also true that proceedings for condemnation in furtherance of an irrigation project cannot be joined with a suit in equity of the kind just considered. A petition, however, must be judged, and the nature and character of the action thereby begun determined, chiefly by the facts alleged, and the legal results thereof, and remedies appropriate thereto. *Alter v. Bank of Stockham*, 53 Neb. 223-230, 73 N. W. 667. Disregarding much surplusage and irrelevance, the prayers for an injunction against the several defendants, and the allegations upon which they are based, are sufficient to bring the petition within the jurisdiction of a court of equity. Nor do we see any reason for holding that the plaintiff in a suit in equity in the nature of a bill of peace to protect his water rights and determine and define conflicting rights to or claims upon the waters of the same stream may not offer to do equity by compensating riparian owners whose rights are affected by 60 L. R. A.

the construction and operation of a canal under his appropriation, and that in this way the amounts due the several parties claiming rights by way of damages may become a proper subject of inquiry and adjudication therein.

One other feature of the plaintiff's case it seems proper to here give consideration. The plaintiff, it appears, was under contract to furnish water to the village of Crawford for general municipal purposes, including water for sprinkling streets and for power for a lighting plant; and was also under some obligation to the general government to furnish water for flushing the sewers at Ft. Robinson, an occupied military post located near the village of Crawford. Furnishing waters for the uses alluded to it is claimed is a domestic use of the water, within the purview of § 43, art. 2, chap. 93a, and because thereof the plaintiff claims priority over several defendants as an appropriator of water to domestic and agricultural purposes under the statute. As far as the canal is intended for irrigation, the appropriation of water to flow therein is obviously an appropriation for an agricultural purpose. We do not, however agree with counsel that the other purposes named are domestic, within the meaning of the statute. In our opinion, the term "domestic purposes," as used in the statute, has reference to the use of water for domestic purposes as known and recognized at common law by riparian proprietors. Gould, Water Rights, § 205. The common law distinguishes between those modes of use which ordinarily involve a taking of small quantities of water, and but little interference with the stream, and those which necessarily involve a taking or diversion of large quantities, and a considerable interference with its ordinary flow. The use of a stream in the ordinary way by a riparian owner for drinking and cooking purposes and for watering his stock is a domestic use. It involves no considerable diversion of water, and no appreciable interference with the stream. This right of the riparian owner the statute intended to preserve to him, and to protect against appropriations of water for other uses by canals, ditches, and pipe lines, whereby large quantities will be abstracted. This is the only construction which will give any force to the statute. If all of the water of a stream may be diverted by a canal for so-called domestic purposes involving identical use for power, the priority given agricultural uses is rendered nugatory. This is the construction given similar provisions elsewhere. *Montrose Canal Co. v. Loutsenhizer Ditch Co.* 23 Colo. 233, 48 Pac. 532; *Broadmoor Dairy & Live Stock Co. v. Brookside Water & Improv. Co.* 24 Colo. 541, 52 Pac. 792. In the first case cited the court says: "While it is true that § 6 of article 16 of the Constitution recognizes a preference in those using water for domestic purposes over those using it for any other purpose, it is not intended thereby to authorize a diversion of water for domestic use from the public streams of the state by means of large canals. . . . The use protected by the

Constitution is such use as the riparian owner has at common law to take water for himself, his family, or his stock, and the like." The principle upon which the decree on the cross petition of the defendant Hall proceeds is in the main correct. Having been brought into court by the plaintiff, he sets up his previously acquired riparian rights, the infringement thereof by plaintiff, and consequent damage, and prays an injunction. It is probably true he would not necessarily have been entitled to an injunction in an independent suit brought by him for that purpose, since there would be no question of repeated trespasses in case plaintiff had acquired a superior right by appropriation for irrigation purposes, and an action at law for damages would be an adequate remedy. But when the plaintiff sued him, and prayed for an injunction against him, he could demand that plaintiff do equity, and pay his damages, before any relief be awarded. The court, we think, was justified in enjoining any interference with the riparian rights of the defendant Hall until this was done. It also appears that, as to those uses to which the plaintiff was putting or seeking to put the water sought to be appropriated by it, not agricultural, defendant had a right to insist that he had priority by reason of his long-continued use for power and manufacturing purposes, and an injunction against any diversion beyond what was used by plaintiff for irrigation, so far as such diversion injured defendant Hall, was proper, in so far, at least, as he was able to make a beneficial use of the water for power purposes for which it was used. Section 20, art. 2, chap. 93a. But the injunction granted goes much beyond either of these grounds. As has been seen, the common law does not give to a riparian owner an absolute and exclusive right to all the flow of the water from a stream in its natural state, but only the right to the benefit, advantage, and use of the water flowing past his land in so far as it is consistent with a like right in all other riparian owners. Hall was entitled to an injunction restraining any unreasonable diversion of the water which produced a substantial injury to him. But he could not insist that the slightest sensible diminution in the volume of the water be stopped merely as such. He was entitled only to protection to the right which he had acquired as a riparian owner against any unlawful invasion thereof.

Connected with this same question is involved the right of the plaintiff, even as against a riparian owner, to divert the storm or flood waters passing down the stream in times of freshets. Hall at most, as a riparian owner, was entitled to only the ordinary and natural flow of the stream, or so much as was found necessary to propel his mill machinery, and could not lawfully claim, as against an appropriator, the flow of the flood waters of the stream. In *Modoc Land & Live Stock Co. v. Booth*, 102 Cal. 151, 36 Pac. 431, it is said on this subject: "It seems clear, however, that in no case should a riparian owner be permitted to demand as of right the intervention of a court of equity

to restrain all persons who are not riparian owners from diverting any water from the stream at points above him simply because he wishes to see the stream flow by or through his land undiminished and unobstructed. In other words, a riparian owner ought not to be permitted to invoke the power of a court of equity to restrain the diversion of water above him by a nonriparian owner when the amount diverted would not be used by him, and would cause no loss or injury to him or his land, present or prospective, but would greatly benefit the party diverting it." And in *Fisfeld v. Spring Valley Waterworks*, 130 Cal. 552, 62 Pac. 1054, it is held that a riparian proprietor is not entitled to an injunction to restrain a water company engaged in supplying water for public use from diverting the storm or flood waters of the creek which will not prevent the flowing over his land of the ordinary waters of the stream, nor in any way damage his land, or interfere with the rights appurtenant thereto. See also *Edgar v. Stevenson*, 70 Cal. 286, 11 Pac. 704; *Heilbron v. 76 Land & Water Co.* 80 Cal. 189, 22 Pac. 62; *Black's Pom. Water Rights*, § 75.

On the arguments of the case at bar it is suggested that defendant Hall had acquired a prescriptive right to the full flow of the stream by ten years' user. There cannot be, in the very nature of things, any such thing as a prescriptive right of a lower riparian owner to receive water of a stream as against upper owners. The riparian owner is entitled to the reasonable use and enjoyment of the water of the stream, and to insist that the water come to his land to be so used and enjoyed. He may, by prescription, acquire a right to use and divert the water beyond that which the common law would give him, but he gets this right only by adverse user. If he diverts water which otherwise would flow down to a lower owner, that use is adverse. On the other hand, the water which comes to him would come in any case, and there is nothing adverse to anyone, in merely receiving it, that could be said to give a prescriptive right enabling him to prevent reasonable use of it by the upper owner. *Hargrave v. Cook*, 108 Cal. 72, 30 L. R. A. 390, 41 Pac. 18; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442; *Mud Creek Irrig. Agri. & Mfg. Co. v. Vivian*, 74 Tex. 170, 11 S. W. 1078.

We have herein discussed some matters having an indirect bearing on the main issues involved in the case. The court, however, must not be understood as being committed to any proposition not expressly decided.

It follows from what has been said that the order of the trial court dismissing the plaintiff's action must be reversed, and the cause remanded, with directions to proceed in the further trial of the cause in accordance with the views herein expressed.

Reversed and remanded.

Sedgwick, J., concurring:

I concur in the conclusions reached upon

the following questions, which are necessarily involved in the determination of this case:

1. The common-law doctrine of riparian rights is the basis of our law upon that subject, and governs, so far as applicable to our conditions, matters not regulated by our irrigation statutes.

2. Those parts of the irrigation act of 1895 which provide for a board of irrigation, and the adoption of the rule of ownership of water by appropriation, are constitutional.

3. A suit in equity may be maintained against persons claiming rights to use or divert water of a stream to prevent infringement, under the color of such right, of the rights of plaintiff acquired under our irrigation act.

4. Damages accruing to such parties by reason of appropriations under the irrigation act become a subject of inquiry and adjudication in such an equity suit.

5. Lower riparian owners do not acquire a prescriptive right to receive water as against upper owners.

6. I think the scope and character of the riparian rights of the defendant Hall, under the facts disclosed in the cross petition, are rightly determined.

I express no opinion on the discussion of the doctrine of appropriation as existing independently of and prior to our statutes. If irrigation enterprises are to be met with demands for damages claimed to accrue from interfering with the ownership of the body of the water in our streams, which ownership it is claimed is derived from some other source than the irrigation statutes, it seems to me that it will be a serious obstacle in the way of the growth and development of such enterprises, and such rules ought not to be announced until the occasion has arisen in actual litigation, and after full discussion. The doctrine of the private ownership of the body of the water of running streams is not to be found in the common law nor in the civil law, but was originated in our mining states, and developed there under the influence of the necessities of our miners, and later of farmers in the arid and semiarid districts. It is in the light of these facts that we must determine how far the common law has been modified by our Constitution and the legislation thereunder, and how far it is applicable to existing conditions. The question whether the law of riparian ownership applies to "the larger streams of the state" appears to depend upon whether the owner of the land is held to own to the thread of the stream or only to the banks, and the former was determined to be the law of this state in *McBride v. Whitaker* (Neb.) 90 N. W. 966. I am not satisfied with the discussion of the extent of lands that may be called riparian, and do not see how it is involved in this case.

Petition for further hearing denied.
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Jens C. MENG, Appt.,

v.

Charles F. COFFEY et al.

(.....Neb.....)

- *1. The power of the courts to declare established doctrines of the common law inapplicable to this state should be used somewhat sparingly, and its exercise is not to be justified unless the inapplicability of a rule is general, extending to the whole or the greater part of the state, or, at least, to an area capable of definite judicial ascertainment.
2. The common-law rules as to the rights and duties of riparian owners are in force in every part of the state, except as altered or modified by statute.
3. The common law does not give to a riparian owner an absolute and exclusive right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners.
4. In regulating the use of water by riparian owners, the law distinguishes between those modes of use which ordinarily involve the taking of small quantities, and but little interference with the stream, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow.
5. The purpose of the law as to use of water by riparian owners is to secure equality therein, as near as may be, to each, by requiring each to exercise his rights reasonably, and with due regard to the right of other riparian owners to apply the water to the same or other purposes.
6. A riparian owner may take water from a stream for purposes of irrigation. But his use of the water for such purposes must be reasonable with reference to the size, situation, and character of the stream, the use to which its waters may be put by other riparian owners, the season of the year, and the nature of the region; and he must not, in so doing, unreasonably diminish or wholly consume such water, to the injury of other owners, nor so as to prevent reasonable use of it by them.
7. What is a reasonable use of water for irrigation is largely a question of fact, depending upon the circumstances of each case, and one which may be viewed with some liberality in semiarid regions, where use for such purposes necessarily involves much loss; but waste, needless diminution, or total consumption of a stream, to the injury of others, is clearly unreasonable.

NOTE.—As to correlative rights of upper and lower proprietors as to use and flow of water in stream, including right to use stream for irrigation, see note to *Barnard v. Shirley* (Ind.) 41 L. R. A. 737; also *Jones v. Conn* (Or.) 54 L. R. A. 630, and *Canton v. Shock* (Ohio) 58 L. R. A. 637.

As to right of prior appropriation of water, and various other questions as to water rights, see the preceding case and footnote thereto.

8. An appropriation of water by "squatter's right," not recognized by the laws of this state, the decisions of its courts, nor any general, well-recognized or widely respected custom therein, does not, by virtue of § 2339, Rev. Stat. U. S. (U. S. Comp. Stat. 1901, p. 1437), give to the settler who has appropriated water in that way for a less period than ten years an exclusive right as against other settlers upon the same stream.
9. But a settler who so appropriates water, and afterwards duly enters and receives a patent to the land from the government, may, as against other patentees from the government upon the same stream, count the time during which he appropriated the water as a mere squatter in making out the statutory period of prescription.
10. Appropriation of considerable quantities of water in seasons when that may be done without sensible injury to lower owners does not give a prescriptive right to divert the whole stream in dry seasons.

(February 4, 1908.)

A PPEAL by plaintiff from a judgment of the District Court for Sioux County in favor of defendants in an action to enjoin the diversion of the waters of a certain stream. *Affirmed in part; reversed in part.*

The facts are stated in the Commissioner's opinion.

Messrs. Chambers Keller and N. K. Griggs for appellant.

Mr. Allen C. Fisher for appellees.

Pound, C., filed the following opinion:

This suit was brought in 1893 to enjoin the defendants, upper riparian owners upon Hat creek and its several tributaries, from diverting the waters of said streams for irrigation purposes to such extent as to deprive the plaintiff, a lower owner, of the use of the stream. Upon trial a decision was announced orally adverse to the plaintiff. On appeal to this court it appeared that no final decree had been entered in accordance with such announcement, and the appeal failed. Thereafter a decree dismissing the cause and following the finding originally announced was duly entered, from which the present appeal is prosecuted.

The defendants justify their diversions of the waters of said streams upon these grounds: (1) Prior appropriation; (2) that irrigation of meadow land to produce forage for their stock is a "domestic" use of the water, for which, if necessary, they may consume the whole; (3) that they have a right to divert the water, as against the plaintiff, by reason of U. S. Rev. Stat. § 2339, U. S. Comp. Stat. 1901, p. 1437; (4) that the character of the soil in the region in question and the nature of the beds of the streams are such that the waters diverted would be lost by evaporation and absorption in any event before reaching the plaintiff; and (5) that they have acquired rights to divert the water by prescription. The alleged appropriations were long prior to any legislation authorizing the same, and 60 L. R. A.

no questions under the present irrigation laws are before us in this case.

The first two positions are clearly untenable if this court is to adhere to its repeated pronouncements that the rules of the common law as to the rights and duties of riparian owners are in force in this state. *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N. W. 239; *Gill v. Lydick*, 40 Neb. 508, 59 N. W. 104; *Eidsmiller Ice Co. v. Guthrie*, 42 Neb. 238, 28 L. R. A. 581, 60 N. W. 717; *Slattery v. Harley*, 58 Neb. 575, 79 N. W. 151; *Crawford Co. v. Hathaway*, 60 Neb. 754, 84 N. W. 271, 61 Neb. 317, 85 N. W. 303. But in view of the general misconception of the scope and purpose of those rules and their effect upon irrigation, and the earnest and able arguments which have been presented in the endeavor to bring the court to a contrary conclusion, it has seemed proper to treat the question as *res integra*, and for that purpose the arguments in the several other cases now pending which involve the soundness of the prior decisions referred to have been considered in connection with those in the case at bar. A great deal of what has been urged upon us as demonstrating the inapplicability of the rules of the common law upon this head to conditions in Nebraska proceeds upon an erroneous impression of the nature and purpose of such rules. Thus, in a brief in which the subject is most elaborately and exhaustively discussed, counsel says: "No riparian proprietor in Nebraska to-day is entitled to the full flow of the stream through his premises just for the pleasure it may give him to see the stream filling its banks. . . . The use of the water belongs to the people." And throughout that brief, and in all the arguments we have examined, it is assumed that at common law any taking of water from a stream is an injury to the riparian proprietor and that the latter may insist that no water whatever shall go out. The common law does not hold to so unreasonable a rule. On the contrary, it considers running water *publici juris*, and, while it will not permit any one man to monopolize all the water of a running stream when there are other riparian owners who need and may use it also, neither does it grant to any riparian owner an absolute right to insist that every drop of the water flow past his land exactly as it would in a state of nature. "No one," said Nelson, J., in *Howard v. Ingersoll*, 13 How. 381, 14 L. ed. 189, "can set up a claim to an exclusive right to the flow of all the water in its natural state; and that what he may not wish to use himself shall flow on till lost in the ocean. Streams of water are intended for the use and comfort of man and it would be unreasonable and contrary to the universal sense of mankind to debar a riparian proprietor from the application of the water to domestic, agricultural and manufacturing purposes, provided the use works no substantial injury to others." In *Embrey v. Owen*, 6 Exch. 353, —a case involving the right to use water for irrigation,—Parke, B., said: "This right to the benefit and advantage of the river

flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state, . . . but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on either side to the reasonable enjoyment of the same gift of Providence." In the leading case of *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85, Shaw, Ch. J., said: "The right to the use of flowing water is *publici juris* and common to all the riparian proprietors. . . . It is a right to the flow and enjoyment of the water subject to a similar right in all the proprietors." The common law seeks to secure equality in use of the water among all those who are so situated that they may use it. It does not give to any riparian owner property in the corpus of the water, either so as to be able to take all of it, or so as to insist that every drop of it flow in its natural channel. *Vernon Irrig. Co. v. Los Angeles*, 106 Cal. 237, 39 Pac. 762. When, therefore, counsel tell us that their clients have a natural right to irrigate, and that reasonable use of the water is necessary in exercise of that right, they urge nothing against the rules of the common law, since the latter merely insist that others along the streams in question have the same natural right, and permit every reasonable use by each consistent with like use by all. The apparent modifications of the common-law rules in the semiarid or arid states in that courts of such states are more liberal in their construction of what is a reasonable use, are no departure from the principles on which the rules are founded. On the contrary, they carry them to their logical conclusion in view of the special conditions of such regions.

Understanding what is meant by the general common-law rule as to riparian rights, and bearing in mind that it does not give to a riparian owner an absolute and exclusive right to the flow of all the water of the stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land so far as consistent with a like right in all other riparian owners, we come next to the question, Is such rule in force in this state? Much of what has been urged to show that the rule is inapplicable to our conditions, and hence not in force under chapter 15a, Comp. Stat., is deprived of its effect by proper statement and limitation of the rule itself and apprehension of the principle on which it proceeds. It is further to be noted that the rule has long been in operation without complaint or objection in the eastern portion of the state, and that the difficulties now asserted arise quite as much from the necessity of application of the principles of the common law to the different circumstances of the semiarid portions of the state so as to reach detailed rules applicable to those sections as from any inherent deficiency in the principles themselves. It is obvious that whatever rule is adopted must be of general effect throughout the state, or, at the least, if there are to be two rules, the 60 L. R. A.

areas within which they are to prevail respectively must be capable of judicial recognition. The territory of each rule must be known to the courts as something of which they take judicial notice. But this is not an arid state. Only a portion of it may be so described with propriety, and there is no arbitrary line by which the arid portions are bounded so as to be judicially recognizable. In the Pacific states, where one rule is applied with reference to the public domain and another in cases of private ownership, the limits are not subject to dispute. But in this state, whether a particular locality is or is not arid is a question of fact in each case (*Slattery v. Harley*, 58 Neb. 577, 79 N. W. 151), and it would be an anomaly to have the rules of law by which a cause is to be governed depend upon such an issue, and be triable to a jury. Moreover, if a rule of the common law is to be rejected as inapplicable to our state, it must be because its inapplicability is general throughout the state. If it were conceded that the extreme western portion of the state presents conditions to which the common law is not applicable, how are we in a state like Nebraska, in which the diversity of extreme conditions is great, and yet the transitions are gradual and imperceptible, to draw any line at which we may say one condition ceases and another begins? Where purely arbitrary, the drawing of such a line would be legislation; and nothing short of anarchy could result from leaving it undrawn with two conflicting rules in force. What is needed in such cases is a sound and practical mode of applying the principles of the common law to the peculiar conditions of arid or semiarid localities, not a sweeping act of judicial legislation requiring not a little supplementary legislation of the same oblique character. In a case like the one at bar, where but a few of the questions inevitably to arise could be involved, complete formulation of a system of rules would be improper and impossible. But to abrogate the existing law as to riparian rights, and put anything less than an equally complete system in its place, would result in a condition of chaos far worse than the partial or local difficulties sought to be obviated. "Where the precedents are unanimous in support of a proposition, there is no safety but in a strict adherence to such precedents. If the court will not follow established rules, rights are sacrificed, and lawyers and litigants are left in doubt and uncertainty, while there is no certainty in regard to what, upon a given state of facts, the decisions of the court will be. If the common rule is inadequate, the proper course is by legislation." Maxwell, Ch. J., in *Wilson v. Bumstead*, 12 Neb. 1, 4, 10 N. W. 411, 412. Not only should the inapplicability of a common-law rule be general, extending to the whole, or the greater part, of the state, or, at the least to an area capable of definite judicial ascertainment, to justify the courts in disregarding such rule, but we think, in view of the ease with which legislative alteration and amendment may be had, the power to dec-

clear established doctrines of the common law inapplicable should be used somewhat sparingly. In the whole course of decisions in Nebraska, from the territorial courts to the present, this power has been exercised but three times: (1) With reference to trespass upon wild lands by cattle (*Delaney v. Erickson*, 10 Neb. 492, 35 Am. Rep. 487, 6 N. W. 600), restricted, however, to wild lands by latter adjudications (*Lorance v. Hillyer*, 57 Neb. 266, 77 N. W. 755); (2) with reference to the effect of covenants to pay rent in a lease after destruction of leased buildings, dissented from, however, by three of the six judges (*Wattles v. South Omaha Ice & Coal Co.* 50 Neb. 251, 36 L. R. A. 424, 69 N. W. 785); and (3) with reference to estates by entirety (*Kerner v. McDonald*, 60 Neb. 663, 84 N. W. 92). Of these three cases it may be remarked that the first was in line with legislation which clearly ran counter to the common-law rule, and that the other two dealt with strict feudal rules of property, based on conceptions long since become obsolete. The recent holdings as to the statute of uses (*Farmers' & M. Ins. Co. v. Jensen*, 58 Neb. 522, 44 L. R. A. 861, 78 N. W. 1054), and the statute of Elizabeth concerning charitable uses (*St. James Orphan Asylum v. Shelby*, 60 Neb. 796, 84 N. W. 273), are of different nature. In the statute of uses the court did not have to do with a rule of the common law, but with an English statute, which was not adjustable to our legislation as to conveyances. In the statute of Elizabeth relating to charitable uses the court was again dealing with an English statute, and, as that statute gave extra-judicial powers to the courts, which they could not exercise under our Constitution, the question was one of legislative superseding of the rule, not of inapplicability. Thus, the distinction between the case at bar and those in which common-law rules or English statutes have been set aside is readily apparent. Here we are confronted with no legislation to the contrary, nor are we dealing with an antiquated rule of feudal origin, but with an enlightened system of rules, founded on obvious principles of justice, and concededly applicable to the general conditions of the country and to the greater part of this state. Moreover, in each of the three cases in which common-law rules have been held inapplicable there was a complete rule at hand to take the place of the one rejected, and no complicated and extensive judicial legislation was required. In the case of trespasses by cattle the herd law was on the statute books. The rule as to the effect of covenants in a lease to pay rent was an isolated rule, without collateral consequences, and the obvious and well-settled principle of apportionment, governing all agreements, was available in its stead; and the doctrine of tenancy by the entirety stood alone, unconnected with any general body of rules, and all cases that might have been governed by it were readily referable to the rules governing tenancy in common: In like manner, with the statute of uses re-

moved, we had a complete statutory system of conveyancing, and, in the absence of the statute of charitable uses, there were still the general equitable powers of the court of chancery existing anterior to that statute. But while in those cases a single rule, part of no general system of modern application, was rejected, here the rules assailed are results of a general doctrine and part of a complete system, and to overthrow them would leave the whole body of the law of waters unsettled and confused. The subject calls for legislative, not for judicial, action. Black's Pom. Water Rights, §§ 162, 163.

Nor do we believe that the common-law rule of equality among riparian owners, administered liberally with respect to the circumstances of particular localities, is necessarily prohibitive of irrigation anywhere. If we bear in mind wherein the essential doctrine of the common law on this subject consists, we doubt whether a more equitable starting point for a system of irrigation law may be found; and we are not alone in this view. Black's Pom. Water Rights, § 163. But if the existence of a rule better applicable to parts of the state were of itself sufficient ground for judicial overturning of the law, the question would arise, What principle are we to adopt? The one for which counsel contend—and the only one that could be contended for seriously—is the doctrine of appropriation, and, believing that to adopt this doctrine by judicial legislation in place of the rules of the common law would lead to difficulties in other parts of this state no less great than those charged to the rules at present sanctioned, we propose to review briefly its history and some of its incidents. The history of this doctrine is well known, and has often been set forth. Black's Pom. Water Rights, §§ 11-24; 17 Am. & Eng. Enc. Law, 494; *Atchison v. Peterson*, 20 Wall. 507, 22 L. ed. 414. It arose in California at a time when government and law were not yet established, when there was no agricultural population and were no riparian owners, and when streams could be put to no use except for mining. From the necessities of the case, there being no law applicable, the miners held meetings in each district or locality, and adopted regulations by which they agreed to be governed. As at that time streams could be put to no use except for mining, and as the use of large quantities of water was essential to mining operations, it became settled as one of the mining customs or regulations that the right to a definite quantity of water, and to divert it from streams or lakes, could be acquired by prior appropriation. This custom required strength; rights were gained under it, and investments made and it was soon approved by the courts and by local legislation; and, though not originally available against the general government or its patentees, was made so available by the act of Congress in 1866. Act July 26, 1866, 14 Stat. at L. 253, chap. 262, § 9, U. S. Comp. Stat. 1901, p. 1437. But it was only the same rule as that by which possession of mining claims was recognized. It was a custom intended to

prevent disorder and forcible dispossession of those who had located mines. As stated by Field, J., in *Atchison v. Peterson*, 20 Wall. 507, 22 L. ed. 414: "By the custom which has obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or to use the waters." In other words, the doctrine in question was not formulated as an enlightened attempt to adjust the conflicting relations of a large community of individuals. It was a crude attempt to preserve order and the general peace, and to settle customary rights among a body of men subject to no law, under which so many and so valuable rights arose that when the law stepped in it was obliged to recognize them. In this way the rule of appropriation became established in the Pacific states, in opposition to the common law, with reference to streams or bodies of water which wholly ran through or were situated upon the public lands of the United States. Black's Pom. Water Rights, § 15. These rules, however, were confined to the public lands, and are so confined at the present time in California, Oregon, and Washington. In other states and territories the new doctrine was given general application; sometimes by judicial decision, as in Nevada, but chiefly by constitutional or legislative enactment. Thus, in those states of which the whole or a portion is arid, we now find some in which the common-law rules are in force,—California, Oregon, Washington, Montana, North Dakota, and substantially Texas,—though in many of these, for reasons stated, the other rule obtained upon the public lands of the United States; others in which the doctrine of prior appropriation is in general force,—Nevada, Arizona, Colorado, Idaho, Utah, Wyoming. Of these, however, Colorado, Idaho, and Wyoming have constitutional provisions declaring such to be the paramount law, and in the other jurisdictions named it is generally established by statute. Not only does the history of the rule obviously remove our state from its operation, but a mere comparison of the jurisdictions where the contending principles are in force is very suggestive. In all states which, like our own, are but partially arid, the common law is in force. The states holding to the contrary rule are wholly within the arid regions. Moreover, whereas in those states, and some of the partially arid, the arid regions were first settled, and rights, customs, and legislation grew up and were shaped with reference to such conditions, with us the amply watered regions of the eastern portion of the state were first settled, and our laws, legislation, and lines of judicial decisions were fixed before agriculture in the arid or semiarid portions of the state was at all established. Not only does this suggest that the appropriation doctrine unregulated by minute legislation is un-

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suited and inapplicable to the state as a whole, but a consideration of some of its incidents will make such conclusion manifest. Under such doctrine the first appropriator may appropriate the entire flow of a stream, if used in proper irrigation. *Hammond v. Rose*, 11 Colo. 524, 19 Pac. 466; *Drake v. Earhart*, 2 Idaho, 716, 23 Pac. 541. Also, a nonriparian may appropriate and get an exclusive right to the whole water of a stream for nonriparian lands. *Hammond v. Rose*, 11 Colo. 524, 19 Pac. 466. It must be clear that such rules are not applicable to this state at large. Land along streams has been bought and sold, and titles have been acquired, for many years throughout the older portions of the state in reliance upon the rights and advantages incident to ownership of riparian property. The application of the rules of the common law in this state having been undoubted so long, the results of suddenly overturning them and permitting the first comers to get all the water from the several streams in the older parts of the state by mere appropriation, and turn whole streams upon nonriparian tracts, would be intolerable. Not only have these rules been relied upon in the acquisition and disposition of property, but they have received legislative recognition. Comp. Stat. § 8, chap. 57, providing for ascertainment of damage to lower owners by retention of water in mill ponds; Comp. Stat. § 32, art. 3, chap. 93a; Comp. Stat. § 6, art. 1, chap. 93a, and perhaps § 43, art. 2, of the last-named chapter,—indicate an understanding that riparian owners have rights which must be respected, and may only be divested by due process of law. Counsel contend that the irrigation act of 1877 "looked on the law of riparian rights with disapproval." But this statement, already sufficiently refuted in the opinion in *Crawford Co. v. Hathaway*, 60 Neb. 754, 84 N. W. 271, is based upon the fallacious assumption that any taking of water from a flowing stream is an infraction of riparian rights.

For the reasons indicated, we are of opinion that the former holdings of the court must be adhered to, and that, except as altered by statutes, the common-law rules are in force in every part of the state. The details of such rules with respect to irrigation, however, and their application to irrigation in the semiarid portions of the state, have not, as yet, received careful consideration by this court. It is generally recognized that at common law a riparian owner may take water from a stream for purposes of irrigation. *Embrey v. Owen*, 6 Exch. 353; *Elliot v. Fitchburg R. Co.* 10 Cush. 191, 57 Am. Dec. 85; *Gillett v. Johnson*, 30 Conn. 180; *Ulbricht v. Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572, 6 So. 78; Gould, Waters, § 617. At an early day there was a tendency to class irrigation among those uses of a stream which might be carried even to entire consumption of its waters. But another view has long prevailed, and is now well established, not only in the eastern portion of the country, but even in the arid and semiarid states (so far as such states recog-

nize the common-law doctrine as to riparian rights), to the effect that irrigation is one of those uses which must be exercised reasonably with due regard to the rights of others. *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *Gillett v. Johnson*, 30 Conn. 180; *Black's Pom. Water Rights*, § 151; Gould, *Waters*, §§ 205, 217. This subject has been confused needlessly by the unfortunate use of the words "natural" and "ordinary" in this connection to distinguish those uses which the common law does not attempt to limit, and "artificial" or "extraordinary" to designate those which are required to be exercised within reasonable bounds. It is no doubt true that irrigation is a very natural and a very ordinary want, and that use of a stream for such purpose is natural and ordinary in semiarid regions. But such is not the question. The law does not regard the needs and desires of the person taking the water solely to the exclusion of all other riparian proprietors, but looks rather to the natural effect of his use of the water upon the stream and the equal rights of others therein. The true distinction appears to lie between those modes of use which ordinarily involve the taking of small quantities, and but little interference with the stream, such as drinking and other household purposes, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow, such as manufacturing purposes. The purpose of the law is to secure equality in the use of the water by riparian owners, as near as may be, by requiring each to exercise his rights reasonably, and with due regard to the right of other riparian owners to apply the water to the same or to other purposes. This purpose is not subverted by any arbitrary classification, and in regions where water must be carefully husbanded, and is in great demand for agricultural purposes, it is obviously better to incline toward such a rule as will further equality and a wide participation in the benefits of a stream. *Lua v. Haggin*, 69 Cal. 255, 10 Pac. 674. Accordingly, wherever the common-law rules as to riparian rights apply, even in the arid portions of the country, the weight of authority places irrigation among those uses of a stream which must be exercised reasonably under the circumstances of each case. *Union Mill & Min. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371; *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 450, Fed. Cas. No. 14,370; *Smith v. Corbit*, 116 Cal. 587, 48 Pac. 725; *Baker v. Brown*, 55 Tex. 377; *Trambley v. Luteran*, 6 N. M. 15, 27 Pac. 312; 17 Am. & Eng. Enc. Law, 2d ed. 487; *Black's Pom. Water Rights*, § 151. This conclusion is not altered, so far as concerns the case at bar, by § 65, art. 2, chap. 93a, Comp. Stat. which declares water for irrigation to be a "natural want." If that section was meant to enact a new rule we have here a cause which arose two years prior to its adoption. If it was meant to be declaratory, we must consider it in connection with § 43, which says that domestic uses must come before agricultural uses, and is inconsistent with

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any construction that would allow complete diversion of the whole stream for irrigation as against those who desire to use its water for domestic purposes. It would doubtless be impolitic to give an arbitrary or hard and fast meaning to the word "reasonable" in this connection. The use of water for irrigation always involves some loss, and we do not think it would be wise to declare every perceptible diminution of the waters of a stream to be unreasonable. The necessity of a liberal view of what constitutes a reasonable use of water for irrigation has been judicially recognized (*Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442), and we think caution in that respect entirely proper. If the rights of the upper owner in the water are no more than those of the lower owner, they are at the same time no less. His right to reasonable use of the water for irrigation ought not to be rendered nugatory by requiring it to be exercised in an impossible manner. We do not think this conflicts with what was said in *Clark v. Cambridge & A. Irrig. & Improv. Co.* 45 Neb. 798, 64 N. W. 239, and reaffirmed in *Slattery v. Harley*, 58 Neb. 575, 79 N. W. 151, since the court was there considering only whether the common-law rules were in force, not the definition of the reasonable use allowed by those rules as applied to sections of the state shown by pleadings and proofs to be arid. Nor does it conflict with the holding in *Crawford Co. v. Hathaway*, 60 Neb. 754, 84 N. W. 271, hereinbefore reiterated to the effect that the common-law rules apply in every part of the state. For, if we regard the question of what is reasonable use as in great part one of fact, the conditions of soil, climate, and rainfall in any given locality, when proved, may be considered properly as important elements of fact, without in the least affecting the general rule. But if we concede so much, the law insists that the lower owner shall not be deprived of the use of the water to an unreasonable extent. *Sampson v. Hoddinott*, 1 C. B. N. S. 590. The uses which an upper riparian owner may make of a stream for purposes of irrigation must be judged, in determining whether they are reasonable, with reference to the size, situation, and character of the stream, the uses to which its waters may be put by other riparian owners, the seasons of the year, and the nature of the region. These circumstances differ in different cases, and what use is reasonable must be largely a question of fact in each case. *Lua v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Baker v. Brown*, 55 Tex. 377; *Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325; *Minnesota Loan & T. Co. v. S. A. Anthony Falls Water-Power Co.* 82 Minn. 505, 85 N. W. 520; *Embrey v. Owen*, 6 Exch. 353; *Pitts v. Lancaster Mills*, 13 Met. 156. Some things, however, are clearly unreasonable, and it may be laid down absolutely that the upper owner, in using the water for irrigation, must not waste, needlessly diminish, or wholly consume it, to the injury of other owners, nor so as to prevent reasonable use of it by them also.

Union Mill & Min. Co. v. Dangberg, 2 Sawy. 450, Fed. Cas. No. 14,370; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Harris v. Harrison*, 93 Cal. 676, 29 Pac. 325; *Gould v. Eaton*, 117 Cal. 539, 38 L. R. A. 181, 49 Pac. 577; *Coffman v. Robbins*, 8 Or. 279; *Gillett v. Johnson*, 30 Conn. 180.

Judged in this way, we think the use made of the streams in question by three of the defendants may not be said to be reasonable. Hat creek is a small stream, about 10 feet wide where it passes the plaintiff's lands, formed by the junction of a number of similar streams a few miles above. Of these, Warbonnet creek, after gathering several small tributaries, flows into Munroe creek, which is received by Sowbelly creek, and the latter soon joins Hat creek, into which, some distance above, a number of smaller streams have been united. All of these creeks are fed by springs in the hills, and flow the year round, although at times somewhat reduced in volume in dry weather. There is some conflict in the testimony as to the disposition of the water diverted by the several defendants, and how far it, or some of it, may return to the creeks. The most satisfactory testimony is that of the county surveyor, and we have looked chiefly to his statements for an understanding of the facts. The defendant Brewster maintains a dam on Warbonnet creek, and a ditch, by means of which he irrigates some 300 acres. The capacity of this ditch is sufficient to contain the entire stream. It takes the water away from the creek to a point about a mile off, where the dip is but very slightly toward the creek, and there discharges it, so that practically all that is not used in irrigation will, in hot weather, evaporate, and not return to the creek. On one occasion, when the season was very dry in that vicinity, and a number of Mr. Brewster's neighbors below him were complaining because they could get no water, it appears that he was turning the water upon a meadow of 80 to 100 acres, so that it stood there from 1 to 1½ inches deep; and, as we have seen, what was not used was substantially wasted. This is obviously unreasonable. The defendant Wilcox maintains a ditch on Munroe creek, with which he irrigates 150 acres. This ditch also is sufficient to carry the whole stream, and the water is so discharged that none gets back into the creek, since the ground slopes in another direction at the point of discharge. With respect to the defendant Coffey, who maintains a ditch on Hat creek, with which he irrigates 160 acres, the case is not so clear. But at the time the writs were served in this case, while there was an abundance of water in his ditch, the sheriff found the creek dry a mile and a half below, and the bed of the creek opposite the plaintiff was so dry that dust blew in it. It is claimed that the character of the creek bed and nature of the soil in that vicinity, shown by the testimony to be close to the "bad lands," at an altitude of 4,600 feet, in an arid region, is such that in a dry season the waters of the creek would evaporate, or

be absorbed in the ordinary course of things, before they reached the plaintiff. This, if true, would be a strong circumstance to consider in determining what would be a reasonable use of the water. *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 450, 459, Fed. Cas. No. 14,370. But a large number of witnesses, well acquainted with the neighborhood, deny this, and the fact that in a former very dry season plaintiff had had water except for two or three days, and that as soon as the injunction was served, water flowed several inches deeper than usual past his land, would indicate that the condition of the creek when suit was brought was due to complete diversion of its waters by the dam above. With respect to the defendant Steele, however, who is on Middle Hat creek, above Coffey, the evidence is that all of the water taken out by him, except what is consumed by evaporation, goes back to the creek, and there is no evidence of unreasonable use or of injury to the plaintiff.

The further claim of the defendants, based upon § 2330 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1437), so far as such section is relied upon in connection with the legislation of this state to set up rules at variance with the doctrines of the common law, is disposed of adversely in *Crawford Co. v. Hathaway*, 61 Neb. 317, 85 N. W. 303. But they also contend that, by virtue of said section, as prior appropriators who have duly entered and received patents to their lands, they are entitled to take the waters of said streams as against the plaintiff, who is a subsequent patentee from the government. The section in question has been construed repeatedly by the Federal courts, and its meaning is not open to question. *Bassey v. Gallagher*, 20 Wall. 670, 22 L. ed. 452; *Broder v. Natoma Water & Min. Co.* 101 U. S. 274, 25 L. ed. 790; *Jennison v. Kirk*, 98 U. S. 453, 25 L. ed. 240. In *Jennison v. Kirk* the court says: "In other words, the United States, by the section, said that whenever rights to the use of water by priority of possession had become vested, and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them," although the title to the lands might be in the government. In *Bassey v. Gallagher* it is said: "It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the court. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; and in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control." In the Pacific and mining states appropriation of water by squatters on the public land became the subject of legislation and judi-

cial decision very early in the history of those communities, whereby customs that had grown up and come to be well-defined, widely recognized, and generally respected in the regions in question were given legal force. Irrigation is very young in this state, as the semiarid portions did not begin to be settled till about 1880. Neither by legislation nor by judicial decision had appropriation of water been recognized in this state as conferring any right until the statutory period of prescription had elapsed. Nor had any such general, well-recognized, or widely respected custom grown up in this state as to justify the application of the Federal statutes thereto. The customs in the states to which Congress had reference were widespread and notorious. The custom attempted to be proved in this case was at best very confined in its limits, known to few, admitted by few, and, as the testimony shows, often disputed. The defendants testify that they began taking the water by "squatter's right." One witness says that in 1880 and 1881 it was usual for every man in northwestern Nebraska to "take what water he could." Others testify that at that time no one respected any other's rights in this regard, but each put in a ditch wherever he could. Another says: "About all the rules there was, if a man went and took out a ditch, he went and took it out." There is some testimony of a custom of respecting prior appropriations. But the weight of the evidence is to the effect that there were very few settlers, and all took what was at hand, without regulation or custom of any sort. Hence we do not think use of the water under such circumstances for a less period than ten years operated to give any right to the defendants as against the plaintiff under the section in question. On the other hand, however, we are of the opinion that under that section the period during which the defendants maintained their ditches as squatters, and afterwards under homestead entries, prior to obtaining patents for their land, may be counted by them in making out the statutory period of prescription as against the plaintiff, a subsequent patentee from the government. The statute has been construed to be a recognition by the government of all claims which might accrue to such squatters as against other settlers, and to intend that all patents which might issue should be subject to such rights. As a right began to accrue as soon as the ditches were dug, we think the period during which the defendants appropriated water "by squatter's right," while giving rise to no rights against the government, is available in proving rights by prescription against the plaintiff. *Tolman v. Casey*, 15 Or. 83, 13 Pac. 669.

This brings us to the last claim made by the defendants, namely, that they are entitled to divert the water of the several streams in question by virtue of ten years' adverse user. We may leave the defendant Steele out of account, because, as has been seen, the evidence does not show that his use of the water is unreasonable. Likewise,

the defendant Wilcox may be dismissed with a few words, since his dam was not built till 1884, and his ditch as it now stands was not dug till 1886. As this suit was begun in 1893, he can claim nothing by prescription. The defendant Brewster put in his dam in 1879 or 1880, and, though he made some enlargements, his system of irrigation seems to have been in existence in its present condition for ten years before the bringing of this action. As to Coffey's ditch, the testimony is conflicting. It was begun in 1881, but seems to have been added to several times, and there is testimony that it was enlarged as late as 1886. But we need not review the testimony on this point, because, conceding that his ditch was in its present form ten years prior to the bringing of this action, neither he nor the defendant Brewster has proved a right to consume all the water of the streams by prescription. The plaintiff settled upon his land in 1886, five years after Coffey began his ditch, and from that time until 1893 there is abundant evidence that he had water in the creek at all times except for a day or two in 1890. No right to divert and dissipate the whole stream was acquired by making such use thereof as would still leave water for the plaintiff. So long as the water was sufficient for all, there was no adverse user. *Anaheim Water Co. v. Semi-Tropico Water Co.* 64 Cal. 185, 30 Pac. 623; *Bathgate v. Irvine*, 126 Cal. 135, 58 Pac. 442; *North Powder Mill Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223; *Church v. Stillwell*, 12 Colo. App. 43, 54 Pac. 395; *Egan v. Estrada* (Ariz.) 56 Pac. 721. One of the elements to be considered in determining what is a reasonable use of the water of a stream is the season of the year, and its effect upon the stream. Riparian owners are not to be debarred from use of water because the season is dry and the stream low. But at such time they must take care "to do no material injury to the common right of plaintiff, having regard to the then stage of the river." *Union Mill & Min. Co. v. Dangberg*, 2 Sawy. 450, 458, Fed. Cas. No. 14,370. The testimony is that the season of 1893 was unusually dry. Hence what might have been a reasonable use of the water, or at least such use as gave the plaintiff no ground of complaint, in other years, became highly unreasonable when it had the effect of giving Coffey and Brewster all the water, and leaving none for other owners. Only a continuous and adverse user of the whole stream could give a right to take out a greater proportion of such water as was in the stream at the time than they had habitually taken in former years.

It is therefore recommended that the decree be affirmed as to the defendant Steele, but reversed as to the defendants Coffey, Brewster, and Wilcox, with directions to make new and further findings of fact in conformity with this opinion, and to enter a decree enjoining the defendant Wilcox from wasting or unreasonably diminishing the waters of Munroe creek, and enjoining the defendants Brewster and Coffey from consuming all the waters of Warbonnet and

Hat creeks, respectively, in the irrigation of their lands, or permanently diverting in any year a greater proportion of the water in such streams for the time being than they were accustomed to take out prior to the summer of 1893, having regard to the nature of the season and the condition of the stream at the time. In consequence, however, of the long time that has elapsed since trial, we think it would be entirely proper to take further evidence upon the question of the amount of water which such defendants may divert, should the lower court so desire.

Sedgwick, C., concurs. Oldham, C., having been of counsel in *Crawford Co. v. Hathaway*, did not sit.

Per Curiam:

For the reasons set forth in the foregoing opinion, the decree of the District Court is affirmed as to the defendant Steele, but reversed as to the defendants Coffey, Brewster, and Wilcox, with directions to make new and further findings of fact in conformity with said opinion, and to enter a decree enjoining the defendant Wilcox from wasting or unreasonably diminishing the waters of Munroe creek, and enjoining the defendants Brewster and Coffey from consuming all the waters of Warbonnet and Hat creeks, respectively, in the irrigation of their lands, or permanently diverting in any year a greater proportion of the water in such streams for the time being than they were accustomed to take out prior to 1893, having regard to the nature of the season and the condition of the stream at the time; that proportion and other questions of fact necessary to the rendition of such decree to be ascertained from the evidence already taken, or by taking further evidence at the discretion of the District Court.

GERMAN INSURANCE COMPANY of
Freeport, Illinois, *Plff. in Err.,*

v.

Arthur L. SHADER.

(.....Neb.....)

*1. In pleading performance of conditions precedent under § 128, Code Civ. Proc., a plaintiff may properly assume that conditions which have been waived will not be relied upon and allegations of waiver to meet a defense based on such conditions are not inconsistent with the statutory allegation

*Headnotes by POUND, C.

NORM.—As to effect of acceptance of overdue premium after forfeiture occurs, see also, in this series, *Phoenix Ins. Co. v. Tomlinson* (Ind.) 9 L. R. A. 317, and *Johnston v. Phelps County Farmers' Mut. Ins. Co.* (Neb.) 56 L. R. A. 127. As to waiver of condition that first premium must be paid before policy will take effect, see *Stewart v. Union Mut. L. Ins. Co.* (N. Y.) 42 L. R. A. 147, and *Cole v. Union Cent. L. Ins. Co.* (Wash.) 47 L. R. A. 201.
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that all conditions on his part have been duly performed.

2. A plaintiff does not change his cause of action by substituting allegations of waiver for a general denial with respect to a defense of breach of conditions precedent.
3. Former decisions of this court as to waiver of conditions in policies of insurance and the construction of such conditions adhered to.
4. Provisions in a policy of insurance that the risk shall not attach unless the premium has been actually paid are waived in case the policy is delivered upon an agreement to extend credit, and the insurer does not take advantage of said provisions, but treats the policy as in force.
5. Receiving the premium after destruction of all the insured property, so that nothing remains to which insurance might attach, waives a provision that the insurer shall not be liable for a loss occurring before payment of the premium.
6. Where an agent who has general power to receive and collect premiums accepts a premium after loss, and the insurer desires to repudiate such act, it should return or tender the money to the insured. Mere return to the agent, with instructions which are not executed, will not suffice.
7. The decision of the trial court upon conflicting evidence as to misconduct of counsel will not be disturbed.
8. While not to be commended, an instruction directing the jury to "do substantial justice" between the parties is not prejudicial error where they are told to do so by finding a verdict "solely from the evidence in the case, applying the law as given in these instructions."

(February 17, 1908.)

ERROR to the District Court for Lancaster County to review a judgment in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. Lionel C. Burr, Charles L. Burr, and Frank A. Boehmer, for plaintiff in error:

An estoppel or waiver is a new and independent cause of action, and must be pleaded in the petition; and such a cause of action cannot be pleaded for the first time in an action, in the reply.

Plummer v. Rohman, 61 Neb. 61, 84 N. W. 600; *German Ins. Co. v. Shader* (Neb.) 93 N. W. 972; *Farmers' & M. Ins. Co. v. Graff*, No. 10,378, 1901; 28 Am. & Eng. Enc. Law, pp. 537, 538; *Anders v. Life Ins. Clearing Co.* 62 Neb. 585, 87 N. W. 331.

A pleading cannot be amended by a substantial departure, or by inserting a new cause of action, substantially different from the one originally alleged.

Clarke v. Omaha & S. W. R. Co. 5 Neb. 318; *Scott v. Spencer*, 44 Neb. 93, 62 N. W. 312; *First Nat. Bank v. Myers*, 44 Neb. 310, 62 N. W. 459; *Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504, 77 N. W. 1094; *Wigton v. Smith*, 57 Neb. 299, 77 N. W. 772.

The statute of limitation had run on the estoppel, verbal agreement, and waiver pleaded in the amended petition.

Buerstetta v. Tecumseh Nat. Bank, 57 Neb. 504, 77 N. W. 1094; *Merrill v. Wright*, 54 Neb. 518, 74 N. W. 955.

The local agent had no power or authority to make the alleged oral agreement for and on behalf of the insurance company.

Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308-365, 46 L. ed. 213-236, 22 Sup. Ct. Rep. 133.

When Shader accepted the policy he thereby accepted the condition that he would not plead or claim upon any other contract than one in writing or print, and he is, by the law in this cause, estopped from now claiming under a parol agreement that is prohibited by, and agreed upon by himself shall not be urged against, the company.

Davis v. Massachusetts Mut. L. Ins. Co. 13 Blatchf. 462, Fed. Cas. No. 3,642; *Wilkins v. State Ins. Co.* 43 Minn. 177, 45 N. W. 1; *Jones v. New York L. Ins. Co.* 168 Mass. 245, 47 N. E. 92; *Kerr, Ins. pp.* 144, 158.

All oral and parol agreements are merged into the written contract where one is delivered, and oral evidence is not permitted to change, alter, or modify any reasonable condition therein named, and, as against the reasonable conditions in the contract, no estoppel can properly be pleaded and proved.

Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 320, 330, 46 L. ed. 219, 223, 22 Sup. Ct. Rep. 133; *Kerr, Ins. pp.* 54, 244; *Klein v. Niagara F. Ins. Co.* 117 Mich. 469, 76 N. W. 165.

Messrs. Halleck F. Rose and Wilmer B. Comstock, for defendant in error:

The court properly granted leave to amend the petition by inserting the allegation that defendant had waived the requirement for prepayment of the premium.

Merrill v. Wright, 54 Neb. 518, 74 N. W. 955; *Norfolk Beet-Sugar Co. v. Hight*, 59 Neb. 103, 80 N. W. 276.

A recording agent of an insurance company, with power to underwrite policies and accept risks on behalf of his principal, and collect and receive premiums, may, by his agreement, waive any condition precedent to the attaching of the risk.

Newark Mach. Co. v. Kenton Ins. Co. 50 Ohio St. 549, 22 L. R. A. 768, 35 N. E. 1060; *Brownfield v. Phenix Ins. Co.* 35 Mo. App. 69; *Southern L. Ins. Co. v. Booker*, 9 Heisk. 606, 24 Am. Rep. 344; *Farnum v. Phenix Ins. Co.* 83 Cal. 256, 23 Pac. 869; *Berliner v. Travelers' Ins. Co.* 121 Cal. 453, 53 Pac. 922; *Wytheville Ins. & Bkg. Co. v. Teiger*, 90 Va. 279, 18 S. E. 195; *Young v. Hartford F. Ins. Co.* 45 Iowa, 377, 24 Am. Rep. 785; 1 Wood, Fire Ins. p. 71; 16 Am. & Eng. Enc. Law, 2d ed. p. 858; *Nebraska & I. Ins. Co. v. Christensen*, 29 Neb. 572, 45 N. W. 924; *Schoneman v. Western Horse & Cattle Ins. Co.* 16 Neb. 404, 20 N. W. 284; *Pythian Life Asso. v. Preston*, 47 Neb. 374, 66 N. W. 445; *Slobodsky v. Phenix Ins. Co.* 53 Neb. 816, 74 N. W. 270; *Home F. Ins. Co. v. Peyson*, 54 Neb. 495, 74 N. W. 960; *Robbins v. 60 L. R. A.*

Springfield F. & M. Ins. Co. 149 N. Y. 484, 44 N. E. 159; *Wood v. American F. Ins. Co.* 149 N. Y. 385, 44 N. E. 80; *Niagara F. Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789; *Hamilton v. Home Ins. Co.* 94 Mo. 353, 7 S. W. 281; *McCollum v. Hartford F. Ins. Co.* 67 Mo. App. 76; *Day v. Dwelling-House Ins. Co.* 81 Me. 244, 16 Atl. 894; *Hilton v. Phenix Assur. Co.* 92 Me. 272, 42 Atl. 412; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411; *Westchester F. Ins. Co. v. Earle*, 33 Mich. 143; *Steele v. German Ins. Co.* 93 Mich. 81, 18 L. R. A. 85, 53 N. W. 514; *Wagner v. Westchester F. Ins. Co.* 92 Tex. 549, 50 S. W. 569; *German Ins. Co. v. Everett*, 18 Tex. Civ. App. 514, 46 S. W. 95; *Kalmutz v. Northern Mut. Ins. Co.* 186 Pa. 576, 40 Atl. 816; *Swain v. Macon F. Ins. Co.* 102 Ga. 96, 29 S. E. 147; *Hobkirk v. Phenix Ins. Co.* 102 Wis. 13, 78 N. W. 160; *Mutual F. Ins. Co. v. Ward*, 95 Va. 231, 28 S. E. 209; *American Ins. Co. v. Luttrell*, 89 Ill. 314; *North British & M. Ins. Co. v. Steiger*, 26 Ill. App. 228; *First Nat. Bank v. American Cent. Ins. Co.* 58 Minn. 492, 60 N. W. 345; *Brandup v. St. Paul F. & M. Ins. Co.* 27 Minn. 393, 7 N. W. 735; *Insurance Co. of N. A. v. Coombs*, 19 Ind. App. 331, 49 N. E. 471; *Grubbs v. North Carolina Home Ins. Co.* 108 N. C. 472, 13 S. E. 236; *Collins v. Farmville Ins. & Bkg. Co.* 79 N. C. 279, 28 Am. Rep. 322; *Gandy v. Orient Ins. Co.* 52 S. C. 224, 29 S. E. 655; *Schroeder v. Springfield F. & M. Ins. Co.* 51 S. C. 180, 28 S. E. 371; *McBryde v. South Carolina Mut. Ins. Co.* 55 S. C. 589, 33 S. E. 729.

The company, by collecting and receiving the premium for the full term, after the loss and with knowledge thereof, is estopped to deny the validity of the policy.

Schoneman v. Western Horse & Cattle Ins. Co. 16 Neb. 406, 20 N. W. 284; *Western Horse & Cattle Ins. Co. v. Scheidle*, 18 Neb. 495, 25 N. W. 620; *Phenix Ins. Co. v. Dungan*, 37 Neb. 473, 55 N. W. 1069.

Found, C., filed the following opinion:

On a former occasion a judgment for the plaintiff in this cause was reversed for the reason that the trial court permitted him to show waiver of conditions in a policy of insurance upon a reply which only denied that there had been any breach. Upon a new trial a verdict for the plaintiff was again rendered, and the insurance company has come to this court on error a second time.

The principal errors assigned are the admission of parol evidence as to waiver of conditions in the policy notwithstanding a provision that no agent should have power to waive such conditions otherwise than by a written indorsement, and certain instructions whereby the question as to waiver was left to the jury. It is also claimed that the amendments whereby plaintiff was allowed to set up waiver of the conditions in the policy state a new and distinct cause of action, upon which the statute of limitations had run, within the purview of the decision in *Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504, 77 N. W. 1094; that the verdict is contrary to the evidence; that plaintiff's

counsel were guilty of prejudicial misconduct; and that the trial court erred in instructing the jury to "do substantial justice" by their verdict.

We are satisfied that the case of *Buerstetta v. Tecumseh Nat. Bank*, 57 Neb. 504, 77 N. W. 1094, has no application. In pleading performance of conditions precedent under § 128, Code Civ. Proc., a plaintiff may safely assume that conditions which have been waived will not be relied upon, and allegations of waiver to meet a defense based on such conditions are not inconsistent with the statutory allegation that all conditions on his part have been duly performed. *Levy v. Peabody Ins. Co.* 10 W. Va. 560, 27 Am. Rep. 598. Hence it was entirely proper to set up the waiver in reply, and there would have been no departure from the cause of action set up in the petition had this course been taken. *Jacobs v. St. Paul F. & M. Ins. Co.* 86 Iowa, 145, 53 N. W. 101; *Standard Acci. Ins. Co. v. Friedenthal*, 1 Colo. App. 5, 27 Pac. 88; *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *Virginia F. & M. Ins. Co. v. Saunders*, 86 Va. 969, 11 S. E. 794. It could make no substantial difference if the plaintiff preferred to anticipate the defense and set up waiver in the petition. He did not change his cause of action by substituting allegations of waiver for the general denial.

The question as to admissibility of the evidence objected to has been before the court in various phases in a number of cases, and if we may rely on past adjudications, has been completely determined. *Slobodisky v. Phenix Ins. Co.* 53 Neb. 816, 74 N. W. 270; *Pythian Life Asso. v. Preston*, 47 Neb. 374, 66 N. W. 445; *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 559, 88 N. W. 779; *Hunt v. State Ins. Co. (Neb.)* 92 N. W. 921, and cases cited. But in a number of cases which have come before us recently, as well as in the case at bar, the prior decisions of this court on the subject of insurance have been assailed vigorously, and it has been asserted that the court has taken positions at variance both with principle and authority. The recent decision of the Supreme Court of the United States in *Northern Assur. Co. v. Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133, is chiefly relied upon in this connection, and that case has been urged upon our attention so persistently of late that it seems proper to state the reasons moving us to adhere to the course of decision long established in this jurisdiction, notwithstanding the great authority of the tribunal which has adopted a different doctrine.

The general rule that an insurance company cannot take advantage of conditions in a policy whereby such policy is to be void by reason of circumstances existing at the time the policy issued, in case the facts were known to its agent at the time, has been recognized universally. More recently insurance companies have sought to avoid the consequence of this well-established rule by provisions to the effect that the conditions of the policy could be waived only by written

indorsement, and by clauses in which agents are forbidden to waive any of the conditions of the policy in any other manner. Notwithstanding provisions of this type, an overwhelming majority of the state courts have continued to apply the rule that an insurance company cannot set up that a policy issued by its agent with knowledge of the facts was void, when it was issued, by reason of facts which he well knew. Including our own court, the courts of some twenty-seven states, at least, have, upon one ground or another, adhered to this doctrine in the face of these provisions as to waiver. *Wood v. American F. Ins. Co.* 149 N. Y. 382, 44 N. E. 80; *Berry v. American Cent. Ins. Co.* 132 N. Y. 49, 30 N. E. 254; *Blass v. Agricultural Ins. Co.* 162 N. Y. 639, 57 N. E. 1104; *Breedlove v. Norwich Union F. Ins. Soc.* 124 Cal. 164, 56 Pac. 770; *Kruger v. Western F. & M. Ins. Co.* 72 Cal. 91, 13 Pac. 156; *Crouse v. Hartford F. Ins. Co.* 79 Mich. 249, 44 N. W. 496; *Improved Match Co. v. Michigan Mut. F. Ins. Co.* 122 Mich. 258, 80 N. W. 1088; *Lamberton v. Connecticut F. Ins. Co.* 39 Minn. 129, 1 L. R. A. 222, 39 N. W. 76; *Anderson v. Manchester F. Assur. Co.* 59 Minn. 182, 28 L. R. A. 609, 60 N. W. 1095, 63 N. W. 241; *Reaper Ins. Co. v. Jones*, 62 Ill. 458; *Hancock Mut. L. Ins. Co. v. Schlink*, 175 Ill. 284, 51 N. E. 795; *Phenix Ins. Co. v. Caldwell*, 187 Ill. 73, 58 N. E. 314; *Bartlett v. Fireman's Fund Ins. Co.* 77 Iowa, 155, 41 N. W. 601; *Western Assur. Co. v. Mo-Alpin*, 23 Ind. App. 220, 55 N. E. 119; *Hobkirk v. Phenix Ins. Co.* 102 Wis. 13, 78 N. W. 160; *St. Clara Female Academy v. Northwestern Nat. Ins. Co.* 98 Wis. 257, 73 N. W. 767; *Cole v. Union Cent. L. Ins. Co.* 22 Wash. 26, 47 L. R. A. 201, 60 Pac. 68; *Hart v. Niagara F. Ins. Co.* 9 Wash. 620, 27 L. R. A. 86, 38 Pac. 213; *Thackery Min. & Smelting Co. v. American F. Ins. Co.* 62 Mo. App. 293; *Flournoy v. Traders' Ins. Co.* 80 Mo. App. 655; *Parsons v. Knoxville F. Ins. Co.* 132 Mo. 583, 31 S. W. 117, 34 S. W. 476; *McGonigle v. Susquehanna Mut. F. Ins. Co.* 168 Pa. 1, 31 Atl. 868; *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369, 12 S. W. 915; *Hartford F. Ins. Co. v. Keating*, 86 Md. 130, 38 Atl. 29; *Pope v. Glens Falls Ins. Co.* 130 Ala. 356, 30 So. 496; *Western Assur. Co. v. Phelps*, 77 Miss. 625, 27 So. 745; *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 So. 13; *Gandy v. Orient Ins. Co.* 52 S. C. 224, 29 S. E. 655; *Wilson v. Commercial Union Assur. Co.* 51 S. C. 540, 29 S. E. 245; *Coucell v. Phenix Ins. Co.* 126 N. C. 684, 36 S. E. 184; *London & L. Ins. Co. v. Gerteisen*, 106 Ky. 815, 51 S. W. 617; *Niagara F. Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789; *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70, 23 Pac. 637; *Spalding v. New Hampshire F. Ins. Co.* 71 N. H. 441, 52 Atl. 858; *Hilton v. Phenix Assur. Co.* 92 Me. 272, 42 Atl. 412; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 428; *Pennsylvania F. Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. 55; *Phenix Ins. Co. v. Searles*, 100 Ga. 97, 27 S. E. 779; *American Cent. Ins. Co. v. Donlon*, 16 Colo. App. 416, 60 Pac. 249; *Farmers' & M. Ins. Co. v. Nixon*,

2 Colo. App. 265, 30 Pac. 42; *Kahn v. Traders' Ins. Co.* 4 Wyo. 419, 34 Pac. 1059; *Osborne v. Phenix Ins. Co.* 23 Utah, 428, 64 Pac. 1103.

In some jurisdictions it is held that the conditions restricting the power of the agent to waive provisions of the policy have no reference to conditions in the policy avoiding the contract in its inception. *Wood v. American F. Ins. Co.* 149 N. Y. 382, 44 N. E. 80; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364, 20 N. E. 77; *Rickey v. German Guarantee Town M. F. Ins. Co.* 79 Mo. App. 485; *Crouse v. Hartford F. Ins. Co.* 79 Mich. 249, 44 N. W. 496. Courts taking this view hold that the provision as to waiver only limits the power of the agent to waive conditions of the policy after it attaches, and not the power of the agent to make a contract in the first instance. Other courts hold that a provision against waiver otherwise than in writing may itself be waived, and that this waiver may be oral. *Phenix Ins. Co. v. Hart*, 149 Ill. 513, 36 N. E. 990; *German Ins. Co. v. Gray*, 43 Kan. 497, 8 L. R. A. 70, 23 Pac. 637; *Orient Ins. Co. v. McKnight*, 197 Ill. 190, 64 N. E. 339; *German-American Ins. Co. v. Humphrey*, 62 Ark. 348, 35 S. W. 428; *Western Assur. Co. v. Williams*, 94 Ga. 128, 21 S. E. 370; *Pennsylvania F. Ins. Co. v. Faires*, 13 Tex. Civ. App. 111, 35 S. W. 55; *Kahn v. Traders' Ins. Co.* 4 Wyo. 419, 34 Pac. 1059. This court took the same position in *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 559, 88 N. W. 799. Other courts hold that such a provision is invalid on the ground that it is, in effect, a limitation of the power of the corporation itself to waive provisions in its own contracts, since the corporation can act only through agents. *Lamberton v. Connecticut F. Ins. Co.* 39 Minn. 129, 1 L. R. A. 222, 39 N. W. 76. In other jurisdictions the position is taken that issuance and delivery of the policy without objection, and with knowledge on the part of the agent of facts which would render the policy invalid, is of itself a waiver by the company of the condition against parol waiver, since the company cannot take the benefit of a contract made by its agent, and at the same time escape the burden thereof. *Home Ins. Co. v. Stone River Nat. Bank*, 88 Tenn. 369, 12 S. W. 915; *McGonigle v. Susquehanna Mut. F. Ins. Co.* 168 Pa. 1, 31 Atl. 868; *American F. Ins. Co. v. First Nat. Bank*, 73 Miss. 469, 18 So. 931; *Liverpool & L. & G. Ins. Co. v. Ende*, 65 Tex. 118; *Davis v. Phenix Ins. Co.* 111 Cal. 409, 43 Pac. 1115.

Finally, it has been suggested that failure to strike out the clause violated by facts of which the agent had knowledge, or to indorse the written consent, should be treated as a waiver. *Devine v. Home Ins. Co.* 32 Wis. 471. From the very nature of the contract of insurance, it is doubtless essential that there be the utmost good faith on the part of the insured; and insurers are compelled to take great precautions to avoid imposition, and to obtain the proper data with reference to which they may determine the character of the risk which they assume. 60 L. R. A.

For these reasons it is proper that the court should not merely enforce provisions in policies designed to protect the insurer in such respects, but the courts would be justified in dealing with provisions of that character somewhat liberally if so drawn as to operate no further. But insurers have to deal, not only with fraud and imposition on the part of those who insure, but with carelessness, and even dishonesty, on the part of those whom they procure to act as their agents. Excessive zeal to procure business leads agents who are paid by commissions to do things in the stress of competition which their employers are not entirely willing to sanction; and the provisions inserted in policies with which courts have had to deal in the past have been designed, manifestly, quite as much to avoid responsibility on the part of the company for acts of its agents as to prevent imposition on the part of those whom the company insured. In *Union Mut. L. Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. ed. 617, Mr. Justice Miller made some characteristically sensible remarks upon this subject, which have been quoted frequently. As he says, the reports of judicial decisions are filled with the efforts of companies to establish the doctrine that they can stimulate agents to great activity in procuring contracts of insurance, and pay them commissions on the premiums obtained, and yet limit their responsibility for the acts of these agents substantially to the simple receipt of the premium and delivery of the policy. In consequence, there has been a contest between the courts on the one hand and counsel for insurance companies on the other, the latter devising skillfully framed clauses and provisions, and the former largely thwarting the purpose of these clauses by construing them strictly against the insurer. It cannot be denied that not a little subtlety has been displayed on both sides of this contest. But it must not be overlooked that the companies are engaged in an endeavor to circumvent well-established principles of the law of agency, arising upon sound policy; and there is much justification for the determination of courts that these settled doctrines of the law shall not be contracted out of existence lightly.

One principle of the law of agency which insurers have steadily sought to avoid is that the knowledge of the agent is the knowledge of the principal. The general doctrine is that notice communicated to or knowledge acquired by the officers or agents of a corporation, when acting in their official capacity or within the scope of their agency, is notice to or knowledge of the corporation. It is said that there are but three exceptions—matters which the agent has forgotten entirely or may have forgotten under the circumstances of the case, matters which for special reasons he could not impart to his principal, and matters which the previous conduct of the agent or the fact that he is engaged in some fraud upon the principal make it certain that he will conceal. 4 Thomp. Corp. § 5192. The application of this rule to insurance companies is well set-

tled. *Fishbeck v. Phenix Ins. Co.* 54 Cal. 422; *Miller v. Hartford F. Ins. Co.* 70 Iowa, 704, 29 N. W. 411; *St. Paul F. & M. Ins. Co. v. Wells*, 89 Ill. 82; *Dick v. Equitable F. & M. Ins. Co.* 92 Wis. 46, 65 N. W. 742; *Pelkington v. Nat. Ins. Co.* 55 Mo. 172; *Phœnia Ins. Co. v. Copeland*, 90 Ala. 386, 8 So. 48; *German Ins. Co. v. York*, 48 Kan. 488, 29 Pac. 586; *Beebe v. Ohio Farmers' Ins. Co.* 93 Mich. 514, 18 L. R. A. 481, 53 N. W. 818; *Tarbell v. Vermont Mut. F. Ins. Co.* 63 Vt. 53, 22 Atl. 533; *Home Ins. Co. v. Gibson*, 72 Miss. 58, 17 So. 13. This court has repeatedly announced the same rule. *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 559, 88 N. W. 779; *Hunt v. State Ins. Co.* (Neb.) 92 N. W. 921, and cases cited. As the corporation can act only through its agents, it might well be a question how far it may contract that it shall not be bound by notice to and knowledge of such agents. It has been suggested that such a provision in a policy would, in effect, be a limitation of the power of the corporation itself. *Lamberton v. Connecticut F. Ins. Co.* 39 Minn. 129, 1 L. R. A. 222, 39 N. W. 76. However this may be, it will be observed that no such stipulation is to be found in the policy in the case at bar. The provision of the policy does not say that notice to the company's agents who are given power to accept risks shall not be notice to the company, but says only that conditions of the policy may not be waived otherwise than in a prescribed manner. It goes without saying that provisions for forfeiture are not favored. *Woodmen Acci. Asso. v. Pratt*, 62 Neb. 673, 55 L. R. A. 291, 87 N. W. 546; *Connecticut F. Ins. Co. v. Jeary*, 60 Neb. 338, 51 L. R. A. 698, 83 N. W. 78; *McMaster v. New York L. Ins. Co.* 183 U. S. 25, 46 L. ed. 64, 22 Sup. Ct. Rep. 10. It has been the settled policy of the courts to construe these provisions against the insurer. Hence, so long as the language of the contract does not preclude the operation of the rule that notice to the agent is notice to the company, the court will not give it such effect. It follows that the condition prohibiting the agent from waiving provisions of the policy otherwise than in the prescribed manner does not take away the duty of the company to take advantage of grounds entailing a forfeiture at the option of the company, when it is chargeable with notice thereof.

Although the policy is conditioned to be void in certain cases, it is well settled that this means voidable at the option of the company. The contract is not wholly void, but the insurer may, if it chooses, insist upon forfeiture under certain conditions. *Hunt v. State Ins. Co.* (Neb.) 92 N. W. 921, and cases cited. This construction of the policy has been assailed as in conflict with the language employed and at variance with the authorities. But it is well sustained by judicial decisions elsewhere. *Hanover F. Ins. Co. v. Dole*, 20 Ind. App. 333, 50 N. E. 772; *Kalmutz v. Northern Mut. Ins. Co.* 186 Pa. 571, 40 Atl. 816; *Schmurr v. State Ins. Co.* 30 Or. 29, 46 Pac. 363; *Horton v. Home Ins. Co.* 122 N. C. 498, 29 S. E. 944; *Stevenson v.* 60 L. R. A.

Phœnia Ins. Co. 83 Ky. 7; *Kingman v. Lancashire Ins. Co.* 54 S. C. 599, 32 S. E. 762; *Bouton v. American Mut. L. Ins. Co.* 25 Conn. 542. The use of "void" in the sense of "voidable" is so common that we see nothing in the language of the policy to militate against such a construction, and it is in entire accord with the disinclination of courts towards forfeitures, and their desire to reach a just and equitable interpretation. It follows that, if the company does not exercise its option to avoid the policy with knowledge of the circumstances giving it that power, and treats the policy as in force, the forfeiture is waived. This is a waiver by the company, not by the agent, and hence is not within the purview of the condition in question. It is said that such a construction of the provisions of the policy as to waiver deprives them of all force. We do not think this is true. An insured would have no standing in court if his case were that the local agent knew of the circumstances entailing a forfeiture, and waived them, where the company, acting on the knowledge of the agent, insisted on a forfeiture. It is true that, when a forfeiture is waived once, it is waived for all time. But the company has limited the power of the agent to waive the forfeiture, and the attempt at waiver by him would not prevent timely action by the company. *German Ins. Co. v. Heiduk*, 30 Neb. 288, 46 N. W. 481, applies to such cases. On the other hand, if the company, notwithstanding it is chargeable with notice of the circumstances entailing a forfeiture, treats the policy as in force, and takes no advantage of such circumstances, an entirely different question is presented. *Hartford F. Ins. Co. v. Landfare*, 63 Neb. 559, 88 N. W. 779. Hence we think the rule as to the admissibility of parol evidence to vary the terms of a written contract has no application to this subject. There is no attempt to show by parol something which is foreclosed by the written agreement of the parties. The attempt is to show by parol that the company knew of the facts and circumstances which entitled it to enforce the provisions of the policy as to forfeiture or not, at its option, and that the company itself, not any particular agent, continued to treat the policy as in force, and declined to exercise such option. For these reasons we think the former adjudications of this court should be adhered to, and, in consequence, that the testimony objected to in the case at bar was admissible.

We come next to the instructions with reference to the claim of waiver. In some respects the wording of these instructions is a trifle extravagant. But the error, if any, in these respects, cannot be said to be prejudicial, so long as the propositions of law announced are sound, and they are stated so as to leave no room for misunderstanding. We are unable to show how the company may take advantage of the provision as to nonpayment of premium in such cases as this. If the agent reports the policy issued and the premium paid, and the amount of the premium is charged to the agent in his

accounts with the company, the latter has no ground of complaint because the agent was willing to advance the premium and give personal credit to the insured. The condition in the policy does not apply to such cases. *Griffith v. New York L. Ins. Co.* 101 Cal. 627, 36 Pac. 113. But, if the agent reported the policy issued, and the premium unpaid, and the company acquiesced, neglecting to insist upon the condition in the policy, it clearly waived such condition. *Slobodisky v. Phenix Ins. Co.* 53 Neb. 816, 74 N. W. 270, and cases cited. Delivery of the policy as a subsisting contract of insurance from a certain date, and charging the insured on the basis of insurance from that date, was a waiver of the printed condition in the policy; and if the company, chargeable with what was known to its agent, acquiesced, and treated the policy as in force, it could not afterwards deny liability. *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 55 N. E. 119. By so holding we do not, as has been asserted, deprive the provision in the policy of all meaning. If due, the premium must be paid, or no risk attaches. If, at the time fixed, it is not paid, the agent cannot waive the condition so as to prevent the company from insisting upon a forfeiture. But in such case it must take advantage thereof. It cannot treat the policy as subsisting, and, when a loss occurs, claim the forfeiture notwithstanding. Whether neglect to take any steps with reference to the policy, allowing the insured to rest in the belief that he is protected, would, of itself, amount to a waiver, we need not decide. In this case, at the appointed time, the money was paid to the agent, and in due course he accounted for it to the company. Receiving the premium after destruction of all the insured property, so that nothing remains to which insurance might attach, waives a provision that the insurer shall not be liable for a loss occurring before payment of the premium. *Johnston v. Phelps County Farmers' Mut. Ins. Co.* 63 Neb. 21, 56 L. R. A. 127, 88 N. W. 142. It is true the money was sent back to the agent afterwards. But no one at any time paid or tendered it back to Mr. Shader. Something more than a mere return to the agent with instructions which have never been executed was necessary. The company had the duty of seeing that the money was restored, or at least tendered. It was not Mr. Shader's duty to search for the representative of the company who might happen to have it. Cases where a person has assumed to act as agent without authority, such as *Turner v. Brooks*, 2 Tex. Civ. App. 451, 21 S. W. 404, are not in point. In this case the agent had a general authority to receive and collect premiums.

The other assignments of error require but brief notice. The evidence as to the amount of property destroyed is in sharp conflict. The chief of the fire department and several firemen gave testimony tending to show that little or nothing could have been lost. On the other hand, there is no little evidence from credible witnesses to the contrary. It is contended on behalf of the 60 L. R. A.

plaintiff that the goods were so light, and so inflammable in character, that almost nothing remained when the firemen arrived, and that such a hypothesis accords with the evidence showing what was in the building shortly before the fire, with the testimony of a bystander as to what he saw when the fire broke out, and with evidence as to fragments found in the debris the next morning. While it must be confessed that the evidence is not entirely satisfactory, we cannot say that the hypothesis suggested is entirely unreasonable, nor that the jury had no right to adopt it. The question was for them, and we have no authority to disturb it in such a case. With respect to the alleged misconduct, the trial court found against the defendant upon conflicting affidavits. We see no reason to disturb its ruling. *Sang v. Beers*, 20 Neb. 365, 30 N. W. 258; *Everton v. Esgate*, 24 Neb. 235, 38 N. W. 794. The instruction directing the jury to "do substantial justice" between the parties is not to be commended. But, taken as a whole, we do not consider it prejudicial error. After directing the jury to retire, and choose a foreman, the court told them to determine upon a verdict "solely from the evidence in the case, applying the law as given in these instructions," and thereby "do substantial justice between the parties." Of course, it is for the law to determine what is just, and the jurors are merely to say what are the facts to which the legal standards of justice are to be applied. Juries, as a rule, need no encouragement to take such a line as they think will lead to a just result. But here they were told to do so solely by means of the evidence and the rules of law laid down by the court. They can hardly have supposed they were at liberty to go out of the evidence, or go counter to the law as declared in the instructions, in the supposed interests of substantial justice.

We recommend that the judgment be affirmed.

Barnes and Oldham, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

City of LINCOLN, *Pff. in Err.*,

v.

FIRST NATIONAL BANK OF LINCOLN.

(.....Neb.....)

* 1. The statute of limitations does

*Headnotes by HASTINGS, C.

NOTE.—For a case holding that notice to the purchaser of premises of a nuisance thereon is not necessary to render him liable for injuries caused thereby, see *Leaban v. Cochrane* (Mass.) 53 L. R. A. 891.

As to liability of abutting owner generally for injuries caused by stepping into coal hole in sidewalk, see *Hawver v. Whalen* (Ohio) 14 L. R. A. 828; *Lorenzo v. Wirth* (Mass.) 40 L. R. A. 347; and *West Chicago Masonic Assn. v. Cohn* (Ill.) 55 L. R. A. 235.

not begin to run against an action on a lot owner's liability over to a city for a judgment for injuries growing out of a defective sidewalk until the city's liability is fixed by law, or by admission and payment on its part.

2. Judgment against the city in an action, of which the lot owner has notice, is conclusive upon the latter as to the fact, cause, and extent of the injury.
3. Such judgment is not conclusive as to the responsibility of the lot owner for such cause.
4. A purchaser of a lot at sheriff's sale, who does not appear to have obtained any possession or control of the premises, except such as arises constructively from the delivery and recording of a sheriff's deed, is not responsible to the city, which has paid a judgment for injuries received by one falling into a negligently constructed coal hole in front of such lot three weeks after the issuance of the sheriff's deed, and while the former owner is still in possession.

(February 4, 1903.)

ERROR to the District Court for Lancaster County to review a judgment in favor of defendant in an action brought to recover the amount which plaintiff had been compelled to pay for injuries caused by the unsafe condition of a sidewalk in front of defendant's property. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Measrs. Edmund C. Strode and D. J. Flaherty, for plaintiff in error:

Recovery in this action could be had at common law.

The judgment in the case against the city is conclusive on certain facts in issue.

Port Jervis v. First Nat. Bank, 96 N. Y. 550; 2 Dill. Mun. Corp. §§ 1034, 1035; *Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720; *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735; *Severin v. Eddy*, 52 Ill. 189; *Canandaigua v. Foster*, 156 N. Y. 354, 41 L. R. A. 554, 50 N. E. 971; *Veazie v. Penobscot R. Co.* 49 Me. 119; *Robbins v. Chicago*, 4 Wall 657, 18 L. ed. 427.

No notice of the defect was required, and no such request to remedy it was necessary.

Leahan v. Cochran, 178 Mass. 566, 53 L. R. A. 891, 60 N. E. 382; *Matthews v. Missouri P. R. Co.* 26 Mo. App. 75; *Morgan v. Illinois & St. L. Bridge Co.* 5 Dill. 96, Fed. Cas. No. 9,802.

The grantee has no right to assume any of the facts which lie at the foundation of its right to notice. It is notified by law that its grantor could acquire no right to maintain the nuisance from any person, or from any authority, or by any means, and that it, as grantee, could not, under any circumstances, lawfully continue such interference or obstruction of the public right.

Mills v. Hall, 9 Wend. 315, 24 Am. Dec. 160; *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Irwin v. Sprigg*, 6 Gill, 200, 46 Am. Dec. 667; *Copland v. Hardingham*, 3 Camb. 398; *Canandaigua v. Foster*, 156 N. Y. 354, 41 L. R. A. 554, 50 N. 60 L. R. A.

E. 971; *Dyggert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575; *Wickwire v. Angola*, 4 Ind. App. 253, 30 N. E. 917; *Wood, Nuisances*, § 266, p. 278.

The liability of the defendant in this case does not depend simply on the power of the state or the municipality to require the abutting property owner to keep the sidewalk in repair. There would have been no defect in the sidewalk, and no injury suffered, except for (1) the excavation made under the sidewalk, (2) the coal hole cut through the sidewalk, (3) and the defective covering, put there by the defendant's predecessor in title, and continued there and maintained in connection with the property by the defendant.

Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427, 2 Black, 418, 17 L. ed. 299; *Canandaigua v. Foster*, 156 N. Y. 354, 41 L. R. A. 554, 50 N. E. 971; *Calder v. Smalley*, 66 Iowa, 219, 55 Am. Rep. 270, 23 N. W. 638; *Port Jervis v. First Nat. Bank*, 96 N. Y. 550; *Dickson v. Hollister*, 123 Pa. 421, 16 Atl. 484; *Milford v. Holbrook*, 9 Allen, 17, 85 Am. Dec. 735; *Congreve v. Smith*, 18 N. Y. 79; *Congreve v. Morgan*, 18 N. Y. 84, 72 Am. Dec. 495; *Creed v. Hartmann*, 29 N. Y. 591, 86 Am. Dec. 341; *Dyggert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 575; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720; *Clifford v. Dam*, 81 N. Y. 52; *Irwin v. Sprigg*, 6 Gill, 200, 46 Am. Dec. 667; *Wickwire v. Angola*, 4 Ind. App. 253, 30 N. E. 917; *Leahan v. Cochran*, 178 Mass. 566, 53 L. R. A. 891, 60 N. E. 382; *Durant v. Palmer*, 29 N. J. L. 544; *Jenne v. Sutton*, 43 N. J. L. 257, 39 Am. Rep. 578; *Morton v. Smith*, 48 Wis. 265, 33 Am. Rep. 811, 4 N. W. 330; *Barry v. Terkildsen*, 72 Cal. 254, 13 Pac. 657; *Smith v. McDowell*, 148 Ill. 51, 22 L. R. A. 393, 35 N. E. 141; *Nelson v. Godfrey*, 12 Ill. 20; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *Severin v. Eddy*, 52 Ill. 189; *Stevenson v. Joy*, 152 Mass. 45, 25 N. E. 78; *Delory v. Canny*, 144 Mass. 445, 11 N. E. 656; *Morris v. Woodburn*, 57 Ohio St. 330, 48 N. E. 1097; *Lowell v. Boston & L. R. Corp.* 23 Pick. 24, 34 Am. Dec. 33; *Davenport v. Ruckman*, 37 N. Y. 568; *Stoughton v. Porter*, 13 Allen, 191; *Pfau v. Reynolds*, 53 Ill. 212; *Shipley v. Fifty Associates*, 101 Mass. 251, 3 Am. Rep. 348; *Morris Canal & Bkg. Co. v. Ryerson*, 27 N. J. L. 457; *Veazie v. Penobscot R. Co.* 49 Me. 119.

A license to maintain the excavation under the walk could not be construed as a license for carelessness.

Port Jervis v. First Nat. Bank, 96 N. Y. 550; *Jennings v. Van Schaick*, 108 N. Y. 530, 15 N. E. 424; *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Clifford v. Dam*, 81 N. Y. 62; *Wood, Nuisances*, § 266.

The city did not sustain damages until the judgment became final and was paid by the city. Suit was brought in less than a year from the time the judgment was affirmed in the supreme court. The statute of limitations had not run.

Veazie v. Penobscot R. Co. 49 Me. 119; *Minick v. Huff*, 41 Neb. 516, 59 N. W. 795; *Oppman v. Steinbrenner*, 17 Mont. 369, 42 N.

W. 1015; *Kramer v. Carter*, 136 Mass. 504; *Illies v. Fitzgerald*, 11 Tex. 417; *Hikes v. Crawford*, 4 Bush. 19; *Burton v. Rutherford*, 49 Mo. 255; *Reeves v. Pulliam*, 66 Tenn. 119; *Thompson v. Stevens*, 2 Nott. & M'C. 493; 3 Pom. Eq. Jur. §§ 1417-1419.

Messrs. W. E. Blake, J. W. Deweese, and Frank E. Bishop, for defendant in error:

If there is any liability of defendant in this case it is statutory; and, in the absence of a statute imposing the obligation on defendant, it is not liable.

Dill. Mun. Corp. 4th ed. § 1012; *Keokuk v. Independent Dist.* 53 Iowa, 352, 36 Am. Rep. 226, 5 N. W. 503; *Hartford v. Talcott*, 48 Conn. 525, 40 Am. Rep. 189; *Taylor v. Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728; *Rochester v. Campbell*, 123 N. Y. 405, 10 L. R. A. 393, 25 N. E. 937; *Woodward v. Bosobel*, 84 Wis. 226, 54 N. W. 332; *Flynn v. Canton Co.* 40 Md. 312, 17 Am. Rep. 603; *Moore v. Gadsden*, 93 N. Y. 12; *Davis v. Omaha*, 47 Neb. 848, 66 N. W. 859; *Omaha v. Jensen*, 35 Neb. 68, 52 N. W. 833; *Beatrice v. Reid*, 41 Neb. 214, 59 N. W. 770.

The repealing of an act without a saving clause obliterates the statute as completely as though it had never been passed.

Dillon v. Linder, 36 Wis. 344; *Van Inwagen v. Chicago*, 61 Ill. 31; *Bennet v. Harcus*, 1 Neb. 419; *Com. v. Standard Oil Co.* 101 Pa. 150.

Although coal holes are for the benefit of abutting property the owner or tenant cannot be held liable for damages on account of the same (in absence of statutory liability) unless he has been guilty of affirmative actual negligence.

Ray, *Negligence of Imposed Duties*, p. 108; *Leonard v. Storer*, 115 Mass. 86, 15 Am. Rep. 76; *Gridley v. Bloomington*, 68 Ill. 47; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Fisher v. Thirkell*, 21 Mich. 1, 4 Am. Rep. 422; *Wolf v. Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672, 4 N. E. 188; *Readman v. Conway*, 126 Mass. 374; *Eastman v. Amoskeag Mfg. Co.* 44 N. H. 144, 82 Am. Dec. 201; *Johnson v. Lewis*, 13 Conn. 303, 33 Am. Dec. 405; *Moak's Underhill*, Torts, 253-255; *Woram v. Noble*, 41 Hun, 398.

A statute compelling a property owner to build or repair sidewalks, or to keep them free from obstructions other than nuisances committed by himself is unconstitutional and void.

Noonan v. Stillcater, 33 Minn. 198, 53 Am. Rep. 23, 22 N. W. 444; *Jansen v. Atchison*, 16 Kan. 358; *Gridley v. Bloomington*, 68 Ill. 554, 30 Am. Rep. 566; *Chicago v. Crosby*, 111 Ill. 539.

Hastings, C., filed the following opinion:

In this case the plaintiff filed in the district court of Lancaster county, January 24, 1901, a petition setting out its incorporation, and that of the defendant bank; that the latter, November 1, 1894, and long prior thereto and thereafter, owned lot 13 in block 34 in plaintiff city, and maintained for its own use and benefit a vault under the sidewalk, which was a public sidewalk of the

city on one of its principal thoroughfares, with a large opening or coal hole through the sidewalk, constructed by defendant's grantors, and maintained by it for its own benefit; that the lid covering this hole was defective, unfastened, and insecure, and subject to displacement by any person stepping upon the edge of it, and was not of sufficient size and weight to securely cover the hole; that these facts were well known to the defendant; that about November 1, 1894, Mrs. Pirner stepped upon the coal-hole cover, and, by reason of its defective construction, fell through, and sustained serious damages thereby, and because of such injuries instituted an action against the plaintiff, in which she recovered the sum of \$4,000 damages and \$227.26 costs; that the city prosecuted error to this court, where the judgment was affirmed on February 9, 1900 (81 N. W. 846), and additional costs in the sum of \$40.80 court costs, and \$20 for printing were incurred; that on September 10, 1900, the city paid the judgment, interest, and costs in full, amounting to \$5,256.12, and incurred expenses, including costs of the supreme court, and procuring bill of exceptions prepared in the defense of said action, in the sum of \$349.86; that the injuries to Mrs. Pirner were caused by the defendant's unlawfully maintaining its excavation under, and its coal hole through, the sidewalk in an unsafe, dangerous, and defective condition, to the plaintiff's damage in the sum of \$5,605.98. The defendant answered, admitting the corporate character of the parties, and the recovery of judgment by Mrs. Pirner against the plaintiff, and the error proceedings to this court, and denied the other allegations. A general denial was filed to this answer, and on the issues so made trial was had to the court, a jury being waived; and the district court found for the defendant, and dismissed the action. Motion for new trial was overruled. From this judgment the plaintiff brings error.

The plaintiff claims that, under the facts in this case, the defendant is liable over to the city (1) at common law; (2) under the city charter, which at the time of the accident provided as follows: "It is hereby made the duty of all real estate owners and occupants to keep the sidewalk alongside or in front of the same in good repair, and free from snow and ice and other obstructions, and they shall be liable for all damages for injury occasioned by reason of the defective condition of such sidewalk;" and (3) under the ordinance of the city providing for excavations beneath sidewalks, as follows: "No person shall be allowed to keep or use for vaults, areas, or other purposes, the space beneath the sidewalk included within the sidewalk lines of any street within the city unless a permit therefor shall have been obtained from the city council; such permit to continue and be issued only upon such condition that the party receiving the same shall, as compensation for the privilege granted by such permit, maintain and keep in repair a sidewalk over such space in-

tended to be used for vaults, areas, or other purposes and pay all damages that may be sustained by any person by reason of said sidewalk being in a defective or dangerous condition." The bank asserts that there is no common-law liability on its part, for lack of any knowledge or notice on its part of the defective condition of this coal hole; that no liability attaches to it as a mere owner, for a mere passive neglect; that defendant's possession of the property was only constructive, by reason of a sheriff's deed bearing date about three weeks before Mrs. Pirner's accident, and no actual knowledge on the part of the bank, or demand upon it for repairs, appears in the evidence; that there was no statutory liability, because in the year 1899, a year and more before the institution of this action, the statute above quoted was repealed; that any attempt to create such a liability by ordinance was unconstitutional and void; and that the right of action is barred by the statute of limitations, because the injury was sustained by Mrs. Pirner in 1894,—more than six years before the commencement of the action.

The bank appears clearly to have had notice of the pendency of Mrs. Pirner's action against the city, and to have refused to take any part in it. Under the admissions of the answer, therefore, the bank is concluded as to the existence of the trouble of which she complained, a defective lid on this coal hole, as to her injury from that cause, and as to the amount of damages sustained by her. The bank, of course, is not concluded by that adjudication as to the question of its own responsibility for the condition of the coal hole. Dill. Mun. Corp. § 1035.

The sole questions in this case, then, are as to the responsibility of defendant merely because it was the owner of this coal hole, and as to the statute of limitations. If either is found in favor of the defendant, the judgment must be affirmed. So far as the latter question is concerned, no authority whatever is cited by the defendant, and only some cases on sureties' rights to contribution and officers' claims for indemnity by plaintiff. It seems clear, however, that, if there exists any right on the part of the city to recover over against the bank because of the injury to Mrs. Pirner, it could only be when the city's liability toward Mrs. Pirner became fixed. The wrong, so far as the city is concerned, only became actionable when damage to the city accrued, and that was only when a final judgment in Mrs. Pirner's favor was rendered. Any attempt to recover of the bank on plaintiff's part before that time would have been futile, and the statute would not commence to run, as against a right of action, until such right of action was in existence. Evidently the city could not assert its liability to Mrs. Pirner if a case against the bank so long as it was denying such liability in Mrs. Pirner's own action in the same court, or in this one on review. It will not be necessary to discuss further the question of the statute of limitations. The city's claim here is for indemnity against

liability on Mrs. Pirner's judgment, not for the injury to Mrs. Pirner.

It remains to see whether there is any right to charge defendant with responsibility for the condition of the coal-hole lid, either at common law, by statute, or by ordinance of the city. The common-law liability of the defendant is the claim most strongly urged by plaintiff. It rests, as above stated, solely on the ownership of the property on the defendant's part by virtue of a sheriff's deed bearing date about three weeks before Mrs. Pirner's fall. One Carr, as owner, had built the walk and coal hole some years before, and was still in possession. In what capacity he was still holding, does not appear. There is nothing to show possession by defendant, except the sheriff's deed, and its recording on October 11, 1894. In that deed, Carr is named as one of the defendants whose rights were conveyed by it. The injury occurred November 1, 1894. The sole cause alleged is the loose lid of the coal hole, so that it slipped aside and let the woman's foot through and caused a fall, with bruising of the foot and leg, and some injury of the back. The excavation and hole in the walk had been there since 1883, in substantially the same condition. The walk and coal hole had been made under the inspection of the city's street commissioner. Not so much as knowledge of the coal hole's existence on the part of this defendant, whose sheriff's deed is dated twenty-three days, and recorded twenty days, before this accident, appears. It is clear that if the defendant is liable at common law, it must be for maintaining a nuisance in a public street. It may be taken as settled that an unauthorized coal hole in a sidewalk would be a nuisance *per se*. *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603; *Robinson v. Mills*, 25 Mont. 391, 65 Pac. 114. Both of the above cases hold, with seeming good reason, that an unsafe and improperly secured authorized excavation is as much a nuisance as is an unauthorized one. No authority for maintaining a coal hole is pleaded here, and the finding in Mrs. Pirner's case would be conclusive as to its bad condition if there was. But can defendant, under the evidence here, be claimed to have been conclusively shown to be guilty of maintaining it, so that the trial court's finding otherwise must be reversed? The bank had only a sheriff's deed, and the defendant in the foreclosure action was still in possession. "A party who comes into possession of lands as grantee or lessee, with a nuisance already existing upon them, is not, in general, liable for the continuance of the nuisance until his attention has been called to it, and he has been requested to abate it." *Cooley, Torts*, 1st ed. p. 611. This rule is put upon the ground, in the first place, that the purchaser has a right to assume as to other persons that a right to maintain it has been acquired. It is also put on the ground that the purchaser ought not to be held liable for consequences of which he was ignorant, and which he did not intend. *Johnson v. Lewis*, 13 Conn. 307, 33 Am. Dec. 405.

It is conceded by plaintiff that such is the general rule, but it is urged that it has no application to a public nuisance that results in an obstruction to the streets. The rule requiring at least notice to the purchaser of the existence of a nuisance, before his liability commences, is stated in Pollock on Torts, without the indication of any exception, and based on *Penruddock's Case*, 5 Coke, 100b. In Cooley on Torts, at the place cited, it is said to have no application to cases where a personal duty or obligation is cast upon the owner by law, or where the nuisance is immediately dangerous to life or health. It would seem reasonable to hold that it would not apply where the owner's suffering the nuisance to continue would amount to a failure to perform some duty owed to the public, or apply to the actual infliction of a wrong. The three cases cited and relied upon by plaintiff are of this kind. *Leahan v. Cochran*, 178 Mass. 566, 53 L. R. A. 891, 60 N. E. 382, is distinctly of this kind. Defendant purchased and thereafter occupied a house whose gutter discharged water on the sidewalk. The water froze, and plaintiff was injured by the ice. The defendant was held liable because of a duty to keep obstructions off the walk, and no prescriptive right to maintain a dangerous situation there was acquirable by use or purchase. *Matthews v. Missouri P. R. Co.* 26 Mo. App. 75, is another case of an obstruction in a highway, and liability is said to result for the same reason to one who was openly maintaining the obstruction which caused the injury. Defendant is held, not as owner of the premises, but as "the continuer of the nuisance." The case of *Morgan v. Illinois & St. L. Bridge Co.* 5 Dill. 96, Fed. Cas. No. 9,802, is cited by the Missouri appellate court and by the plaintiff here. The liability in the latter case is held to result because the receiver and the road which he represented had maintained for three years, as lessees of another corporation, a 14-foot cut in a crowded thoroughfare, without railing or protection. It was held that the fact of the premises being in such condition when leased was no protection. A duty to protect passers against their excavation arose when they commenced to use it. These cases are very far from showing a duty on defendant's part to protect passers or the city from injury because of this coal hole. It seems clear that to bring the defendant within the exception to the rule requiring that purchasers have notice of the existence of a nuisance, to render them liable, such possession and control of these premises as to cast upon it the duty of actively providing for the public safety must be shown. Such a duty is found and indicated in *Irvine v. Wood*, 51 N. Y. 224, 10 Am. Rep. 603, where it is held to devolve upon both landlord and tenants to see that an excavation under the street was made safe for passers. The numerous decisions as to the respective liability of lessor and lessee in such cases show that the owner's liability in such cases, where it exists, is not as owner, but as creator or continuer of a nuisance. They may be found collected 60 L. R. A.

and discussed in *Plumer v. Harper*, 3 N. H. 88, 14 Am. Dec. 333, or more recently and fully in *Martin v. Pettit*, 117 N. Y. 118, *sub nom. Wasson v. Pettit*, 5 L. R. A. 794, 22 N. E. 566, and in the extended notes to those cases. Such presumption of use and control as the three-weeks possession of a sheriff's deed might raise is rebutted by the fact that the foreclosure defendant was still in possession. The liability as owner which is sought to be established by means of the statute before quoted cannot attach. As before stated, a right of action accrued in favor of the city only when its liability to Mrs. Pirner became fixed. This was after the repeal of the statute in question, which took place in 1899. The affirmance of Mrs. Pirner's judgment was in 1900. The general saving clause in chapter 88, § 2, Comp. Stat. relates only to causes of action accrued before such repeal. The liability under the city ordinance is against the person who is "allowed to keep or use" a vault or excavation beneath the street. As the evidence in this case entirely fails to show that defendant kept or used this excavation or coal hole, there can be no liability under this ordinance. Indeed, the fact that the excavation and coal hole were outside of the defendant's lot, and entirely on the city's land, and could not be maintained except with the consent of the city, is of itself a sufficient answer to any claim against defendant merely as owner of lot 13. Doubtless possession, control, and use of these premises would make defendant responsible for the safety of any excavation under the city's streets, at least to the extent of taking all reasonable precaution to make it so. *Martin v. Pettit*, 117 N. Y. 118, *sub nom. Wasson v. Pettit*, 5 L. R. A. 794, 22 N. E. 566. No such control appears here.

It is recommended that the judgment of the district court be affirmed.

Kirkpatrick and Lobingier, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed.

HOME FIRE INSURANCE COMPANY

v.

Charles J. BARBER, Appt.

(.....Neb.....)

- * 1. Subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation.
- 2. Such a stockholder ought not to be allowed to sue, unless the mismanagement or its effects continue and are injurious

*Headnotes by POUND, C.

NOTE.—For another case in this series as to the right of a purchaser of stock to complain of prior wrongful acts or mismanagement of the corporation, see *Clark v. American Coal Co.* (Iowa) 17 L. R. A. 557.

to him, or it affects him specially and peculiarly in some other manner.

3. Stockholders who have acquired their shares and their interest in the corporation from the alleged wrongdoers, and through the prior mismanagement, have no standing to complain thereof.
4. Stockholders, as such, have no title to the corporate property which they may convey or encumber in their own name; but this is only another way of saying that the corporation must act through its proper agents and in the prescribed way.
5. Where a corporation is proceeding at law, or where it is asserting a title to property, or the title to property is involved, the corporation is regarded as a person separate and distinct from its stockholders, or any or all of them.
6. But where it is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery; and if the stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf and for their advantage, the corporation will not be permitted to recover.
7. The proposition announced in the fourth paragraph of the syllabus in *Fitzgerald v. Fitzgerald & Mallory Construction Co.* 59 N. W. 838, 41 Neb. 374, was in effect, if not expressly, retracted on rehearing in *Fitzgerald v. Fitzgerald & Mallory Construction Co.* 62 N. W. 899, 44 Neb. 473, and is disapproved.
8. A plaintiff must recover on the strength of his own case, not on the weakness of the defendant's case. It is his right, not the defendant's wrongdoing, that is the basis of recovery.
9. Where service under a contract of employment for a fixed period continues after such period has expired, it is presumed to be under the same contract; but this presumption must yield to evidence showing a change of terms.
10. The general manager of a corporation, after expiration of a contract fixing his salary at \$5,000 per annum, continued in the same employment, without any new agreement, and afterwards voluntarily reduced his salary to \$3,000 per annum, drawing it from month to month thereafter on that basis for many years, until he gave up the office. After the original contract, no action was taken by the directors with reference to his salary; but the evidence that he took the less sum from time to time in full payment was clear and convincing. *Held*, that a judgment for back salary at the rate of \$2,000 per annum could not be sustained.

(February 17, 1903.)

APPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought to recover damages for mismanagement by defendant of the plaintiff corporation, and to recover salary which he had taken in excess of the amount to which he was entitled under contract. *Reversed*.

The facts are stated in the Commissioner's opinion.
60 L. R. A.

Messrs. Byron G. Burbank and Hallock F. Rose, for appellant:

The proof sufficiently shows the existence of an unlawful scheme of defendants for the use of the company's funds in carrying on a private enterprise and speculation, that the preconceived plan was executed in all its details, and that a large profit was realized by the unlawful investment of the company's funds.

The presumption of equity is against the validity of transactions between principal and agent, and the burden of proof to establish their validity is upon the agent. The burden is on Barber to show affirmatively payment of collateral loans.

San Pedro Lumber Co. v. Reynolds, 121 Cal. 89, 53 Pac. 410; *Pom. Eq. Jur.* § 956.

The fiduciary character of the defendants as managing officers of the corporation precluded their use of the corporate funds for private speculation.

(*Order v. Plattsmouth Canning Co.* 36 Neb. 548, 54 N. W. 830; *Fitzgerald v. Fitzgerald & M. Constr. Co.* 41 Neb. 445, 59 N. W. 838, 44 Neb. 491, 62 N. W. 899; *European & N. A. R. Co. v. Poor*, 59 Me. 278; *Underhill, Trusts*, 178; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530.

Defendants, by construction of equity, will be adjudged trustees of the profits realized from these unlawful transactions, without regard to the fact of whether, at the precise time of acquiring the shares, they obtained the purchase money from other sources.

Stettinische v. Lamb, 18 Neb. 627, 26 N. W. 374; *Ellis v. Ward*, 137 Ill. 509, 25 N. E. 530; *Jones v. Deater*, 130 Mass. 380, 39 Am. Rep. 459; *Ross v. Hayden*, 35 Kan. 106, 57 Am. Rep. 145, 10 Pac. 554; *Wood v. Rabe*, 96 N. Y. 414, 48 Am. Rep. 640; *Jenkins v. Frink*, 30 Cal. 586, 89 Am. Dec. 134; *Pom. Eq. Jur.* § 1052; *Bent v. Priest*, 86 Mo. 477; *European & N. A. R. Co. v. Poor*, 59 Me. 278; *Fountain Spring Park Co. v. Roberts*, 92 Wis. 345, 66 N. W. 399; *Drury v. Cross*, 7 Wall. 305, *sub nom. Drury v. Milwaukee & S. R. Co.* 19 L. ed. 40.

A corporate office, as such, is not the subject of bargain and sale.

Bent v. Priest, 86 Mo. 477; *McClure v. Low*, 161 N. Y. 78, 55 N. E. 388.

The company's action is not barred, either by acquiescence, or by lapse of time.

Fitzgerald v. Fitzgerald & M. Constr. Co. 41 Neb. 430, 59 N. W. 838; *Pacific R. Co. v. Missouri P. R. Co.* 111 U. S. 520, 28 L. ed. 503, 4 Sup. Ct. Rep. 583.

A sole stockholder of a corporation has no title, legal or equitable, to its property which he can convey by a deed in his own name.

Parker v. Bethel Hotel Co. 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209; *Louisville Bkg. Co. v. Eisenman Bros. & Co.* 94 Ky. 83, 19 L. R. A. 684, 21 S. W. 531, 1049; *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667; *Spurlock v. Missouri P. R. Co.* 90 Mo. 200, 2 S. W. 219; *Syndicate Ins. Co. v. Bohn*, 27 L. R. A. 614, 12 C. C. A. 531, 27 U. S. App. 564, 65 Fed. 165; *Wilde v. Jenkins*, 4 Paige, 482; *Russell v. M'Lellan*, 14 Pick. 63; *England v. Dearborn*, 141 Mass.

590, 6 N. E. 837; *Mathis v. Morgan*, 72 Ga. 525, 53 Am. Rep. 847; *Fitzgerald v. Missouri P. R. Co.* 45 Fed. 812; *Mickles v. Rochester City Bank*, 11 Paige, 118, 42 Am. Dec. 103; *Sellers v. Greer*, 172 Ill. 552, 40 L. R. A. 589, 50 N. E. 246; 1 Thomp. Corp. § 1073; *Morawetz, Priv. Corp.* 2d ed. § 233; *Humphreys v. McKissock*, 140 U. S. 304-315, 35 L. ed. 473-476, 11 Sup. Ct. Rep. 779; *Fitzgerald v. Fitzgerald & M. Constr. Co.* 41 Neb. 429, 59 N. W. 838.

The claim that Barber changed his position on representations of other shareholders, or without knowledge of the facts that determined his own liability to the company, is entirely without foundation.

New Sombbrero Phosphate Co. v. Erlanger, L. R. 5 Ch. Div. 73.

Knowledge of the existence of the right and an intention to relinquish it must concur in order to estop a party by waiver.

Henry & C. Co. v. Fisher, 37 Neb. 207, 55 N. W. 643; *Livesey v. Omaha Hotel Co.* 5 Neb. 50; *Cutler v. Roberts*, 7 Neb. 14, 29 Am. Rep. 371.

The ratification or affirmance of a fraudulent transaction is in effect a new contract to forgive the fraud practised and condone the wrong done, made consciously with such intent and purpose; and, in case fraud is actually established, this defense must stand upon the clearest evidence.

Montgomery v. Pickering, 116 Mass. 227; *Tarkington v. Purvis*, 128 Ind. 187, 9 L. R. A. 607, 25 N. E. 879; *Moxon v. Payne*, L. R. 8 Ch. 881; *Morse v. Royal*, 12 Ves. Jr. 355; *Crouce v. Ballard*, 1 Ves. Jr. 215; *Staley v. Housel*, 35 Neb. 172, 52 N. W. 888.

To make out the defense of estoppel by waiver or acquiescence it is essential for Barber to show that the stockholders all participated in the fraudulent scheme entered into and carried out in the year 1892 for the misappropriation of the funds in the acquisition of the shares formerly held by the Hamilton party, or that they subsequently ratified this transaction.

Morawetz, Priv. Corp. 2d ed. § 249; *Bagshaw v. Eastern Union R. Co.* 7 Hare, 129; *Hazard v. Durant*, 11 R. I. 195; *Brewer v. Boston Theatre*, 104 Mass. 378.

Where the contract of hiring is for a year, and the parties do not disagree, and the service continues, the presumption is that it is under the same contract; but such presumption may be rebutted by evidence of a change of contract.

McCullough Iron Co. v. Carpenter, 67 Md. 555, 11 Atl. 176; *Hale v. Sheehan*, 41 Neb. 102, 59 N. W. 554.

Where the agent is unfaithful to his trust, and abuses the confidence reposed in him, he thereby forfeits his right to claim compensation.

Cleveland & St. L. R. Co. v. Pattison, 15 Ind. 70; *Sea v. Carpenter*, 16 Ohio, 412; *Porter v. Silvers*, 35 Ind. 295; *Sumner v. Reicheniker*, 9 Kan. 322; *Vennum v. Gregory*, 21 Iowa, 328.

Messrs. V. O. Strickler and W. W. Morsman, for respondent:

If the title to the shares had actually 60 L. R. A.

vested, even though the money was afterwards absolutely stolen and used to pay a debt contracted in the acquisition of the title, the shares would not have been impressed with a trust.

Oloott v. Bynum, 17 Wall. 59, 21 L. ed. 570; *Dick v. Dick*, 172 Ill. 578, 50 N. E. 142; *National Bank v. Gilmer*, 117 N. C. 416, 23 S. E. 333; *Jones v. Hughey*, 46 S. C. 193, 24 S. E. 178; *Woodside v. Hewell*, 109 Cal. 481, 42 Pac. 152; *Jacksonville Nat. Bank of Beesley*, 159 Ill. 120, 42 N. E. 165; *State v. Bank of Commerce*, 54 Neb. 728, 75 N. W. 28.

There is no equity in any of the plaintiff's demands, and the doctrine of estoppel applies to each with full force.

1 *Morawetz, Priv. Corp.* 2d ed. § 227.

A sole stockholder will, in equity, be treated as the corporation or not, as the equitable rights of litigants may demand.

Thomp. Corp. § 8403; *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336, 5 Atl. 534; *Union P. R. Co. v. Chicago*, R. I. & P. R. Co. 163 U. S. 564, 41 L. ed. 265, 16 Sup. Ct. Rep. 1173; *Louisville Bkg. Co. v. Eisenman Bros. & Co.* 94 Ky. 83, 19 L. R. A. 684, 21 S. W. 531, 1049; *Barr v. New York, L. E. & W. R. Co.* 125 N. Y. 263, 26 N. E. 146; *Pott v. Schmucker*, 84 Md. 535, 35 L. R. A. 392, 36 Atl. 592; *Des Moines Gas Co. v. West*, 50 Iowa, 16.

There were no causes of action in favor of the entity, and against Barber. Whatever there might have been, for the protection of the rights of other shareholders, they were all extinguished through Barber's acquisition of all the shares of stock; and, when Barber transferred the shares with the schedule of specific assets as all of the assets of the company, the claims now set up, even if they had existed, were excluded.

Morawetz, Priv. Corp. 2d ed. § 265; *Schilling & S. Brewing Co. v. Schneider*, 110 Mo. 83, 19 S. W. 67; *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & T. Co.* 13 Colo. 587, 22 Pac. 954.

The body of stockholders is, in substance, the corporation, estoppels are concurrent as between the stockholders and the corporation; in other words, whatever will estop the stockholders will estop the corporation, and whatever will estop the corporation will estop the stockholders.

Thomp. Corp. § 5269; *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 24 L. ed. 917; *Omaha Bridge Cases*, 2 C. C. A. 174, 10 U. S. App. 98, 51 Fed. 309; *Union P. R. Co. v. Chicago*, R. I. & P. R. Co. 163 U. S. 564-596, 41 L. ed. 265-276, 16 Sup. Ct. Rep. 1173; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328; *Pawson v. Brown*, 10 C. C. A. 135, 27 U. S. App. 49, 61 Fed. 874; *Hammond v. Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418; *Hoyt v. Latham*, 143 U. S. 553, 36 L. ed. 259, 12 Sup. Ct. Rep. 568.

If one person is induced to do an act prejudicial to himself, in consequence of the acts or declarations of another, on which he had a right to rely, equity will enjoin the latter from asserting his legal rights against the tenor of such acts or declarations.

Branson v. Wirth, 17 Wall. 32-42, 21 L. ed. 566-570; *Dickerson v. Colgrove*, 100 U. S. 578-580, 25 L. ed. 618, 619.

Pound, C., filed the following opinion:

The plaintiff is an insurance company, organized in 1884, with a capital stock of \$100,000, divided into 1,000 shares of \$100 each. Its business is conducted by a board of directors, a finance committee, an executive committee, and certain other officers, including a secretary and general manager. It appears that the secretary and general manager, at least down to December, 1899, was at all times interested with the active management and control of the company's affairs, and the president and the remaining officers appear to have given very little, if any, attention thereto. The appellant and principal defendant, Charles J. Barber, was one of the original incorporators of the company, and was a stockholder therein from its organization until December 2, 1899. During that period he was secretary and general manager, one of the directors, and a member of the executive committee. His codefendants, Lovett, Woodman, and Reynolds, were also original incorporators and stockholders, and from time to time from its organization until December 2, 1899, were directors and members of the executive and finance committees. On December, 1899, the defendant Barber entered into a contract with one Funkhouser, whereby he agreed to sell to said Funkhouser all of the shares of the capital stock of said company, except 2 shares, which he was to obtain, if possible, and to procure the resignation of all the officers and a majority of the directors. He also agreed not to engage in the insurance business, directly or indirectly, for a period of three years. By the terms of the contract he was to furnish to Funkhouser a true and complete statement of all the assets and liabilities of the company, and if, upon investigation, the statement of assets and liabilities proved to be correct and satisfactory to Funkhouser, the latter was to pay the sum of \$75,000 for said shares, less \$200 for the 2 shares above mentioned, in case they could not be obtained, and a further sum of \$40,000 as a bonus for obtaining all of the shares of stock and for procuring the resignation of the officers, relinquishing his control of the company, and agreeing not to engage further in the business of insurance. On December 2, 1899, pursuant to said contract, the defendant Barber delivered to said Funkhouser all of the shares of the capital stock of said company, except 8. He also delivered an option contract for 6 of the remaining shares, and subsequently procured and delivered the other 2. In payment therefor he received the sum of \$94,380.60 in cash and \$20,619.40 in assets of the company,—namely, \$12,350 of collateral loans, which he had agreed to accept at the time when the contract of sale was made, and certain other assets, amounting to \$8,269.40, which Funkhouser had refused to accept at the time when the list of assets was under consideration. Accordingly the shares of stock 60 L. R. A.

were transferred on the books of the company, under the direction of Funkhouser, to himself and certain others, his associates in the transaction, and he and his said associates became thereupon, and now are, the only stockholders in the company. None of them had held stock therein theretofore. At the same time, pursuant to the contract, the defendant Barber resigned his office and procured the resignation of the defendants Reynolds, Woodman, and Lovett, and of the other principal officers and directors of the company, and a new board of directors was elected, and new officers took charge. On November 20, 1899, evidently in contemplation of a transfer of all his interest in the corporation, the defendant Barber drew out \$2,200 of the company's moneys upon a claim of unpaid salary. Subsequent to the change in management of the company, this was discovered, and a controversy arose between Barber and the new management with reference thereto, as a result of which suit was brought by the company to recover said sum. Thereupon Barber made a counterclaim for some \$10,000 of salary alleged to be due him and not withdrawn, and as a result of examination and investigation of the company's books with reference to this claim certain irregularities and mismanagement came to light, which were set forth in an amended petition and furnished the principal points of controversy in the case as finally tried.

Thus there are two branches to the case: Upon the one hand, a suit by the corporation to recover the money taken out by Barber as back salary just prior to the time he sold his stock, and certain other moneys which at various times he is alleged to have appropriated wrongfully to his own use; and, on the other hand, a suit to recover for Barber's mismanagement and for profits made by him through the use of the company's money at a time when he stood in a fiduciary relation thereto. The principal mismanagement consisted in borrowing funds of the company to purchase its stock, and in making a profit out of the purchase of the stock and the dividends accruing thereon. At the time the stock was bought with money borrowed from the company, it was worth about \$55 per share. But seven years later, when the defendant Barber sold out his interest in the company, it had come to be worth \$115 per share. During the time dividends had accrued in considerable amounts, and had been paid to and received by Barber. The decree compels Barber to account for the profits and for the dividends, on the ground that the loan of the company's funds and the use of those funds in purchase of the stock was unauthorized, and that the profits and the dividends belonged in equity to the company. Upon the issue as to salary, the court found that Barber was entitled to recover for back salary, as claimed, and applied to the amount found to be due him thereon upon the amounts found due the company by reason of his mismanagement.

The facts with reference to the misman-

agement, as found by the court, are substantially these: In January, 1892, and for some time prior to that date, the stockholders of the company were divided into two factions. The one consisted of the defendants, Barber, Lovett, Reynolds, and Woodman, who held 237 shares, and some other stockholders, not sufficient, however, to constitute a majority. The other faction was controlled by one Hamilton, and held in the aggregate 507 shares. As the controversy became acute, the Hamilton faction required the Barber faction to purchase their 507 shares of stock, or else to submit to the election of a board of directors who would choose a new secretary and general manager and entirely alter the policy and management of the company. It appears that Barber and his associates were experienced insurance men, while Hamilton and his faction were not, and the court has found that Barber, Lovett, Woodman, and Reynolds believed it to be for the best interests of the company, as well as for their own interest, that the company should be managed by persons of experience in the business. Accordingly they agreed among themselves to purchase the 507 shares, and thus preserve control of the company. For that purpose they agreed also to procure money temporarily by borrowing of banks on their own notes, paying said notes with money which they could borrow from the company as soon as they could obtain control thereof, unless in the meantime they were able to sell enough of the shares purchased to pay off their notes, or to pay them off by the sale of other property. In pursuance of this design, they borrowed the necessary funds of banks, purchased the shares, and distributed them among themselves; the majority going to the defendant Barber. A period of financial depression was imminent, and after the purchase it became impossible to dispose of the shares, as the defendants had hoped, so that it was necessary to borrow of the company in order to pay off their notes at the banks. Accordingly the defendants resorted to the company's funds, borrowing a portion upon real estate security, and another portion upon notes secured by pledge of the stock.

As to the money borrowed upon real estate security, the court has found that the loans were made in good faith, with bona fide intention of repaying them in full, principal and interest; that the security was fair and reasonable; that the loans were made according to the usual mode of business of the company, were entered upon the books in the regular way, were known to the officers, directors, and stockholders of the company, were in large part included in the annual reports of the company, and have all been paid in full, either by cash or conveyances of property to the company, except the interest on a mortgage loan to the defendant Barber. The loans on collateral security, on the contrary, were not carried on the books of the company openly in the name of the parties who obtained them. They were not such loans as the statute authorized the

company to make, and the court has found that they were not properly secured. The court has also found that it was agreed between the defendants Barber, Lovett, and Reynolds, when these collateral loans were originally obtained from the company, that they would pay no interest thereon, and that after a short time they ceased to pay any. These loans were kept standing on the books, in one form or another, until the sale of the stock to Funkhouser in December, 1899, when the collateral loan account, which consisted of these items, was turned over to Barber, as above stated. The court found on this point that the apportionment of the consideration which Funkhouser was to pay, and did pay, to Barber for all the shares of stock in the company, as provided for in the contract, whereby \$75,000 was stated to be the consideration for the shares of stock, and the remaining \$40,000 a bonus, was made after the sale was practically consummated, to enable Barber to buy in the shares of the company held by other stockholders for the purpose of selling and delivering them, and that the real value of the stock and the true consideration received therefor was not \$75,000, but the full sum of \$115,000. Upon this basis the court found that the portion of said 507 shares of stock which was covered by the collateral loans, namely, 203 $\frac{1}{2}$ shares, was at all times after the sale by Hamilton in equity the property of the company, and that the company was entitled to recover the full consideration which Funkhouser paid Barber therefor, namely, \$115 per share.

Another item of mismanagement grew out of a mortgage loan to the defendant Woodman. In 1886 Woodman and his wife borrowed \$1,400 of the plaintiff upon a mortgage. In January, 1898, there was \$1,600 due upon the loan, and on that date Woodman assigned to Barber his half interest in 75 shares of the stock purchased from Hamilton and his associates, which had been apportioned to Lovett and Woodman as partners. Thereupon the company released the mortgage, and Barber charged the \$1,600 on the books of the company as cash. This item was carried on the books in various ways until December 1, 1899, when Barber paid it. The court considered that this amounted to a use of \$1,600 of the company's funds in the purchase of the stock, and that the profits on 37 $\frac{1}{2}$ shares, amounting to \$2,612.50, should be accounted for to the company.

A similar item grows out of the purchase by Barber from the plaintiff of 20 shares of stock, originally held by the wife of the defendant Reynolds. This stock was sold to the company on August 1, 1899, and applied on a mortgage of \$2,700, given by her and her husband to the company. The court found that Barber purchased the stock of the company, giving his note for a portion, and carrying the remainder upon the books of the company by various devices until December 1, 1899, when the whole was paid. It held, therefore, that he was liable

to the company for the profit on these shares.

A further item of mismanagement grows out of a mortgage for \$2,600 executed by one Raff. In January, 1894, an instalment of principal and a large amount of accrued interest and taxes had fallen due. At that time the mortgage was assigned by its then holder to the defendant Barber for about the sum of \$1,300. The court has found that Barber knew at the time that foreclosure would be necessary, and immediately instituted a suit in his own name for that purpose. Pending a stay, on order of sale pursuant to decree in the foreclosure suit, Barber assigned the mortgage to the plaintiff company as collateral security for a note which he owed it, and afterwards drew out \$2,500 of the company's money in payment therefor. Subsequently the foreclosure sale was confirmed, and a large deficiency judgment entered. This judgment was never assigned to the company; but after receiving a master's deed in the foreclosure proceedings, he conveyed the property by warranty deed to the plaintiff. The court found that the company paid taxes amounting to nearly \$1,200, and, taking this into account, held that the total amount of the company's money used in the transaction was over \$5,100. It found, further, that this was an improvident, and unlawful investment, in case the mortgage was bought originally for the company, as Barber alleged, and that, if it was not so bought originally, the sale to the company pending stay in the foreclosure suit was a violation of his trust, so that in either event he did not act for the best interests of the company, and upon reconveyance should account to it for said sum of \$5,100.

The other items are of a different nature. In 1895 Barber, while secretary and manager of the company, drew two checks, for \$1,500 each,—one to the defendant Reynolds, and the other to the defendant Lovett. These checks were indorsed and deposited by Barber in his personal account. Thereupon he drew his check in favor of the company for the aggregate sum, deposited it to the credit of the company, and credited said sum of \$3,000 on collateral notes signed by himself and said defendants, as a payment thereon. These checks were issued in payment of alleged claims for services rendered by Lovett and Reynolds in preventing legislation hostile to the company and other similar matters, and the court has found that such claims were not bona fide, and were barred by the statute of limitations, and that the transaction was in effect a conversion of \$3,000 of the company's money. It has also found that at various times the defendant collected sums amounting to \$237.37, belonging to the company, for which he failed to account. We think that the item of interest on the mortgage loan above mentioned is to be put in the same category.

And here belongs, also, the claim for \$2,200 of the company's funds withdrawn by Barber on November 20, 1899, on account of back salary. Upon the issues as to salary,

the court found that in 1890 a contract was entered into between Barber and the company, whereby he was to receive a certain salary for the remainder of that year and for the year 1891, and from January 1, 1892, to January 16, 1895, a salary at the rate of \$5,000 per annum. The term of employment under the contract was for five years. Barber served, however, continuously from the inception of the contract until December 2, 1899, and after the expiration of the term provided no action of any kind was ever taken by the company, by its board of directors, or by any committee or officer, other than Barber, with reference to the amount of salary. But in 1895, on account of general financial depression, it became necessary to reduce the salaries of all employees, and at that time Barber voluntarily reduced his own salary to \$3,000 per annum. The court finds that from that date he drew his salary from month to month substantially on the basis of such reduction until he terminated his connection with the company. The evidence tends to show that during the period from 1895 to 1899, he made repeated admissions that his salary was paid, that he made statements of the condition of the company from which it is evident he considered his salary was \$3,000 per year, and that the statement of the assets and liabilities which he made to Funkhouser, pursuant to his contract, was made upon the same basis. The court found, however, that he was not estopped by his voluntary action, but was entitled to receive salary at the rate of \$5,000 per annum during the whole period from 1895, and that there was due him on account of undrawn salary the sum of \$9,485.22.

Thus, as already indicated, this suit involves two distinct questions. The liability of the defendant Barber to account to the company, as at present constituted, for his mismanagement and unauthorized dealings with the company's funds prior to the sale of all the stock to Funkhouser and his associates is one question. His liability to the company for moneys and assets of the company withdrawn and converted to his own use is quite another question. Connected with this last question is his claim for unpaid salary.

We shall first address ourselves to the question of Barber's liability for mismanagement. Complaint is made of the findings of fact of the trial judge upon the several items with respect to which mismanagement is charged. The evidence on these points is very voluminous, and in some respects is conflicting. Much of it takes the form of expert testimony with reference to the company's books, and is made up of conclusions deduced by accountants from their examinations of the books and papers of the company, which are difficult to follow, and at times are somewhat conjectural. But upon review of the evidence we are satisfied that the findings of fact are accurate and complete, and are well sustained by competent and credible evidence. We have no disposition to interfere with any of them. Accept-

ing these findings of fact, however, several important questions of law arise, with reference to which the decree rendered must be tested.

Counsel for appellant makes three points. The first is that the several transactions recited amounted to loans of the company's money to Barber, and that, as the money borrowed has been repaid, he and not the company is entitled to the profits. We cannot assent to this proposition. The use of the company's money amounted, as the court has found, to a speculation by one of the officers in violation of his trust, which resulted in a profit. Were this an ordinary case, we think there can be no question that the corporation would be entitled to sue, or a stockholder on its behalf and for the benefit of all others. But it is urged that this is not an ordinary case. None of the present stockholders were owners of stock in the corporation at any time previous to December 2, 1899. All of them acquired their interest in the corporation by and through the sale from Barber to Funkhouser on that date. Accordingly, the second point made by counsel is that as the defendant Barber came to own all of the stock, and the present stockholders acquired their stock through him, there was a merger in said defendant of all the claims which the corporation or its stockholders might have held against him, and such claims became extinguished thereby. We do not think this point is well taken. The trial court has found, upon conflicting evidence, that the defendant was never the owner of all the stock in the corporation, but was only the agent of some of those whose stock he procured and sold to the present stockholders. There is ample evidence to show that this is true, and that as to several shares of stock he had at no time any beneficial interest. The third and most serious point is that a recovery in the present case would be entirely for the advantage and inure to the benefit of the present stockholders. It would amount, in substance, to a recovery back by them of the purchase money which they paid the defendant Barber for his stock, since the money, when recovered for the corporation, would be for distribution among them,—the sole stockholders of the company as now constituted.

This raises numerous and difficult questions. It must be determined whether the present stockholders, or any of them, are entitled to complain of the acts of the defendant and of his past management of the company; for, if any of them are so entitled, there can be no doubt of the right and duty of the corporation to maintain this suit. It would be maintainable in such a case, even though the wrongdoers continued to be stockholders and would share in the proceeds. 1 Morawetz, Priv. Corp. § 294. We have, therefore, to consider first how far, if at all, subsequent shareholders may complain of prior mismanagement of the corporation. Next we must consider how far subsequent shareholders may complain of mismanagement, when they hold through 60 L. R. A.

such mismanagement or have acquired their shares from persons who participated therein. The third question to be considered is whether the result of a recovery in this case would be inequitable, as permitting the present stockholders to recover back purchase money, or a portion thereof, for which they received full consideration, and to acquire shares worth \$115 each at \$55 per share, and, in addition thereto, recover and divide among themselves a further sum of \$60 per share, imposed upon the defendant Barber for his delinquencies in matters which have in no way injured the present stockholders, or any of them, or their interests. Finally, assuming that, by reason of the foregoing propositions, the present stockholders are in no position to complain and have no standing in equity, may the court look beyond the corporation to the ultimate and substantial beneficiaries of a recovery, or is it bound to deal with the corporation as a separate person in all respects?

Sound reason and good authority sustain the rule that a purchaser of stock cannot complain of the prior acts and management of the corporation. *Haues v. Oakland*, 104 U. S. 450, sub nom. *Haues v. Contra Costa Water Co.* 26 L. ed. 827; *Dimpfell v. Ohio & M. R. Co.* 110 U. S. 209, 28 L. ed. 121, 3 Sup. Ct. Rep. 573; *Taylor v. Holmes*, 127 U. S. 489, 32 L. ed. 179, 8 Sup. Ct. Rep. 1192; *Southwest Natural Gas Co. v. Fayette Fuel Gas Co.* 145 Pa. 13, 23 Atl. 224; *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630; *Clark v. American Coal Co.* 86 Iowa, 436, 17 L. R. A. 557, 53 N. W. 291; *United Electric Securities Co. v. Louisiana Electric Light Co.* 68 Fed. 673; *Venner v. Atchison, T. & S. F. R. Co.* 28 Fed. 581; *Heath v. Erie R. Co.* 8 Blatchf. 347, Fed. Cas. No. 6,306; *Dannmeyer v. Coleman*, 8 Sawy. 51, 11 Fed. 97; *Pennsylvania Tack Works v. Sowers*, 2 Walk. (Pa.) 416; 4 Thomp. Corp. § 4569. In *Alexander v. Searcy*, 81 Ga. 550, 8 S. E. 636, the court says: "The weight of authority seems to be that a person who did not own stock at the time of the transactions complained of cannot complain or bring a suit to have them declared illegal." In *United Electric Securities Co. v. Louisiana Electric Light Co.* it is said: "As a general proposition, the purchaser of stock in a corporation is not allowed to attack the acts and management of the company prior to the acquisition of his stock; otherwise, we might have a case where stock duly represented in a corporation consented to and participated in bad management and waste, and, after reaping the benefits from such transactions, could be easily passed into the hands of a subsequent purchaser, who could make his harvest by appearing and contesting the very acts and conduct which his vendor had consented to." These remarks are not without application to the case at bar. The present shareholders are all subsequent purchasers. They obtained their stock through the defendant Barber. They hold a large number of their shares under a purchase from him and his associates through the very mismanagement now complained of. A majority of

the remaining shares come directly from Barber and his associates in the wrongs upon which this suit is based. In other words, the present stockholders are contesting acts through which they get title to a large portion of their stock, and acts which those through whom they derived the greater part of the remainder could not have challenged because they participated therein, and, by contesting these acts, which did not injure any of the present stockholders in the least, are recovering back a large part of the purchase price of stock which was admittedly worth all that they paid for it. Such cases illustrate forcibly the wisdom of confining complaints of this kind to those who were stockholders at the time or their successors by operation of law.

The rule that a suit for mismanagement cannot be maintained by one who was not a stockholder at the time has been criticized as based on jurisdictional considerations peculiar to the Federal courts and on obsolete common-law doctrines as to champerty and maintenance. 4 *Thomp. Corp.* §§ 4560-4571; 1 *Morawetz, Priv. Corp.* § 270. In our judgment it does not depend upon either. The Federal equity rule, while designed in part to prevent collusive proceedings in fraud of the jurisdiction of those courts, goes far beyond the requirements of such a purpose. If that were the sole purpose of the rule, it should go no further than to prevent such suits where the vendor of the stock was a citizen of the same state as the corporation. If the vendor and purchaser were citizens of the same state, and the vendor, an original stockholder, had never had the same citizenship as the corporation, no fraud on the jurisdiction of the court would be possible, and in such case, if recovery were proper and the purchaser's cause were meritorious, it would be highly unjust for the court to abrogate its jurisdiction. This consideration alone disposes of the criticism. The rule has its foundation in a sound and wholesome principle of equity, namely, that the rules worked out by chancellors in furtherance of right and justice shall not be used, because of their technical character, as rules to reach inequitable or unjust results. Resting on this basis, "the value and importance of the rule . . . are constantly manifested." Field, J., in *Dimpfell v. Ohio & M. R. Co.* 110 U. S. 209, 28 L. ed. 121, 3 Sup. Ct. Rep. 573. The right of the stockholder to sue exists because of special injury to him for which otherwise he is without redress. If his interest is trifling and the injury thereto of no consequence, he cannot sue to compel righting of wrongs to the corporation. *McHenry v. New York, P. & O. R. Co.* 22 Fed. 130; *Albers v. Merchants' Exchange*, 45 Mo. App. 206. Hence there is obvious reason for holding that one who held no stock at the time of the mismanagement ought not to be allowed to sue, unless the mismanagement or its effects continue and are injurious to him, or it affects him specially and peculiarly in some other manner. *Chicago v. Cameron*, 22 Ill. App. 91, on Appeal 120 Ill. 447, 60 L. R. A.

11 N. E. 899, is a case of the first type. *Carson v. Iowa City Gaslight Co.* 80 Iowa, 638, 45 N. W. 1068, is of the second type. Except in such cases, the purchaser ought to take things as he found them when he voluntarily acquired an interest. If he was defrauded in the purchase, he should sue the vendor. As to the corporation and its managers, so long as he is not injured in what he got when he purchased, and holds exactly what he got and in the condition in which he got it, there is no ground of complaint. *Clark v. American Coal Co.* 86 Iowa, 436, 17 L. R. A. 557, 53 N. W. 291.

The cases which hold that a subsequent stockholder may sue for mismanagement may be noticed briefly. Those commonly cited are: *Ramsey v. Gould*, 57 Barb. 398; *Young v. Drake*, 8 Hun, 61; *Parsons v. Joseph*, 92 Ala. 403, 8 So. 788; *Winsor v. Bailey*, 55 N. H. 218; *Forrester v. Boston & M. Consol. Copper & S. Min. Co.* 21 Mont. 544, 55 Pac. 229, 353. In *Ramsey v. Gould* plaintiff, believing that there had been mismanagement, bought shares for the purpose of proceeding against the directors and officers and "bringing them to justice." The court permitted the suit upon the ground that plaintiff's motives were immaterial. But it assumed, without discussion, that he had an interest to vindicate, and had suffered some wrong, which is the real question on which such cases depend. Moreover, it is by no means clear that the motives behind a stockholder's suit are immaterial. Where stock is acquired for the purpose of bringing suit, it has been held that the complainant is a mere interloper, entitled to no consideration. *Hawes v. Oakland*, 104 U. S. 461, *sub nom. Hawes v. Contra Costa Water Co.* 26 L. ed. 827; *Moore v. Silver Valley Min. Co.* 104 N. C. 534, 10 S. E. 679; *Kingman v. Rome, W. & O. R. Co.* 30 Hun, 73; *Du Pont v. Northern P. R. Co.* 18 Fed. 467, 471. And stockholders' suits not brought in good faith in the interests of the corporation have been dismissed on that ground. *Beshoar v. Chappel*, 6 Colo. App. 323, 40 Pac. 244; *Belmont v. Erie R. Co.* 52 Barb. 637. In *Young v. Drake* the court follow *Ramsey v. Gould*. The further point is made that "the plaintiff acquired all the rights of the person of whom he purchased." Of course, in a case where those of whom he purchased had participated or acquiesced in the mismanagement, this view would preclude the purchaser from suing. And he could not sue as being a bona fide purchaser in ignorance of the disability attaching to his vendor, because shares of stock are not negotiable, and the sale cannot pass greater rights than those possessed by the vendor. *Clark v. American Coal Co.* 86 Iowa, 436, 17 L. R. A. 557, 53 N. W. 291; 4 *Thomp. Corp.* p. 3410. But it may be doubtful whether a purchaser of stock buys, or intends to buy, anything beyond the vendor's present interest in the corporation and its assets. His vendor's causes of action for past injuries and rights to complain of past mismanagement are scarcely in contemplation of the parties. We must not suffer ourselves to

be deceived by speaking of causes of action of the corporation in this connection, since causes of action of this character belong to the corporation for the benefit and in the interest of its stockholders. *Parsons v. Joseph and Winsor v. Bailey* adopt the view of Mr. Morawetz that the rule announced by the Federal courts is a rule of practice based on jurisdictional peculiarities of those courts, and not of general application. In *Forrester v. Mining Co.* the transaction was not complete and still required ratification by the stockholders. The complainants, although they bought after the acts were done, were stockholders while the matter was still formative, and had an undoubted right to interfere to prevent its consummation. Hence what is said as to the point in question is *dictum* only.

The fallacy in the view that one who has not been injured by a transaction and is not affected thereby can acquire a right to sue in equity to set it aside, because he has acquired the shares of the person injured, is exposed in such cases as *Graham v. La Crosse & M. R. Co.* 102 U. S. 148, 26 L. ed. 106, and *Hoffman v. Bullock*, 34 Fed. 248. The right to complain of such transactions is one which the stockholders injured may or may not exercise as they choose. Where such transactions are not absolutely void, they may, if they so elect, acquiesce and treat them as binding. The discretion whether to sue to set them aside or to acquiesce in and agree to them is incapable of transfer. If the new stockholder is injured, there is another question. In that case he also has a power of proceeding or remaining inactive as he may prefer. Where he is not injured, he can take no advantage of the power which was in his vendor and the latter did not care to exercise. In *Graham v. LaCrosse & M. R. Co.* 102 U. S. 153, 26 L. ed. 108, the point was urged which is so often made in connection with suits by subsequent stockholders, and upon which Mr. Morawetz bases his statement that such stockholders should be allowed to sue. Bradley, J., says: "But it is contended that this is a case in which the debtor corporation was defrauded of its property, and that, as the company had a right of proceeding for its recovery, any of its judgment and execution creditors have an equal right; that it is a property right, and one that inures to the benefit of creditors. Conceding that creditors who were such when the fraudulent procurement of the debtor's property occurred, . . . the question still remains whether . . . subsequent creditors have such an interest that they can reach the property for the satisfaction of their debts. We doubt whether any case going as far as this can be found. . . . It seems clear that subsequent creditors have no better right than subsequent purchasers to question a previous transaction in which the debtor's property was obtained from him by fraud, which he has acquiesced in and which he has manifested no desire to disturb. Yet in such case subsequent purchasers have no such right." Hence, upon review of the authorities and the principle

on which they appear to proceed, notwithstanding the position of some of the text writers, the sounder doctrine, sustained by the better and more numerous adjudications, appears to be that subsequent stockholders have no standing, as a general rule, to attack prior mismanagement of the corporation.

It appears to be well settled, also, that stockholders who have acquired their shares and their interest in the corporation from the alleged wrongdoers and through the prior mismanagement have no standing to complain thereof. *Brown v. Duluth, M. & N. R. Co.* 53 Fed. 889; *Re Syracuse, C. & N. Y. R. Co.* 91 N. Y. 1; *Schilling & S. Brewing Co. v. Schneider*, 110 Mo. 83, 19 S. W. 67; *Langdon v. Fogg*, 14 Abb. N. C. 435; *Parsons v. Hayes*, 18 Jones & S. 29; *Hollins v. St. Paul, M. & M. R. Co.* 29 N. Y. S. R. 209, 9 N. Y. Supp. 909; *Clark v. American Coal Co.* 86 Iowa, 436, 17 L. R. A. 557, 53 N. W. 291; 4 *Thomp. Corp.* p. 3410; *Cook, Corp.* §§ 40, 736, note. If a stockholder's predecessor in title has acquiesced in a course of mismanagement, it has even been held that he cannot maintain a suit to restrain its continuance. *Trimble v. American Sugar Ref. Co.* 61 N. J. Eq. 340, 48 Atl. 912. In *Thomp. Corp.* p. 3410, the learned author says: "But as share certificates do not, under any theory, rise to the grade of strictly negotiable paper, it should follow, and especially in regard of the transfer of any litigious rights which may attach to them, that their holder cannot, by selling them to another, transfer to that other any better litigious rights, inhering in them, than he himself possesses. If, therefore, he has, by his conduct as a shareholder, estopped himself from maintaining a suit in equity to undo corporate action, which he might otherwise have maintained, this estoppel will attend the shares in the hands of his vendee." In consequence, it would make no great difference in the case at bar, as to the standing of the present shareholders of the company in a court of equity, if we held that subsequent shareholders could attack prior mismanagement. The present shareholders hold 260 shares through a purchase from Barber, who acquired title through the acts complained of, and the money which they paid for those very shares, which they hold through such purchase, is now claimed to belong to the corporation, and is sought to be recovered from their vendor. Nor is this all. The greater part of the remaining shares were held by Barber and his associates when the alleged wrongs were committed, and are now held by the present stockholders under a purchase from Barber. To allow them to open up these transactions is to allow them to go counter to their own title to a large part of the stock, and to assert rights and claims which their vendor could never have asserted, and this, too, as to past transactions, which have no present effect upon the value of their stock, and do not continue to be felt in any way in the corporate management.

There is another and still stronger reason

why the present stockholders have no standing in a court of equity to complain of the transactions on which this suit is based. To permit them to recover, under the circumstances of the case at bar would be highly inequitable. It would be to give them moneys to which they have no just title or claim whatever, and enable them to speculate upon wrongs done to others with which they have no concern. It would enable them to recover back a large part of the purchase money they paid and agreed to pay for the stock, notwithstanding the stock was worth all that they paid for it, and notwithstanding they obtained and now retain all that they bargained for. So long as they received all that was contracted for, there is no equity in allowing them to recover back a considerable portion of what they paid, merely because their vendor had previously wronged someone else who could have obtained redress in the name of the corporation which they are now able to use. This is especially manifest in respect to the dividends. As Barber and his associates acquired shares by unauthorized borrowings of the company's money, and so held them in trust for the corporation, as representing all the then stockholders, in equity the dividends paid upon such shares doubtless were received impressed with the same trust. But who were the beneficiaries of that trust? Not the other stockholders only, but Barber and his associates, together with such remaining stockholders. Barber and his associates held most of the stock outside of the shares in question. Instead of receiving all the dividends on those shares, they should have received, in equity, the greater portion only. Had a stockholder gone into equity at that time and recovered the dividends for the company, they would simply have been for distribution among those who held the shares not subject to a trust for the company, and Barber and his associates would still have been the heaviest beneficiaries. For it is well settled that a recovery in such case inures to the benefit of all stockholders, as well those who were wrongdoers as those who were innocent. 4 Thomp. Corp. § 4491. But after an entirely new set of stockholders have come in, holding these shares under Barber and his associates and the remainder of the latter's shares under purchase from them, to let them recover back these dividends is to let them reclaim over 50 per cent of the purchase money, and recover from Barber moneys which in equity belonged to him when he took them. The fact that a relatively small portion belonged to others cannot alter the unconscionable character of such a recovery, so long as the present stockholders are not those others and have no standing in equity as their representatives. Recovery by or for the benefit of the present stockholders means, to put it plainly, that through the instrumentality of a court of equity they are to get shares, worth by their own valuation \$115 each, for \$55 each, are to get back dividends which never would have been payable to them in any event and were not bargained for when

they bought, and are to receive, in addition to the shares, worth \$1.15 on the dollar, 60 cents more on each dollar, imposed on Barber for his delinquencies. Barber wronged the old stockholders. His conduct in many respects was unconscionable and indefensible. But his fellow stockholders were supine for many years. They took no steps to investigate what he was doing, or to protect or assert their rights. Now third parties, who bought all of Barber's shares, including those which he held as a result of his wrongful manipulations, seek to assert those rights and reap a profit thereby. Because the inequitable conduct of Barber shocks the conscience of the chancellor is no reason why he should give his conscience a further shock by allowing Funkhouser and his associates to recover moneys to which they have no legal or equitable claim.

Conceding, then, that all of the present stockholders are so circumstanced that no relief should be afforded them in a court of equity, may the corporation recover, notwithstanding? We think not. Where a corporation is not asserting or endeavoring to protect a title to property, it can only maintain a suit in equity as the representative of its stockholders. If they have no standing in equity to entitle them to the relief sought for their benefit, they cannot obtain such relief through the corporation or in its own name. *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & T. Co.* 13 Colo. 587, 22 Pac. 954; *Des Moines Gas Co. v. West*, 50 Iowa, 16; *Schilling & S. Brewing Co. v. Schneider*, 110 Mo. 83, 19 S. W. 67; *Flagler Engraving Mach. Co. v. Flagler*, 19 Fed. 468; *Parsons v. Hayes*, 14 Abb. N. C. 419; *Langdon v. Fogg*, 14 Abb. N. C. 435. It would be a reproach to courts of equity if this were not so. If a court of equity could not look behind the corporation to the shareholders, who are the real and substantial beneficiaries, and ascertain whether these ultimate beneficiaries of the relief it is asked to grant have any standing to demand it, the maxim that equity looks to the substance, and not the form, would be very much limited in its application. "It is the province and delight of equity to brush away mere forms of law." Post, J., in *Fitzgerald v. Fitzgerald & M. Constr. Co.* 44 Neb. 463, 62 N. W. 899. Nowhere is it more necessary for courts of equity to adhere steadfastly to this maxim, and avoid the danger of allowing their remedies to be abused, by penetrating all legal fictions and disguises, than in the complex relations growing out of corporate affairs. Accordingly, courts and text-writers have been in entire agreement that equity will look behind the corporate entity, and consider who are the real and substantial parties in interest, whenever it becomes necessary to do so to promote justice or obviate inequitable results. In 4 Thomp. Corp. § 4479, the learned author says: "As in point of substance and sense the corporation consists of the aggregate body of its shareholders, it is obvious that in the most substantial sense the directors are trustees for the shareholders, and that, in any action to

redress breaches of trust on the part of the directors, the shareholders are the real parties in interest." Again: "For the purposes of substantial right, though not for the conveniences of legal procedure, the aggregate body of shareholders in a joint-stock company should be deemed the corporation." 1 *Thomp. Corp.* § 17. Mr. Morawetz also writes very cogently to the same effect: "It is essential to a clear understanding of many important branches of the law of corporations to bear in mind distinctly that the existence of a corporation independently of its shareholders is a fiction, and that the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being." 1 *Morawetz, Priv. Corp.* § 1. "While a corporation may, from one point of view, be considered as an entity, without regard to the corporators who compose it, the fact remains self-evident that a corporation is not in reality a person or thing distinct from its constituent parts. The word 'corporation' is but a collective name for the corporators or members who compose an incorporated association." *Ibid.* In *Moore v. Schoppert*, 22 W. Va. 282, 290, the court says: "The relation between a corporation and its several members may, for all practical purposes, be treated as that of trustee and *cestui que trust*. In contemplation of law, the property and rights of an incorporated company belong to the united association acting in the corporate name, and not to the stockholders. The latter, however, are the real owners; and a technical trust thus arises in their favor, which will be protected and enforced by the courts of equity."

This principle that in equity the corporation is regarded as a trustee for those who are the ultimate substantial beneficiaries of what is held and acquired in the corporate name finds many important illustrations in various departments of the law of corporations. Thus, it has been held that a sole stockholder may be treated in equity as the corporation, when the equities of a case so require. *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336, 5 Atl. 534; 7 *Thomp. Corp.* § 8403; 4 *Thomp. Corp.* § 5097. The case of *Swift v. Smith* has been criticised, as we think with some reason, so far as it deals with the sole stockholder as if he had some title to the property. But so far as it sustains the proposition that between the corporation and the stockholder the latter is to be recognized as the real beneficiary, and consequently that equitable rights and remedies, the benefit whereof would inure solely to the shareholder, are to be regarded as exercised for him by the corporation, and not as something belonging to it independently, the decision is in accord with the authorities. It has also been applied frequently where acts have been done or assented to by the whole body of shareholders, and attempt has been made to evade liability by conjuring with the corporate name. 1 *Morawetz, Priv. Corp.* § 262; *Sheldon Hat Blocking Co. v. Eickemeyer Hat Blocking Mach. Co.* 90 N. Y. 607, 60 L. R. A.

613; *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 23, 24 L. ed. 917, 919.

Another case where this principle comes into play is to be seen in attempts to place property beyond the reach of creditors by fraudulent incorporations. In such cases courts do not hesitate to look behind the corporation to the real and substantial beneficiaries. *First Nat. Bank v. F. O. Trebein Co.* 59 Ohio St. 316, 52 N. E. 834; *Terhune v. Hackensack Sav. Bank*, 45 N. J. Eq. 344, 19 Atl. 377; *Kellogg v. Douglass County Bank*, 58 Kan. 43, 48 Pac. 587; *Lusk v. Riggs* (Neb.) 91 N. W. 243. In *First Nat. Bank v. F. O. Trebein Co.* the court says: "The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, existing separate and apart from the individuals composing it, is of such general utility and application as frequently to induce the belief that it must be universal, and be in all cases adhered to, although the greatest frauds may thereby be perpetuated under the fiction as a shield. But modern cases, sustained by the best text writers, confine the fiction to the purposes for which it was adopted." It has likewise been applied to cases of estoppel. Thus, Mr. Thompson says: "We may also conclude, from the premise that the body of stockholders are in substance the corporation, that estoppels are concurrent as between the stockholders and the corporation,—in other words, that whatever will estop the stockholders will estop the corporation, and that whatever will estop the corporation will estop the stockholders." 4 *Thomp. Corp.* § 5269. But the commonest instance of application of this principle is in stockholders' suits for mismanagement. Ordinarily such suits are to be brought in the name of the corporation, at the instance of the corporate authorities. But where, for some reason, this course is not open, the stockholders injured will not be deprived of all remedy, but upon proper showing will be permitted to sue directly by joining the corporation as a defendant. The very basis of these suits is that "courts of equity recognize that the stockholders are ultimately the only beneficiaries." *Chicago v. Cameron*, 120 Ill. 447, 11 N. E. 899. Stockholders are allowed to sue, in order to obtain redress for such wrongs, because "in their effect and essential character they are wrongs to the individual shareholder, inflicted upon his corporate interests by means of the control over those interests secured through the corporate organization and management." *Brewer v. Boston Theatre*, 104 Mass. 378. See also *State ex rel. Bugbee v. Holmes*, 60 Neb. 39, 42, 82 N. W. 109. It is but another application of the same principle to hold that where no question of title is involved, but some equitable remedy is sought in the corporate name, depending purely upon the doctrines of a court of equity, the court, to prevent abuse and perversion of its doctrines and remedies, will look through the corporation to the real parties in interest, and, if those parties have no standing in equity, will refuse the remedy.

Cases of this kind must be differentiated sharply from those where the proceeding is at law, or where a question of title to the corporate property is involved. There is no question that stockholders, as such, have no title to the corporate property which they can convey or encumber in their own names. *Humphreys v. McKissock*, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779; *Wheelock v. Moulton*, 15 Vt. 519; *Smith v. Hurd*, 12 Met. 385, 46 Am. Dec. 690; *Parker v. Bethel Hotel Co.* 96 Tenn. 252, 31 L. R. A. 706, 34 S. W. 209; *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667; *Spurlock v. Missouri P. R. Co.* 90 Mo. 200, 2 S. W. 219. But this, in substance, is only another way of saying that the corporation must act through its proper agents and in the prescribed way. 4 *Thomp. Corp.* § 4476. It is also true, for convenience of legal procedure and to avoid confusion, that restitution or redress, even where the injury has affected the interests of the stockholders, is to be sought primarily through the corporation. But this rule must always yield to the requirements of equity, and is cast aside in view of the fact that the stockholders are the real beneficiaries whenever the usual course is not open. *Brewer v. Boston Theatre*, 104 Mass. 378, 395; 4 *Thomp. Corp.* § 4477. Cases like the one at bar are obviously within the same reason. To permit persons to recover through the medium of a court of equity that to which they are not entitled, simply because the nominal recovery is by a distinct person through whom they receive the whole actual and substantial benefit, and that nominal person would, in ordinary cases, as representing beneficiaries having a right to recover, be entitled to relief, is perversion of equity. It turns principles meant to do justice into rules to be administered strictly without regard to the result. It is contrary to the very genius of equity. When the corporation comes into equity and seeks equitable relief, we ought to look at the substance of the proceeding, and, if the beneficiaries of the judgment sought have no standing in equity to recover, we ought not to become begoggled by the fiction of corporate individuality, and apply the principles of equity to reach an inequitable result.

Hence, we think the rule to apply to such cases is this: Where a corporation is proceeding at law, or where it is asserting a title to property, or the title to property is involved, the corporation is regarded as a person separate and distinct from its stockholders, or any or all of them. But where it is proceeding in equity to assert rights of an equitable nature, or is seeking relief upon rules or principles of equity, the court of equity will not forget that the stockholders are the real and substantial beneficiaries of a recovery, and if the stockholders are the real and substantial beneficiaries of a recovery, and if the stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf and for their advantage, the corporation will not be

permitted to recover. This rule finds many illustrations in the authorities.

In *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & T. Co.* 13 Colo. 587, 22 Pac. 954, the court said: "It is true that, for some purposes, a body corporate is sometimes regarded as a legal entity, or a fictitious person having a distinct existence. This fiction is not recognized in equity. The reason is clear. Without organization and members, without officers and stockholders, a corporation is but a naked body. It may be authorized to exercise corporate franchises, but is without means or instrumentalities for such exercise. It is clear, therefore, that a body corporate cannot maintain a suit for equitable relief, except as the representative of the stockholders. It necessarily follows that, if the shareholders are without equity, they cannot, through the corporate organization or in its name, obtain relief either for themselves or for the corporation. 'In equity the conception of a corporate entity is used merely as a formula for working out the rights and equities of the real parties in interest, while at law this figurative conception takes the shape of a dogma, and is often applied rigorously, without regard to its true purpose and meaning. In equity the relationship between the shareholders is recognized whenever this becomes necessary to the attainment of justice; at law this relationship is not recognized at all.' 1 *Morawetz, Priv. Corp.* § 227. At the very outset of the discussion, then, it must be assumed that, in a suit of this nature, the corporation and the individual plaintiffs cannot be separated. It follows that, if the individual plaintiffs are not entitled to relief, as counsel admits, the corporation is not, and the judgment dismissing the bill might very properly be affirmed without further discussion."

In *Parsons v. Hayes*, 14 Abb. N. C. 419, the court says: "Again, considering that the fundamental position is that Catlow became, in fact, shareholder to the amount of all the capital stock, the following was the relation between the parties: The corporation was the holder of the legal title of the property of the corporation, subject to corporate uses. Excepting this legal title for corporate uses, the shareholders were the parties interested in the property, in fact, owning all of it, excepting the legal title, which, as against them, could be used for corporate purposes. The trustees were the statutory corporation. The shareholders were members or a part of the corporation. The corporation held the legal title for the pecuniary benefit of the shareholders, having no beneficial or pecuniary benefit in it. On the claims for the plaintiff, the thing possessed is the right of the corporation to have an action against its trustees for damages for their acts, which it is claimed were wrongful to the corporation. This right, if it existed, was held by the same tenure and for the same purposes that other property would be held. The corporation would have a bare title to it for the beneficial use of shareholders. It seems to be evident that

the corporation could not claim as damage to its interests what would be damage to the beneficial interest, when the owners of the latter had consented to the so-called injury."

In *Flagler Engraving Mach. Co. v. Flagler*, 19 Fed. 468, the promoters and directors of a corporation put in certain patent rights as part of its capital. Afterwards by fraudulent practices they induced others to buy stock at extravagant prices. The purchasers got control of the corporation, and brought a suit in equity in the name of the corporation against the former directors for mismanagement. The court said that the purchasers might have a right to set aside the sales of stock made to them through fraud, but that they could not, by obtaining control of the company, set up an artificial case and recover through the company what was really their loss individually, and not as stockholders.

In *Schilling & S. Brewing Co. v. Schneider*, 110 Mo. 83, 19 S. W. 67, a corporation brought suit against certain stockholders to have shares which they held declared to be the property of the corporation. The court treated the remaining stockholders as the real parties in interest, and expressly referred to them as such, and held that, as their predecessors in interest could not have complained of the use of moneys of the corporation in acquiring the shares, the stockholders in whose interest the suit was brought could not do so in their own name or in that of the corporation.

The only decision which has been cited to the contrary is *Fitzgerald v. Fitzgerald & M. Constr. Co.* 41 Neb. 374, 429, 59 N. W. 838. There it was held that a suit for mismanagement was maintainable in equity as to a transaction in which four fifths of the stockholders participated and the remainder acquiesced. There had been no change in the stockholders. Suit was brought by one who had acquiesced to recover for the benefit of the corporation. It was said that the action was for the benefit of the corporation, which was a distinct person, and was not affected by the circumstance that the stockholder himself was in no position to complain. But a rehearing was granted, if we may judge from the motion and brief of counsel, on this very ground; and upon rehearing this branch of the case was decided upon an entirely different point, namely, that there had been no acquiescence on the part of the complaining stockholder. *Fitzgerald v. Fitzgerald & M. Constr. Co.* 44 Neb. 463, 62 N. W. 899. Hence, while there is no express retraction of the statement in the former opinion, we are satisfied that the court intended to recede from it, and that we are not bound thereby. We reach this conclusion the more readily because the proposition that acquiescence of all the stockholders does not preclude the right of the corporation to relief, as advanced in the first opinion, is contrary to the uniform and long-established course of decisions in all courts, and the understanding of all writers upon the subject. 2 Cook, Corp. §§ 278, 279; 4 Thomp. 60 L. R. A.

Corp. § 5269; 2 Beach, Priv. Corp. § 887; 1 Morawetz, Corp. §§ 262-264. The adjudications to the same effect as the statements of the text-writers cited are legion.

But it is said the defendant Barber, by reason of his delinquencies, is in no position to ask that the court look behind the corporation to the real and substantial parties in interest. The trial court took this view, saying: "I have come to the conclusion that, there being no equities in this case in favor of Mr. Barber, it is not the duty of this court to look behind the entity of the corporation." We do not think such a proposition can be maintained. It is not the function of courts of equity to administer punishment. When one person has wronged another in a matter within its jurisdiction, equity will spare no effort to redress the person injured, and will not suffer the wrongdoer to escape restitution to such person through any device or technicality. But this is because of its desire to right wrongs, not because of a desire to punish all wrongdoers. If a wrongdoer deserves to be punished, it does not follow that others are to be enriched at his expense by a court of equity. A plaintiff must recover on the strength of his own case, not on the weakness of the defendant's case. It is his right, not the defendant's wrongdoing, that is the basis of recovery. When it is disclosed that he has no standing in equity, the degree of wrongdoing of the defendant will not avail him. This principle can hardly need demonstration; but abundant illustrations are at hand. For instance, a creditor cannot complain of a fraudulent conveyance by his debtor, unless he is injured thereby. *Baldwin v. Burt*, 43 Neb. 245, 61 N. W. 601. The conduct of the debtor may have been ever so fraudulent. But, if it appears that the creditor has not been prejudiced, he acquires no right merely from the evil intent or unconscientious acts of the debtor. Another example may be seen in *Roberts v. Northern P. R. Co.* 158 U. S. 1, 13, 39 L. ed. 873, 15 Sup. Ct. Rep. 756. In that case a county had granted land to a railroad company without authority, and the grant, under statutes and decisions of the state, was of no effect. Afterwards the county sold the same land to an individual. The court said: "Whatever might be the result in a court of law of a contest between these respective grantees of the county, it may well be doubted whether a court of equity could be successfully appealed to by a purchaser from the county of property worth upward of \$200,000 for a nominal consideration of less than \$400. If the county had found that it had been overreached in its bargain with the railroad company, or had learned that its grant of these lands was invalid for want of power, and had come into a court of equity, offering to do equity by an offer to return or account for the consideration received, the condition of things would have been different from what it now is. In such a proceeding, the rescission would have inured to the benefit of the taxpayers of the county; but, under the present claim, the benefit would

go to a private party, who bought with knowledge of the county's previous sale, and who admits in his answer that he secured his own grant for a grossly inadequate consideration because of the fact of such previous sale." In other words, the wrongdoing of the defendant will not blind a court to the fact that the plaintiff may have no standing in equity.

Counsel say that the court will not look through the corporation to the real plaintiffs, in order to preserve to Barber the fruits of his wrongdoing. If such were the only purpose, we should agree. But the court will bear in mind the real parties in interest, in order to prevent those parties from misusing equitable rules and remedies to obtain relief to which they have no right, and recover back moneys which they paid out voluntarily upon full consideration, without any deception, and to which they can assert no legal claim whatever.

Turning, now, to those items which involve withdrawal of moneys and assets of the company by Barber and conversion thereof to his own use, it must be evident that the foregoing discussion does not apply thereto. So far as its title to property and its right to its moneys and assets are concerned, a clear distinction between the company and its stockholders is always drawn. As we have seen, even if Barber had owned all the stock in the company, he would have had no title to the corporate property, so far as to be able to deal with it in his own, rather than in the corporate, name. But he was only a majority stockholder. When he withdrew money or assets of the corporation, and converted it to his own use, there was as clear a conversion as if the transaction had taken place between natural persons. If he concealed and covered up these transactions by availing himself of the opportunities afforded him as secretary and manager of the company, and they were not discovered until a change in management resulted in an investigation of the books, we see no reason why the company should not recover the sums so misappropriated. We are therefore of opinion that, so far as relates to the \$3,000 converted under pretense of payment to Reynolds and Lovett for services as lobbyists, detailed in the twenty-third finding of the district court, and the conversion of the various collections, detailed in the twenty-eighth finding, the plaintiff should have judgment. We think, likewise, that it ought to recover the interest on the mortgage loan as found in the sixteenth finding. The trial court held that this loan was made in good faith, was duly entered on the books of the company, and properly secured and acquiesced in by the company and its officers. But it further found that a large amount of interest on the loan remained unpaid. There is nothing in the record to justify any inference, much less a finding, that Barber was not to pay all the interest on this loan. He had charge of the books and accounts of the company, and the evidence shows conclusively that he manipulated them in many ways so as to conceal

the true nature of his dealings and the actual condition of the transactions between himself and his employer. As to this item of interest, the case stands the same as any other between debtor and creditor.

The same considerations apply to the money withdrawn on November 20, 1899. Unless the claim for back salary is a just and valid one, this was simply a conversion of that amount of money of the company. It becomes necessary, therefore, in this connection, to pass upon the issues as to Barber's claim for unpaid salary, since the company has filed a cross-appeal from that portion of the decree in which such claim is allowed. Undoubtedly, as a general rule, when parties have contracted for performance of certain services for a definite period at a fixed salary, and the employment continues beyond the period agreed upon, in the absence of any new contract, it will be presumed that the employment continued under the same contract and upon the terms originally fixed. *Wallace v. Floyd*, 29 Pa. 184, 72 Am. Dec. 620; *Crane Bros. Mfg. Co. v. Adams*, 142 Ill. 125, 30 N. E. 1030. But this presumption must yield to evidence showing a change of terms. *Hale v. Sheehan*, 41 Neb. 102, 59 N. W. 554; *McCullough Iron Co. v. Carpenter*, 67 Md. 555, 11 Atl. 176; *Com. Ins. Co. v. Crane*, 6 Met. 64. It may be conceded that it would take two to make the new agreement, and that a mere intention on the part of Barber to accept a less sum, or even an express statement by him that he would accept the less sum, would not of itself bind him so to do. *Richard Thompson Co. v. Brook*, 37 N. Y. S. R. 506, 14 N. Y. Supp. 370. In that case certain employees of a corporation agreed among themselves to accept a reduction of salary. The corporation was not a party to the agreement, and it was never communicated to or acted on by the corporation or its directors. Such a case is very different from the one at bar. Here, while there was no action by the corporation expressly, the court has found that from the time Barber as general manager reduced his own salary, along with the salaries of other employees, to the time he ceased to be an officer of the company, he drew his salary from time to time substantially on the basis of the reduction; and the evidence is clear and convincing that he took the moneys withdrawn in full satisfaction of his claim for salary, and had no thought of claiming more until his right to withdraw the \$2,200 was challenged after the new management took charge. We think these circumstances are sufficient to show that the company relied on his voluntary action in reducing his own salary, and took no express action thereon, because none was necessary, and that it was understood by both parties that his salary was that which he had voluntarily fixed upon. In *Shade v. Sisson Mill & Lumber Co.* 115 Cal. 357, 47 Pac. 135, the corporation rendered statements monthly to an employee, in which he was credited with a less salary per month than he should have received. It was held that the employee, by acquiescence in these statements so rendered

him was estopped to claim afterwards a salary in excess of that for which he was given credit. So long as Barber's reduction of his own salary was carried out by himself for a long series of years, and even at the time when he withdrew the \$2,200 he did not claim the right to withdraw any such sums as would be due to him if his present claims were allowed, we see no ground whatever on which to sustain the judgment in his favor in this behalf. Hence, we are of opinion that the company should recover the item of \$3,000 converted on April 17, 1895, the item of \$237.37 for collections unaccounted for, the unpaid interest on the mortgage loan, amounting at the date of the decree in the lower court to \$1,510, and the item of \$2,200 withdrawn on November 20, 1899.

It is therefore recommended that the decree of the district court be reversed, and

the cause remanded, with directions to enter a new decree in favor of the plaintiff and against the defendant Barber for the several sums last above stated and interest thereon at the rate by law provided. We further recommend that each party pay his own costs in this court.

Barnes and Oldham, CC., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is reversed, and the cause is remanded, with directions to enter a new judgment in favor of the plaintiff and against the defendant Barber in accordance with said opinion. It is further ordered that each party pay his own costs in this court.

TEXAS SUPREME COURT.

**B. P. DORITY et al., Appts.,
v.
Helen DORITY.**

(.....Tex.....)

1. A lease of land which is the separate estate of a married woman, for a period of more than one year, is a conveyance within the meaning of statutes requiring husband and wife to join in the conveyance of real estate the separate property of the wife, and forbidding the conveyance of an estate for a term of more than one year unless the conveyance be in writing; and the wife must, therefore, join in its execution notwithstanding a statute giving the husband the sole management of the wife's property during marriage.
2. A husband may be enjoined, in a suit which does not seek the dissolution of the marriage, from further interference with his wife's separate estate, notwithstanding the statute gives him the sole management of it during marriage, where he refuses to support her, and so diverts the income of her property as to deprive her of the benefit which the law entitles her to receive therefrom through his management.

(February 12, 1903.)

CERTIFICATION by the Court of Civil Appeals for the First Supreme Judicial District of an appeal by defendants from a judgment of the District Court for Nueces County in favor of plaintiff in an action brought to establish plaintiff's right to manage and control her own estate. *Affirmed.* The facts are stated in the opinion.

NOTE.—The above decision as to the right of a court, in a suit by a married woman other than for divorce, to restrain her husband from exercising over her separate property the control expressly given to him by statute, seems to be one of first impression. It is a clear example of the fundamental power of equity to modify the strict legal rights of parties by reason of special circumstances.
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Messrs. G. R. Scott, James W. Durst, R. P. Clarkson, D. W. Doom, and D. H. Doom for appellants.

Messrs. McCampbells & Stayton and J. C. Scott, for appellee:

The husband does not own his wife's separate estate, but only has the right to manage the same as a trustee for her; and she may sue him when it becomes necessary for her to do so for the protection of her rights in the property.

Ryan v. Ryan, 61 Tex. 473; *Black v. Black*, 62 Tex. 296; *Nickerson v. Nickerson*, 65 Tex. 281; *O'Brien v. Hilburn*, 9 Tex. 297; *Roper v. Roper*, 29 Ala. 247; *Rainey v. Rainey*, 35 Ala. 282; *Shulman v. Fitzpatrick*, 62 Ala. 571; *Sampley v. Watson*, 43 Ala. 377.

The law will not permit the husband to defraud and swindle his wife out of her separate property merely because she may not have sufficient grounds to secure a judgment of divorce from him, and cannot have her separate property set aside to her in such judgment; but she will be protected in her property rights, even as against her husband, and though she may not bring a divorce suit against him.

Magee v. White, 23 Tex. 180.

The husband cannot lease the separate real estate of his wife without her joining him in the lease and acknowledging it privily and apart from him, the same as required by the statute for a fee-simple deed of conveyance of such property.

Texas Rev. Stat. 1897, arts. 624, 635; 2 Bl. Com. p. 310; *Waples, Homestead & Exemption*, p. 433; *Muir v. Bissett*, 52 Vt. 287; *Jackson ex dem. Campbell v. Holloway*, 7 Johns. 81.

Williams, J., delivered the opinion of the court:

This case comes to us upon certificate of dissent from the court of civil appeals for the first district. The action was brought in the district court by Helen DORITY against

her husband, B. P. Dority, and James W. Durst, A. A. Thompson, and R. P. Clarkson, for the purpose of setting aside leases of land owned by Mrs. Dority in her separate right, which had been made by her husband to the other defendants, and of establishing her own right to manage and control her separate estate as a *feme sole*, and to enjoin her husband from interfering therewith. The district judge held that the leases in question were void, because made in excess of the authority of the husband over his wife's separate property; that, under the facts shown, they operated as a legal fraud upon the rights of Mrs. Dority; also, in substance, that Mrs. Dority was entitled, under the circumstances developed, to the management and control of her own property; and that her husband should be restrained from interfering therewith. The majority of the court of civil appeals agreed with the trial court upon all of these points, and Associate Justice Pleasants dissented from the decision upon each of them. A statement of the facts of the case is essential to an understanding of the points involved in the dissent:

The plaintiff and defendant B. P. Dority were married in 1873, and have acquired the property in question in such way, as held by the court of civil appeals, as to make it the separate property of the wife. No question as to this is now before us. The evidence tends to show that for several years before their separation, and until the present time, plaintiff has been in very delicate health, while her husband, a wheelwright by trade, has been very strong, healthy, and able to work when he could secure employment. Plaintiff raised poultry, and, with cows, which were her separate property, conducted a dairy, and, from the products of her industry, earned, in the main, her support. Her husband earned little, and, up to two years before the trial, contributed to his wife's maintenance only a few groceries. For two years before the trial he contributed nothing. At all times he has had the management of his wife's ranch, which constituted the chief part of her separate property, and has received whatever revenue has been derived from it. They lived together on their homestead in Corpus Christi until their separation took place. Dority, while contributing little to the support of his wife, has made no claim to any part of her personal earnings. This had been the condition of affairs between them for some years before 1899. In that year the taxes upon her property and upon the homestead for the year 1898 were delinquent, and the property was advertised for sale. Of this fact Dority notified his wife; saying at the same time that he could not pay the taxes, and did not know where they would get the money to meet the demand. In order to meet it, Mrs. Dority executed a lease of her ranch to one Keyes at \$200 per year. Her husband refused to assent to it, and would not permit the lessee to take possession; considering his wife's action a reflection upon him. This, as she says, was the immediate cause of their separation. She informed her husband that

she would not longer live with him, and they have since that time lived apart. This occurred October 26, 1899, and Mrs. Dority brought suit for divorce November 10, 1899, upon the ground of cruel treatment, excesses, and outrages. She succeeded in the district court, but the court of civil appeals reversed the judgment in her favor, holding that the evidence showed no legal ground for divorce, and remanded the cause, which she dismissed May 16, 1901. (Tex. Civ. App.) 62 S. W. 106. In the meantime the parties had occupied apartments in their home, living apart, until January, 1901, and Dority had continued to assert control of the ranch and some other property; and a few days after the separation he executed to defendant Durst a lease, bearing a date anterior to the separation, by which he let to Durst the ranch for one year, with the privilege in Durst of taking it for two years longer, in consideration of \$10 per month, and the privilege to Dority of pasturing therein some 90 head of horses, his separate property and 15 or 20 cattle, community property. Dority thereafter sold the horses to Durst, and the latter held the ranch until about December 23, 1900, and paid to Dority \$150 rent, all of which was applied by him to payment of attorneys' fees in his litigation with his wife. In December, 1900, Dority, Durst, and defendant Thompson orally agreed that the last named should take the unexpired portion of the Durst lease from December 23, 1900, to October 23, 1902; recognizing Durst as his landlord, but paying to Dority rent at \$20 per month, and agreeing to make improvements at the rate of \$5 per month. Thompson still held possession at the time of the trial of this case, and had paid to Dority \$80 of rent; payment of the balance having been stopped by injunction in the divorce suit. The sum paid was also appropriated by Dority to his own use. In January, 1901, Dority left home, and went to Mexico, where he remained until May 7, 1901. He then returned, and offered to resume relations with his wife, and to live with her as her husband; but, upon her refusal to have anything to do with him, he left her in possession of the homestead, and has not since molested her. On the 21st of May, 1901, Thompson being still in possession of the ranch under the agreement, lasting until October, 1902, Dority executed to defendant Clarkson a lease of the property for ten years next ensuing, with privilege in the lessee of renewal for five years, at rental of \$25 per month. It was orally agreed that Clarkson was not to have possession until the expiration of Thompson's lease. The lease also contained the provision that the lessee should, out of the rent, pay all expenses and costs incurred in resisting the attempt of any person to recover possession of the land. Dority assigned this lease contract to pay his attorneys' fees and personal debts for more than \$650, and a note given for money borrowed to defend a suit with other parties involving Mrs. Dority's title to the land. All of these leases were made without the knowledge or consent of Mrs.

Dority. She continued, after the separation, to earn money as before, though suffering greatly from chronic sickness and becoming continually weaker and less able to work. Being defeated, as stated, in her effort to raise means to pay the taxes through a lease of her land, she borrowed the money and repaid it out of her earnings, and thus paid the taxes due up to the time of the trial upon the homestead and her separate property, while her husband was controlling the ranch and diverting its revenues to other purposes. During this period she has received nothing whatever from him, but has become indebted for various kinds of necessities. Dority now has no property except an interest in the homestead and in the household and kitchen furniture, which is community property in use by Mrs. Dority. It is found by the court of civil appeals that there is no reasonable probability of the parties ever living together again. The record shows that, in addition to her suit for divorce, plaintiff, on the 13th day of November, 1899, instituted in the county court, under article 2972, Rev. Stat., a proceeding against her husband to enforce the appropriation by him to her support of a portion of the proceeds of her lands. This he resisted and defeated on the grounds that the property had not for the five years before produced any revenue which had been appropriated by him.

The questions upon which the difference of opinion exists may be stated thus: First. Did the power of "sole management" given by the statute to the husband over the wife's separate property include the power, if fairly exercised, to make leases for a longer term than one year? Second. If so, do the facts warrant the conclusion that the power was exercised in this case in such manner as to constitute a fraud upon the rights of the wife, which entitled her to maintain an action to have the leases set aside? Third. Do the facts justify the decree enjoining Dority from interfering with his wife's separate property?

1. The decision of the first question depends upon whether leases such as those in question are conveyances, within the meaning of article 635, Rev. Stat., requiring the husband and wife to join in "the conveyance of real estate the separate property of the wife," or are authorized by article 2967, giving to the husband "the sole management" of the wife's property during marriage. Article 624 (a part of the same title with article 635) provides: "No estate of inheritance or freehold, or for a term of more than one year, in lands and tenements shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing." The majority of the court of civil appeals, construing the two articles together, held that the joint action of husband and wife was essential to the creation of leases for longer terms than one year, for the reason that article 624 declared such terms to be "estates in land," and the instruments creating them "conveyances," and article 635 applied to all conveyances of the real estate

of the wife. The dissenting justice held that the "conveyances" intended in article 635 were only such as purported to convey the whole title of the wife. The provision of article 624 was contained in the act of February 5, 1840, concerning conveyances, which did not expressly regulate the conveyance of the property of married women; and that provision was not connected, as it has become in the revisions, with the rule declared in article 635. The acts of February 3, 1841, and of April 30, 1846, prescribing the mode of conveyances by married women, were not adopted in the form of amendments of the act of 1840, but by their terms they regulated the conveyance of "any estate or interest in land the separate property of the wife." Those statutes, before the revision in 1879, had been construed as prescribing an exclusive mode of conveying land of married women, and the language was so altered by the revisers as to affirmatively express this construction; and their report shows that no other change affecting this question was intended to be made in the law. As respects the question before us, article 635 has the same force and effect as the act of 1846, of which it is a condensed revision; and consequently, if a lease for more than one year creates and passes "an estate or interest in land," the joinder of the husband and wife in its execution, and the separate acknowledgment of the wife, are essential to its validity. The statute regulating such conveyances, and that giving to the husband the sole management of the wife's property, must both be observed; and it is evident that the power conferred by the latter cannot include the doing by the husband, alone, of those things in which the joint action of husband and wife are required by the former. As we have seen, the question is to be determined from the language of the act of 1846. It relates to any "deed or other writing purporting to be a conveyance of any estate or interest in land the separate property of the wife." We need not dwell upon an exact definition of the word "conveyance," for, from the very terms of the statute itself, it necessarily results that any writing which is necessary to convey land, and which purports to convey any estate or interest in land of a married woman, is a conveyance such as is meant. That a leasehold for more than one year is an estate or interest in land is recognized by the statute (article 624). When the acts of 1841 and 1846 were adopted, the other statute, regulating conveyances generally, declared such terms for more than five years to be estates in land, and the instruments creating them to be conveyances; and the Congress, in adopting the married women's statute, must have had in mind those provisions, and, by the language employed must have meant to include such conveyances. One statute required written conveyances to pass such an interest, and the others prescribed the persons by whom, and the mode in which, they should be made. *Ballard v. Carmichael*, 83 Tex. 363, 18 S. W. 734. In the revision of 1879 the term for which parol leases might be made was

reduced to one year, but the provision for conveyances by married women was introduced as a part of the chapter upon conveying; and the association between the rules originally adopted by different statutes was thus preserved, so that the conveyances which one required to be in writing were by the other required to be executed by the husband and wife, if the property conveyed were the separate estate of the wife. That such statutes, enabling husband and wife to convey the wife's separate property, apply to leases of it, has been held by the courts of the highest authority, and we find no conflicting decision. *George v. Goldsby*, 23 Ala. 326; *Chandler v. Jost*, 81 Ala. 411, 2 So. 82; *Warren v. Wagner*, 75 Ala. 188, 51 Am. Rep. 446; *Jackson ex dem. Campbell v. Holloway*, 7 Johns. 81. *Jones v. Marks*, 47 Cal. 242, is authority for the proposition that a lease is a conveyance, in the sense of a statutory provision like article 624. It is true that the original statutes, as well as the Revised Statutes, declare that the conveyances provided for "shall pass all the right and interest which the husband and wife, or either of them, may have in or to the property therein conveyed;" and it may be urged that this shows that only conveyances of the entire title were in contemplation. But the answer is that by "property therein conveyed" is meant the estate or interest conveyed, which need not be the whole. Otherwise the prior use of the words "any estate or interest" would be rendered wholly meaningless. This construction is also enforced by the decisions of this court holding that the husband and wife may mortgage her separate property, which they could not do if only empowered to convey absolutely the whole title, and others holding that the statute applies to the granting of easements over such property. *Hall v. Dotson*, 55 Tex. 524; *Texas & P. R. Co. v. Durrett*, 57 Tex. 51. These decisions refute the contention that only alienations of the entire title of married women are regulated by the statute. Whether or not a lease for a year, or less, by the husband of his wife's land, would be valid, is not involved, unless argumentatively, in the dissent certified; the difference being as to the validity of longer leases. In the case of *Chandler v. Jost*, 81 Ala. 411, 2 So. 82, the court held that such leases for a year were valid, while those for longer terms were void. The opinion of this court in *Ballard v. Carmichael*, 83 Tex. 363, 18 S. W. 734, may also have an important bearing upon this question. We think the court of civil appeals correctly held that the leases for terms in excess of one year were void, and that the wife could maintain an action to set them aside and recover the property. *O'Brien v. Hilburn*, 9 Tex. 297.

2. The conclusion reached upon the first question renders the second immaterial.

3. The question whether or not, at the suit of a married woman, other than for divorce, a court may restrain a husband from exercising over his wife's separate property the control expressly given to him by statute during marriage, is one of grave importance

and of considerable difficulty. At common law a wife could not sue her husband. As a result of our statutes recognizing the separate existence of married women, and conferring upon them capacity to own property, it is settled in this state that causes of action in their favor, incidental to their ownership, may arise and be asserted in the courts against their husbands. *O'Brien v. Hilburn*, 9 Tex. 297; *Ryan v. Ryan*, 61 Tex. 473; *Hall v. Hall*, 52 Tex. 298, 36 Am. Rep. 725; *Price v. Cole*, 35 Tex. 461. In general, however, the wife cannot have a cause of action against her husband, and hence cannot sue him. Thus, it was held in *Nickerson v. Nickerson*, 65 Tex. 282, that she cannot sue her husband for a tort committed by him upon her person; and in *Trevino v. Trevino*, 63 Tex. 650, it was held that, except by suit for divorce, or a proceeding under article 2972, Rev. Stat., the wife cannot maintain an action to require her husband to support her. Each decision is based upon the proposition that the wife had no cause of action of the character asserted. It will therefore be assumed, for the purposes of this decision, that, besides actions for divorce, the only ones which a wife may maintain against the husband are those which are founded upon her title to her separate property, and are incidental to it. Whenever such a cause of action arises, it is clear, under the decisions, that she has capacity to assert it against her husband. In systems where common-law and equity jurisprudence prevail, unchanged by statute, the legal title to land conveyed to the wife for her sole and separate use vests in the husband; but the equitable title vests in the wife, and equity treats the husband as trustee, holding for her benefit, and requires him to apply the fruits and revenues of the property to her use. It is a common exercise of chancery power to control the husband, as trustee, in the management of property thus held, and, where necessity exists, to take away his powers and bestow them upon a more suitable person. In some jurisdictions the statutes giving married women capacity to hold property expressly make their husbands trustees, and subject them to removal for proper cause. The decisions cited from Alabama are based upon such a statute. Under such systems the fruits and revenues, as well as the corpus, of the property, belong beneficially to the wife, and herein they differ from ours in an important particular. Here the title to the property is vested in the wife, and the only right or power which the husband has over it is that of sole management during marriage; but the fruits and revenues become community property, in which the husband has an equal interest, and of which he has complete power of disposal. It is thus evident that the statute confers upon the husband, not only a power over the wife's separate estate, but a right with respect to it, and these are incidents of the marriage. His position, therefore, is not that of a simple trustee, as it is under the English chancery jurisprudence. If it were, the present case would not involve great dif-

ficulty. It does not follow, however, that the power given to the husband is irresponsible, or that the right is unqualified and indefeasible. Whether or not a husband, under our system, is to be regarded as a trustee for his wife, in respect of her separate estate, is a question upon which expressions of some of the most eminent justices of this court indicate differences of opinion. The opinions of Judge Hemphill show a decided tendency to liken married women's statutory separate estates to those existing under the equity jurisprudence of England, where the husband held as trustee for the sole and separate use of the wife. Of these doctrines, Judge Bell, in *Magee v. White*, 23 Tex. 189, said: "Their whole tendency is to the building up of a system in which all distinction will be destroyed between the statutory estate of a married woman and an equitable estate, limited to her sole and separate use, — a system in which every married woman who has a separate estate will become a ward of chancery, and her husband converted into a trustee for the management of her estate, under the supervisory power of the courts, and subject to be controlled by the court, or removed from his trust, whenever the court becomes dissatisfied with his management, or whenever it becomes necessary to make orders to prevent the misapplication of the rents, issues, and profits of the estate." Further on he said: "If this is permitted, it will be difficult to stop short of an equity system, uncertain and oppressive, in which, as has been before said, the separate estate of the wife shall be placed under the constant supervision of the courts, and, as a part of which, the courts will exercise authority to control or remove the husband from the management of his wife's property, whenever they may think proper to do so, to prevent waste, misapplication of proceeds, etc." In *Richardson v. Hutchins*, 68 Tex. 88, 3 S. W. 279, Judge Stayton said: "While a husband does not, here, hold title to his wife's separate estate in trust for her, as he is held to do in England and in the states of this Union generally, when a conveyance is made to a wife for her separate use and benefit, and no trustee named, yet it does not follow from this that the husband is not, as to the wife's separate property, essentially a trustee, charged with duties for the violation of which any estate subject to the payment of his debts will be liable. A person is said to be a trustee in whom a power over property, or affecting it, rests for the benefit of another; and a person having such power is as essentially a trustee as is one in whom the title to the property which he has the right to control is vested for the benefit of another. The husband is here made by statute the trustee for the wife, with power to manage and control her separate property, and we see no reason why he shall not be held to the duties and liabilities which ordinarily attach to that relation. So long as he manages the separate estate of his wife with reasonable care, not diverting it from the purpose for which the law places it in his hands and control, though loss may result

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from his management, he is not liable therefor; but can it be said that such a trustee may convert the separate estate of the wife into money or other property, and appropriate that to the benefit of himself or to the benefit of the community, and not be liable for its value?"

These expressions are important only because they indicate, in a general way, the conceptions of these able jurists of the nature of the statutory separate estate of married women, and the husband's relation to it. In none of the cases was the question before us, or any one like it, involved; nor were the cases under consideration by Judges Bell and Stayton at all similar. Judge Bell's language would seem to indicate an inclination of the mind against the theory that the husband is trustee for the wife, and subject, as such, to the control of the courts in his management of her estate; but that which he really reprobated was the adoption into our jurisprudence of the English chancery system, under which the husband, purely as trustee, and the wife, as ward, would be under the constant control and supervision of the courts. His remarks do not imply even an impression that the wife has not such an interest in the proper management of her estate as to entitle her, even during marriage, to protection at the hands of the courts against mismanagement on the part of the husband. Judge Stayton's view, that the husband, in some sense, is to be regarded as trustee, because he exercises powers such as belong to trustees, and is to some extent, at least, accountable as such, is, in our opinion, correct. That it is the duty of the husband to support the wife, and that the management of her separate property is committed to him partly for that purpose, is put beyond question by our statutes and decisions. One of her rights is to have this support from him, and, so far as her separate estate constitutes a fund from which the means to satisfy it are to be derived, the right is an incident to her ownership of such estate. The fruits and revenues of that estate constitute a part of such fund. Article 2972, which entitles her to go into court and secure a judgment devoting to her support a sufficient portion of the proceeds of her separate lands, as well as the decisions of this court, clearly shows this. The rights of the husband over the wife's property, and his duty to manage it properly and afford her this support, are thus made correlative. *Wright v. Hays*, 10 Tex. 133, 60 Am. Dec. 200. If he wholly fails to perform this duty, and cannot be made to perform it by ordinary remedies, is his right to the management of her property unaffected by this repudiation of the duty that goes with it, and must the courts, because of this right, deny to the wife any redress? We think the decisions which affirm her right to sue him to enforce her property rights furnish an answer, and that the character of the remedy to which she is entitled must depend upon the necessity of the case. When the husband, by nonperformance of his duties and the abuse of his powers, has defeated

the purposes of the law in conferring the right to manage the wife's property, that right should not be allowed to stand in the way. The wife owns the property, and is entitled to a support out of its revenues when the husband does not furnish it; and this, in our opinion, is a right for the enforcement of which she should have an adequate remedy in the courts. If it be said that the law furnishes her a remedy by divorce, the answer is that a suit for divorce is not a remedy for the enforcement of property rights, nor can it be sustained upon a mere violation of such rights. They may be brought into and adjusted in connection with the proceeding, but are not dependent upon it. A suit for divorce can only be maintained when some of the causes prescribed by statute exist, and such causes are by no means coextensive with those which a party may have for the enforcement of rights of property. Such rights may be infringed in many ways for which there would be no remedy by divorce. Besides, if ground for divorce existed, why should the law require that they be availed of for the protection of mere property interests, when, perhaps, conscientious scruples restrain the party wronged. The proceeding provided for by article 2072 may furnish a sufficient remedy in cases where the husband so manages the wife's property as to make its proceeds subject to the judgment of the court, and to afford a fund adequate to the wife's maintenance, but not in cases like this, where his transactions are such that the fruits of the property cannot be reached. This was demonstrated by the result of the proceeding which plaintiff instituted. The community property and the separate estate of the husband may also be made liable for necessities for the wife, if anyone can be found to furnish them, but this at best uncertain means of relief wholly fails where no such property exists. And if it be true, as held in *Trevino v. Trevino*, 63 Tex. 650, that the wife cannot maintain an action against him to require him to support her, this only strengthens the position that she is entitled to get her support by the proper management of her separate property. Married women may also contract for necessities, and bind their separate property for the prices of them; but why should they be forced, out of respect for supposed rights of husbands, to thus consume the corpus of their estates, when their revenues, properly applied, would supply all needs? The answer is deducible from the decisions that when the husband totally fails in the discharge of his duty, and so diverts the fruits of the wife's property as to deprive her of the benefits which the law entitles her to receive therefrom through his management, the right and power which the law gives to enable him the better to discharge the duty is not an obstacle to the granting of such relief as the nature of the case may require. That these rights of the wife may be asserted by herself, under some circumstances, without action in the courts, although the marriage is not dissolved, is settled by many decisions of this court.

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Wright v. Hays, 10 Tex. 130, 60 Am. Dec. 200; *Cheek v. Bellows*, 17 Tex. 613, 67 Am. Dec. 686; *Cullers v. James*, 66 Tex. 494, 1 S. W. 314; *Fullerton v. Doyle*, 18 Tex. 13; *Kelley v. Whitmore*, 41 Tex. 648; *Ann Berta Lodge No. 42, I. O. O. F. v. Levertton*, 42 Tex. 20; *Clements v. Bwing*, 71 Tex. 372, 9 S. W. 312; *Hector v. Know*, 63 Tex. 617; *Slator v. Neal*, 64 Tex. 222; *Davis v. Saladee*, 57 Tex. 326. While these decisions may not wholly apply to a case like this, where the husband is present, asserting control of the wife's property, they do affirm the principle that his right of management is dependent upon the discharge of the duties which go hand in hand with that right, and that the wife during marriage has rights of property of which she may avail herself when the purposes of the law in making the husband the manager of her estate are defeated by his abandonment of the duty. When there has been no abandonment by the husband of his rights and powers as such, it may be true that the wife is not, by the decisions referred to, restored to all the capacities of a *feme sole* merely by his misconduct; but we think that it is also true that if the husband has repudiated the duties, and is asserting only the rights and powers of his position for selfish purposes, the wife has rights of property which she can enforce in the courts, and, if they can only be adequately enforced by enjoining the husband from controlling her property, that this may be done. We do not understand that Justice Pleasants holds that in no case could a wife be entitled to such relief, but understand him as holding that the facts in this record did not justify such action. We shall not comment at length on the facts. We are bound by the conclusions of the court, if there was any evidence to sustain them, and whether there was, or not, is the question presented by the certificate.

We think the facts stated justify the conclusions that the husband wholly and habitually failed to support his wife; that he has had the management of property belonging to her, the revenues of which, properly utilized, would have supported her, or at least have greatly lessened the hardships of her situation; that he has so systematically and so long managed to keep them out of her reach as to justify the inference that he will continue to do so; and that there is no other remedy afforded by law which will enable her to get the benefit of her property, but to restrain him from its management, and leave her free to utilize it for herself. The court of civil appeals has merely stated the conclusion that the judgment of the district court was sustained by the facts, and we must presume that the court drew all conclusions necessary to sustain its judgment, so far as there is evidence tending to establish them. We are not to be understood as holding that the mere fact of a separation, caused by an unjustifiable refusal of a wife to live with her husband, would entitle her to such relief as is here granted, if the husband is present, asserting his rights, and attempting to perform his duties. It may be conceded that in

such a case his rights would continue, for the reason that the wife cannot by her own acts terminate them. But his right would be to manage the property, as the law intends he shall manage it, for the purposes for which it is committed to his care. The rights of the wife with respect to her separate property would continue in full force, and her fault in causing the separation would not bar her assertion of them, and would not, therefore, protect the husband in the misuse of her property. It is said that the disposition which the husband has made of money received and of other property was within his powers. This may be true, but it does not meet the question as to whether or not

he should be left free in this way to continue to defeat the rights of his wife. That question goes deeper, and brings up for review his exercise of the powers and rights intrusted to him, and the effect thereof upon the rights and interests of his wife. Each act of his, as between his wife and third parties, may be within his lawful power, while it lasts, and yet, as between himself and wife, his course of conduct may be an utter perversion and abuse of those powers.

We are of the opinion that the judgment of the majority of the Court of Civil Appeals is sustained by the evidence stated in the certificate.

WASHINGTON SUPREME COURT.

John H. McDANIELS, *Appt.*,
v.

J. J. CONNELLY SHOE COMPANY, *Defendant*,
and

A. J. BURCHILL *et al.*, *Garnishees, Resp'ts.*

(.....Wash.....)

1. Affidavits controverting a denial by the garnishee of possession of goods of the debtor under a statute permitting such affidavits stating reason to believe the answer to be incorrect and the particulars wherein it is so, are sufficient to raise an issue, where they state that plaintiff believes with good reason that the answer is incorrect, because garnishee took into his possession the debtor's stock of goods and attempted to acquire title thereto without complying with the terms of the statute requiring the purchaser of a stock of goods to ascertain the creditors of the seller, and have the purchase price applied to their claims.
2. A statute forbidding the purchase of a stock of goods in bulk without ascertaining the seller's creditors, and having their claims settled, does not deprive the seller of his property without due process of law, and is not void as class legislation; nor is it in restraint of trade.

(December 30, 1902.)

APPPEAL by plaintiff from a judgment of the Superior Court for Pierce County in favor of the defendant garnishee in an action brought to recover for goods sold and delivered, in which it was sought to reach an amount for which the garnishees were alleged to be liable. *Reversed.*

The facts are stated in the opinion.

NOTE.—This seems to be the first case involving a statute making a transfer of a stock of goods in bulk invalid as to the seller's creditors, unless steps are taken to discharge their claims. On the general question of the participation by purchaser in fraud of vendor, which will invalidate transfer for good consideration as against the vendor's creditors, see note to *Kansas Moline Plow Co. v. Sherman* (Okla.) 82 L. R. A. 38.
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Mr. Fenley Bryan, with Messrs. Bates & Murray, Leopold M. Stern, F. S. Blattner, and John H. McDaniels, for appellant:

The judiciary can only arrest the execution of a statute when it conflicts with the Constitution.

Cooley, *Const. Lim.* 168.

This act does not take away the right to sell property or the right to pay debts. It is not an excess of the legislative authority that security is given for debts not yet due at the time the lien is given.

Phillips, *Mechanics' Liens*, § 209.

The power of the legislature to protect creditors by giving them liens on the property of their debtors is unquestioned.

Gleason v. Tacoma Hotel Co. 16 Wash. 412, 47 Pac. 894; *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147; *State v. Hoskins*, 106 Tenn. 430, 61 S. W. 781; *McCoy v. Cook*, 13 Wash. 158, 42 Pac. 546.

Such law merely grants a new remedy, and is applicable to debts created prior, as well as subsequent, to its passage.

Gordon v. South Fork Canal Co. McAll. 513, Fed. Cas. No. 5,621; *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860; *Bolton v. Johns*, 5 Pa. 145, 47 Am. Dec. 404; *Sullivan v. Brewster*, 8 How. Pr. 207.

Messrs. Ira A. Town, A. R. Titlow, and F. M. Halsted for respondents.

Fullerton, J., delivered the opinion of the court:

The appellant brought an action in the superior court of Pierce county against the J. J. Connelly Shoe Company, as defendant, to recover upon certain accounts for merchandise which had theretofore been assigned to him by the wholesale dealers who had sold the merchandise to the defendant. At the time of commencing the action the appellant sued out a writ of garnishment against the respondents A. J. Burchill and William Turner, averring in his affidavit for the writ, in the language of the statute, that he had reason to believe, and did believe, that the respondents were indebted to the defendant

the J. J. Connelly Shoe Company, and that they had in their possession and under their control personal property and effects belonging to the defendant. The respondents answered separately to the writ, averring, in substance, that they were not indebted to, and did not have in their possession or under their control any personal property or effects of, the defendant. To these answers the appellant filed a controverting affidavit, in which he alleged that he had good reason to believe, and did believe, that the answers of the respondents were incorrect, particularly that part of the answers which averred that the respondents had no personal property or effects in their possession or under their control belonging to the defendant; further averring, in substance, that the defendant had theretofore been engaged in the retail boot and shoe business in the city of Tacoma, and had become indebted in large sums to various wholesale dealers, among whom were the assignors of the appellant; that just prior to the commencement of the action the defendant had undertaken to sell to the respondents, and the respondents had undertaken to purchase of the defendant, its stock of goods in bulk; that the goods had been delivered, and the agreed purchase price paid, without a compliance with the provisions of the statute relating to the sale of stocks of goods in bulk, and was therefore fraudulent and void. The respondents thereupon moved for a discharge upon their answers, which motion the trial court granted, entering a judgment of dismissal of the garnishee action. This appeal is from that judgment.

The trial judge sustained the motion to dismiss on the ground that the act of the legislature of March 16, 1901, relied upon by the appellant, is unconstitutional and void; and it is to this question that the arguments are mainly directed. The respondents, however, insist that the controverting affidavits were insufficient to raise an issue, and that the judgment of dismissal should be sustained for that reason. But without following the argument in detail, we are satisfied that the affidavits were sufficient to raise the issue sought to be raised. The statute (Ballinger's Anno. Codes & Statutes, § 5409) provides that, if the plaintiff should not be satisfied with the answer of the garnishee, he may controvert the same by affidavit in writing signed by him, stating that he has good reason to believe that the answer of the garnishee is incorrect; stating in what particulars he believes the same is incorrect. The affidavits controverting the answers of the respondents sufficiently complied with the statute in this respect. They not only stated that the appellant had good reason to believe, and did believe, that the answers were incorrect in the particular wherein it was averred that the respondents had no property or effects in their possession or under their control belonging to the defendant J. J. Connelly Shoe Company, but the grounds upon which that belief was based were detailed at length, namely, facts were alleged tending to show that the respondents

had taken into their possession and attempted to acquire title to a stock of goods belonging to the defendant under circumstances prohibited by statute.

The further question involves the constitutionality of the act of March 16, 1901 (Sess. Laws 1901, p. 222; Pierce, Code, §§ 5346 et seq.). The 1st section of this act makes it the duty of every person who shall bargain for or purchase any stock of goods in bulk, for cash or on credit, before paying the vendor any part of the purchase price thereof, to demand of and receive from the vendor a written statement showing the names and addresses of all of the creditors of the vendor, together with the amount of such indebtedness, whether due or to become due, owing to each of such creditors, verified according to a form set out in the statute. The 2d section makes "fraudulent and void" any sale of a stock of goods in bulk unless the vendee demands and receives from the vendor the statement mentioned in the first section, verified as therein provided, "and without paying or seeing to it that the purchase money of said property, is applied to the payment of the bona fide claim of creditors of the vendor as shown upon such verified statement, share and share alike." The 3d section makes it perjury on the part of a vendor to make and deliver a statement which does not include all of the creditors of the vendor, with the correct amounts owing to each of them, or which contains any false or untrue statement, and provides a punishment for the same. The 4th section declares that any sale or transfer of a stock of goods out of the usual or ordinary course of business or trade of the vendor, or whenever substantially the entire business or trade theretofore conducted by the vendor shall be sold or conveyed, or whenever an interest in or to the business or trade shall be sold or conveyed, or attempted to be sold or conveyed, shall be a sale in bulk, in contemplation of the act; followed by a proviso to the effect that, if the vendor shall produce and deliver a written waiver of the provisions of the act, then this section shall not apply. The 5th and last section provides that nothing in the act contained shall apply to sales by executors, administrators, or receivers, or to sales made by any public officer acting under judicial process.

The first objection to the constitutionality of the act is that it deprives persons of their property without due process of law. As we understand the argument, the contention is not that the act deprives an owner of property of his day in court, where his property rights are judicially called in question, or that it in any manner authorizes the actual physical taking by one of the property of another, but it is that as the term "property," in legal signification, includes in its meaning the right of any person to possess, use, enjoy, or dispose of a thing, the act violates the Constitution, inasmuch as it restricts the right of an owner to dispose of his property. The act, it is true, does prohibit owners of certain kinds of property from disposing of it in a particular way, without

complying with certain conditions, but it is not for that reason necessarily unconstitutional. While the legislature may not constitutionally declare that void which in its nature is, and under all circumstances must be, entirely honest and harmless, yet it may, under its police powers, place such reasonable restrictions on the right of an owner in relation to his property as it finds necessary to protect the interests of the public, or prevent frauds among individuals. If this were not so, it would be easy to find many unconstitutional acts on the statute books. Statutes familiar to every person, such as those regulating the manner of conveying real property, regulating the mortgaging and sale of personal property, requiring certain articles of food made in imitation of other well-known articles to be branded with their true names, regulating the sales of poisons, and the like, are statutes restricting the rights of an owner in relation to his property, yet such statutes, in so far as they tend reasonably to prevent injury to the public, and frauds among individuals, are uniformly held constitutional. Turning to the act before us, its purpose is plain. It was intended to prevent retail dealers in goods, wares, and merchandise from defrauding their creditors. As such, it is among the undoubted subjects of legislation; and the real question to be considered, therefore, is, Is the act so far an abuse of the power of legislation as to take it out of the rule of due process of law? In our opinion, it is not. It is a general rule that, when the business is a proper subject of police regulation, the legislature may, in the exercise of that power adopt such measures as they see fit to correct the existing abuses, so long as the measures adopted have relation to and a tendency to accomplish the desired end, and violate no direct constitutional provision. This act is within the rule. That it has relation to and will tend to prevent the particular frauds aimed at, cannot be doubted. Nor is there any direct constitutional provision against the enactment of such laws. Whether the act is more harsh than was necessary, or whether it is not the wisest or best that could have been adopted, are legislative questions, with which the courts have nothing to do. It is enough for the court to know that the act is within the legislative power.

It is next said that the act violates that provision of the Constitution which prohibits the legislature from granting to a class of citizens privileges and immunities which upon the same terms shall not equally belong to all citizens; in other words, it is class legislation. In *Redford v. Spokane Street R. Co.* 15 Wash. 419, 46 Pac. 650, we held that where a law is uniform so far as it operates, its constitutionality is not affected by the number of persons within the scope of its operation; and, applying this principle, we held in *Fitch v. Applegate*, 24 Wash. 25, 64 Pac. 147, that a law giving laborers in certain enumerated industries liens upon the general property of their employers was constitutional. The same principle is applicable to the case in hand. It is true that 60 L. R. A.

the mere fact of classification is insufficient to relieve a statute from the reach of this clause of the Constitution,—that it must appear that the classification is made upon some reasonable and just difference between the persons affected and others, to warrant classification at all; but, applying this test, the act is sufficient. The reason is found in the nature of the business itself. It is well known that the business of retailing goods, wares, and merchandise is conducted largely upon credit and furnishes an opportunity for the commission of frauds upon creditors not usual in other classes of business. In fact, charges of fraud made against retail dealers who have sold their stocks in bulk are among the most common with which the courts are called upon to deal. Legislation, therefore, which restricts the absolute right of persons engaged in such business to transfer their property, so long as it applies alike to all persons engaged therein, is not class legislation, within the meaning of the Constitution, merely because it does not apply to all owners of property. Nor is the act in restraint of trade. It prevents no one from dealing in the usual and ordinary course, nor does it prevent the selling of stocks of goods in bulk. It restricts only the application of the proceeds when stocks are sold in the latter manner. It may be that, because of this, sales in this manner will not be so readily made as formerly; but, if this be so, it is only another case where private desires must yield to the public good, and not one of unconstitutional enactment.

As to the particular provisions of the act, there is, indeed, much that may be criticised, and doubtless certain of its provisions will require construction when attempt is made to work it out in detail. But the former are not so gross as to authorize the courts to declare the law a nullity, and the latter can best be determined when the questions actually arise.

The judgment of the trial court is reversed, and the cause is remanded, with instructions to proceed with a hearing upon the merits.

Reavis, Ch. J., and Dunbar, Anders, and Mount, JJ., concur.

Elzie N. HOWE, *Respt.*,
v.

NORTHERN PACIFIC RAILWAY COMPANY, Impleaded, etc., *Appt.*

(.....Wash.....)

1. Master and servant may be joined as defendants in an action for injuries to another servant caused by the act of the one

NOTE.—As to liability of master where his own negligence combines with that of a fellow servant to injure an employee, see also, in this series, *Loveless v. Standard Gold Min. Co. (Ga.)* 59 L. R. A. 506, and *footnote* thereto.

As to right to join corporation and officer

made defendant, for which the master is responsible.

2. The dismissal of the servant from the suit at the close of the testimony, against the objection of plaintiff, because the evidence makes no case against him in an action against master and servant for a personal injury, will not entitle the master to remove the cause to a Federal court, which removal had been prevented at an earlier time by the presence of the servant as codefendant in the case.
3. A fireman on a train is not the fellow servant of the conductor of his train, or of that of a preceding one, with reference to the placing and observance of signals to prevent a collision in case the leading train is delayed so as to be a menace to the following one.
4. A master is liable for injury to a servant to which his negligence contributes, although negligence of a fellow servant of the injured person is also a contributory cause.

(December 30, 1902.)

APPEAL by the defendant corporation from a judgment of the Superior Court for Spokane County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. Stephens & Bunn, for appellant:

There is one duty to the plaintiff, and that is the duty of the master.

A failure to provide a safe place in which a servant shall work is a failure of the master, and of the master alone.

McDonough v. Great Northern R. Co. 15 Wash. 244, 46 Pac. 334; *Ogle v. Jones*, 16 Wash. 319, 47 Pac. 747; *Mulcahey v. Methodist Religious Soc.* 125 Mass. 487.

Neither of the conductors owed any duty whatever to the plaintiff. There being no duty, there could be no breach of duty, and, no matter what the consequent damage might prove to be, neither one nor the other of them could be held responsible therefor.

Murray v. Usher, 117 N. Y. 542, 23 N. E. 504; *Osborne v. Morgan*, 137 Mass. 1; *Dean v. Brock*, 11 Ind. App. 507, 38 N. E. 829; *Steinhauser v. Spraul*, 114 Mo. 551, 21 S. W. 515, 859, 127 Mo. 541, 27 L. R. A. 441, 28 S. W. 620, 30 S. W. 102; 1 Shearm. & Redf. Neg. 5th ed. §§ 243, 245; *Willard v. Pinard*, 44 Vt. 34; *Van Antwerp v. Linton*, 89 Hun, 417, 35 N. Y. Supp. 318; *Jessup v. Sloneker*, 142 Pa. 527, 21 Atl. 988.

They could not be liable jointly with the railway company, because the railway company would be liable only because of the doctrine of *respondeat superior*.

thereof as defendants in action for injuries caused by the negligence of both, see *Greenberg v. Whitcomb Lumber Co.* (Wis.) 28 L. R. A. 439.

As to right of nonresident railroad company, joined with resident agent in action for injuries caused by the latter's negligence, to remove case to Federal court, where agent was joined solely to prevent removal, see *Winston v. Illinois C. R. Co.* (Ky.) 55 L. R. A. 603.

For joinder of action against city and officers

Doremus v. Root, 23 Wash. 710, 54 L. R. A. 649, 63 Pac. 572.

The action of the court in denying the defendant railway company's petition for removal to the United States circuit court was erroneous.

The case would have been removable had the defendants Kamm and Gilbert been dismissed voluntarily by the plaintiff himself at any time before the case went to the jury.

Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264.

When the codefendants were dismissed from the action, the railway company filed a proper bond and petition. Then the case was removed to the United States court *ipso facto*.

Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67.

All of the members of the two different crews on these trains were fellow servants of the fireman and plaintiff Howe, who was a member of one of those crews.

Sayward v. Carlson, 1 Wash. 29, 23 Pac. 830; *Morgan v. Carbon Hill Coal Co.* 6 Wash. 577, 34 Pac. 152, 772.

No negligence which was or could have been shown on the part of the company, or of the defendants, was the proximate cause of the injury to the plaintiff.

Evansville & T. H. R. Co. v. Tohill, 143 Ind. 49, 41 N. E. 709, 42 N. E. 352; *Pease v. Chicago & N. W. R. Co.* 61 Wis. 163, 20 N. W. 908; *Trewatha v. Buchanan Gold Min. & Mill Co.* 96 Cal. 494, 28 Pac. 571, 31 Pac. 561; *Keever v. Providence Gold & Silver Min. Co.* 70 Cal. 392, 11 Pac. 740; *Wood, Mast. & S.* 812; *Norfolk & W. R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Kansas & A. Valley R. Co. v. Dye*, 16 C. C. A. 604, 36 U. S. App. 23, 70 Fed. 24; *Fowler v. Chicago & N. W. R. Co.* 61 Wis. 159, 21 N. W. 40; *Relyea v. Kansas City, Ft. S. & G. R. Co.* 112 Mo. 80, 18 L. R. A. 817, 20 S. W. 480; *Lutz v. Atlantic & P. R. Co.* 6 N. M. 496, 16 L. R. A. 819, 30 Pac. 912.

Imperfect equipment does not relieve trainmen from the duty to use care, but, on the contrary, it should impose upon them the duty to use greater care.

La Croy v. New York, L. E. & W. R. Co. 132 N. Y. 570, 30 N. E. 391; *Johnson v. Chesapeake & O. R. Co.* 38 W. Va. 206, 18 S. E. 573; *Enright v. Toledo, A. & N. M. R. Co.* 93 Mich. 409, 53 N. W. 536; *Rose v. Gulf, C. & S. F. R. Co.* (Tex.) 17 S. W. 789; *Whittaker v. Delaware & H. Canal Co.* 49 Hun, 400, 3 N. Y. Supp. 576; *Redford v. Spokane Street R. Co.* 15 Wash. 419, 46 Pac. 650.

The proximate cause of an injury is that

for establishing pesthouse, see *Clayton v. Henderson* (Ky.) 44 L. R. A. 474.

As to joinder of municipality and abutting property owner in action to recover damages for injuries caused by defective sidewalk, see *Dutton v. Lansdowne* (Pa.) 53 L. R. A. 469.

As to joining city, street railway company, and contractor working for latter in action for injuries caused by negligent obstruction of street, see *Weist v. Philadelphia* (Pa.) 58 L. R. A. 666.

act or omission which immediately causes, or fails to prevent, the injury, and without which the injury would not have happened, notwithstanding other acts or omissions concurrent therewith.

Deming v. Merchants' Cotton-Press & Storage Co. 90 Tenn. 306, 13 L. R. A. 518, 17 S. W. 89; *Lynn Gas & Electric Co. v. Meriden F. Ins. Co.* 158 Mass. 570, 20 L. R. A. 297, 33 N. E. 690; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 18 L. R. A. 215, 32 N. E. 285.

It is not enough that the accident and injury are natural consequences of the negligence, but such negligence is the proximate cause only when, under all the circumstances, the accident could have been foreseen by a man of ordinary intelligence and prudence.

Huber v. La Crosse City R. Co. 92 Wis. 636, 31 L. R. A. 583, 66 N. W. 708; *Block v. Milwaukee Street R. Co.* 89 Wis. 371, 27 L. R. A. 365, 61 N. W. 1101; *Barton v. Pepin County Agri. Soc.* 83 Wis. 19, 52 N. W. 1129; *Davis v. Chicago, M. & St. P. R. Co.* 93 Wis. 470, 33 L. R. A. 654, 67 N. W. 16, 1132; *McGowan v. Chicago & N. W. R. Co.* 91 Wis. 147, 64 N. W. 891; *Hoover v. Beech Creek R. Co.* 154 Pa. 362, 26 Atl. 315; *Wheatley v. Philadelphia, W. & B. R. Co.* 1 Marv. (Del.) 305, 30 Atl. 660; *Herrington v. Lake Shore & M. S. R. Co.* 83 Hun, 305, 31 N. Y. Supp. 910; *Northern P. R. Co. v. Poirier*, 167 U. S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741; *Moeller v. Delaware, L. & W. R. Co.* 13 App. Div. 467, 43 N. Y. Supp. 603.

The chain of causation between the negligence of the defendants (if there was such negligence) was broken before the accident, and the negligent omission of members of the train crew was the immediate and proximate cause of the injury.

Harvey v. New York O. & H. R. R. Co. 32 N. Y. S. R. 817, 10 N. Y. Supp. 645; *Searles v. Manhattan R. Co.* 101 N. Y. 661, 5 N. E. 60; *Whittaker v. Delaware & H. Canal Co.* 49 Hun, 400, 3 N. Y. Supp. 576.

Messrs. Barnes & Latimer and Hyde, Townsend, & Tompkins, for respondent:

The defendant company was negligent in sending the snowplow train out of Cheney, with the locomotives in the condition they were in at the time, and in failing to supply a competent fireman for the helper engine.

Flike v. Boston & A. R. Co. 53 N. Y. 549, 13 Am. Rep. 545; *Greene v. Minneapolis & St. L. R. Co.* 31 Minn. 248, 47 Am. Rep. 785, 17 N. W. 378; *Reed v. Burlington, C. R. & N. R. Co.* 72 Iowa, 166, 33 N. W. 451; *Northern P. R. Co. v. Babcock*, 154 U. S. 201, 38 L. ed. 961, 14 Sup. Ct. Rep. 978; *Atchison, T. & S. F. R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Ogle v. Jones*, 16 Wash. 319, 47 Pac. 747; *McDonough v. Great Northern R. Co.* 15 Wash. 244, 46 Pac. 334.

The defendant was negligent in the person of McCarthy, conductor of train No. 13, 60 L. R. A.

in following the snowplow train out of the station of Almira.

Northern P. R. Co. v. O'Brien, 1 Wash. 606, 21 Pac. 32; *McDonough v. Great Northern R. Co.* 15 Wash. 256, 46 Pac. 334.

The defendant company was negligent in the person of Kelley, conductor of the snowplow train, in failing to protect the rear of said train, when losing time, after leaving Almira and shortly prior to the accident.

Northern P. R. Co. v. O'Brien, 1 Wash. 606, 21 Pac. 32.

If the negligence of the defendant company in any one of the foregoing particulars was one of the efficient causes of the accident and plaintiff's injury, the company is liable for the damages sustained, whether negligence, attributable to plaintiff's fellow servants, contributed thereto or not.

Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; *New Jersey & N. Y. R. Co. v. Young*, 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 723; *Sroufe v. Moran Bros. Co.* 28 Wash. 381, 58 L. R. A. 315, 68 Pac. 896; *Keating v. Pacific Stream Whaling Co.* 21 Wash. 422, 58 Pac. 224; *Atchison, T. & S. F. R. Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343; *Chicago & N. W. R. Co. v. Gillison*, 173 Ill. 264, 50 N. E. 657; *Cone v. Delaware, L. & W. R. Co.* 81 N. Y. 206, 37 Am. Rep. 491; *Chandler v. Melbourne R. Co.* 2 Vict. L. R. 71; *Louisville, N. A. & C. R. Co. v. Heck*, 151 Ind. 292, 50 N. E. 988; *Illinois C. R. Co. v. Spence*, 93 Tenn. 173, 23 S. W. 211; *Pittsburgh, C. & St. L. R. Co. v. Henderson*, 37 Ohio St. 549.

The question as to proximate cause—as to whether there was any negligence on the part of plaintiff's fellow servants, and, if so, whether the negligence of the defendant company in any of the particulars named concurred and efficiently contributed to the accident—was a question properly left to the determination of the jury.

St. Louis, I. M. & S. R. Co. v. Needham, 16 C. C. A. 457, 32 U. S. App. 635, 69 Fed. 823; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Union P. R. Co. v. Callaghan*, 6 C. C. A. 205, 12 U. S. App. 541, 56 Fed. 988; *Gray v. Washington Water Power Co.* 27 Wash. 713, 68 Pac. 360.

Dunbar, J., delivered the opinion of the court:

This is a personal-injury case. On the 2d of January, 1899, the respondent was fireman on train No. 13, a mixed passenger and freight train running from Cheney to Coulee City. On this day a snowplow train had been sent ahead of the passenger train to clear the road and prepare the track for the passenger train, and at a point about 6 miles west of Almira, a station between Cheney and Coulee City, No. 13, upon which respondent was firing the lead engine, ran into the snowplow, and respondent was injured by the collision to such an extent that his leg had to be amputated. Suit for \$25,000 damages on account of his injuries was brought by the respondent against the

Northern Pacific Railway Company, which was operating the trains above spoken of. Respondent joined as defendants with the railway company Frederick W. Gilbert, who was at the time the superintendent of the division of the railroad upon which plaintiff was working, and A. G. Kamm, who was the chief despatcher employed by the railroad of the division before mentioned. The trial of the cause resulted in a verdict for respondent for \$15,000 against the railway company alone, Kamm and Gilbert having been dismissed from the case by the court at the end of all the testimony. Judgment was entered upon the verdict, and from such judgment this appeal was taken.

The statement of the case by the appellant is very extensive and minute in detail, but we think we have stated sufficient to settle the propositions necessary for the determination of the cause. The complaint alleged negligence in the company in failure to promulgate and enforce ample and sufficient rules for the running of the trains; failure to provide proper machinery and appliances; in running defective locomotives and engines; that the same were unskillfully equipped, manned, and fitted out; failure to furnish competent servants; an insufficient number of servants; negligently ordering train No. 13 to proceed westerly from Almira station to Coulee City on the night in question; and various other allegations of negligence, and failure on the part of Gilbert and Kamm to prepare, publish, and enforce all necessary rules, regulations, and orders for the running and operation of their trains. A joint demurrer of the defendants was interposed to the complaint on the ground of misjoinder, which was overruled, and on this ruling is based one of the assignments of error. It is contended by the appellant that there is no joint liability between the railway company and the despatcher and the division superintendent; that the master cannot be liable together with any of its employees joined in an action based upon charges of this character; and it is insisted that this court has decided this question in favor of appellant's contention in *Doremus v. Root*, 23 Wash. 710, 54 L. R. A. 649, 63 Pac. 572. But we do not so understand the decision in that case. There the action, brought against the railroad company and Root, was based exclusively upon the alleged negligence of Root while acting as conductor of one of the railroad company's freight trains, the respondent in that case being fireman and Root conductor on the same train. The jury returned a verdict finding for the plaintiff and against the defendant railroad company, and assessed the damages of the plaintiff at \$15,000. After the verdict was read, and before the jury was discharged, the attorney for defendant Root inquired of the court what construction the court would place upon the verdict with respect to defendant Root, and the court ruled that said verdict was, and should be considered as, a verdict in favor of defendant Root. The verdict was then recorded, and the jury discharged. After-

wards a judgment was entered in favor of Root and against the plaintiff for costs, and judgment was finally entered against the railroad company for the amount of the verdict, with costs to the respondent. This court held in that case that, inasmuch as the negligence of the railroad company was alleged to be the negligent action of the servant, and the jury having affirmatively found that the servant was not negligent, it must follow that there was no negligence on the part of the master, the railroad company; and that, as there had been no appeal from the judgment in favor of the servant, the cause could not be retried, and it was, therefore, ordered dismissed. In so far as the decision in this case and the discussion leading up to it are concerned, the particular question involved here was not involved in that case, nor attempted to be decided. If, however, any inference is to be drawn from the decision in that case, it is opposed to appellant's contention, for at the threshold of the case the question of nonjoinder was raised and vigorously discussed in appellant's brief, and, if the court had concluded that the appellant's contention was right on that jurisdictional question, it would not have been necessary to have examined or decided the subsequent point upon which the court's decision was based. On this question, however, there is a square conflict of authority, and we have examined it with reference, not only to the cases which are cited in appellant's brief, but with reference to the cases cited in the brief of the appellants in the case of *Doremus v. Root*, 23 Wash. 710, 54 L. R. A. 649, 63 Pac. 572. Section 242 of Shearman & Redfield on the Law of Negligence, 5th ed., is cited to support the contention that the master and servant cannot be joined. This and the succeeding section are in reality a discussion of the principle involved in the distinction that has been raised by some courts between the liability of an agent in case of nonfeasance and that of one in case of misfeasance; but in § 248 the rule is thus stated under the title "Joint Liability of Master and Servant:" "Wherever a master can be held responsible for the tortious negligence of his servant, the two are generally held jointly as well as severally liable; and if a servant employs a subagent under such circumstances that both the original master and the intermediate employer are liable for the negligence of the subagent, they are all jointly and severally liable,"—citing several cases, but stating that a different rule prevails in Massachusetts, and probably in Maine. The theory of the cases holding that there cannot be a joint liability is that there is really but one act of negligence; that the negligence can be imputed to the master, not by reason of his being a joint tortfeasor, but by reason of his peculiar relation to his agent; and that public policy holds him responsible for the agent's acts under the doctrine of *respondent superior*; and it seems that theoretically there may be something in this idea. Many of the cases, however, base their opinions upon the old distinction

which we have spoken of between a case of misfeasance and one of nonfeasance, a distinction which this court, in *Lough v. John Davis & Co.* (Wash.) 59 L. R. A. 802, 70 Pac. 491, held not to be sound, either on reason or on authority. Without specially reviewing the cases on this subject, which are collated in *Waras v. Cincinnati, N. O. & T. P. R. Co.* 72 Fed. 637, in which the right to join the master and servant is denied, there are cited, as sustaining the affirmative of the proposition: *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; *Suydam v. Moore*, 8 Barb. 358; *Montfort v. Hughes*, 3 E. D. Smith, 591; *Phelps v. Wait*, 30 N. Y. 78; *Wright v. Compton*, 53 Ind. 337; *Greenberg v. Whitcomb Lumber Co.* 90 Wis. 225, 28 L. R. A. 439, 63 N. W. 93; *Newman v. Fowler*, 37 N. J. L. 89. In support of the view that the master cannot be joined as defendant in an action against his servant for negligence, where the master is not personally concerned in the negligence either by his presence or express direction, the following are cited: *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745; *Mulchey v. Methodist Religious Soc.* 125 Mass. 487; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Seelen v. Ryan*, 2 Cin. Sup. Ct. Rep. 158; *Campbell v. Portland Sugar Co.* 62 Me. 553, 16 Am. Rep. 503; *Beuttel v. Chicago, M. & St. P. R. Co.* 26 Fed. 50; *Page v. Parker*, 40 N. H. 47; *Bailey v. Bussing*, 37 Conn. 349. Other cases have been decided since with equally conflicting results. But, without entering into a discussion or an analysis of these conflicting opinions, considering the fact that universal authority will hold responsible in independent actions both the master and the agent or servant whose tortious act is the cause of the injury, and the holding of this court that, as to the liability of the servant or agent, there is no distinction between cases of misfeasance and those of nonfeasance, and in further consideration of the reformed procedure which obtains in this state, we are inclined to hold with those cases which permit the rights of all parties to be determined in one action, thereby discourteous and rendering unnecessary a multiplicity of suits, rather than to compel the plaintiff to pursue and exhaust his remedy against one actor, and then, if compensation cannot be realized for the damage sustained, to proceed against another. We think this view is more in harmony with the spirit of our Code and modern procedure generally. It is therefore held that no error was committed by the court in overruling the defendant's demurrer to the complaint.

The next pertinent claim is that the cause should have been removed to the Federal court upon the application which was made and the bond which was offered when Kamm and Gilbert were dismissed from the case. We do not think this contention can be sustained. It is true, under the authorities, if the application is made seasonably, it should be granted, even though it was not made at the commencement of the trial, as was decided in *Powers v. Chesapeake & O. R. Co.* 60 L. R. A.

169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264, cited by appellant. In that case, however, the plaintiff discontinued as to the resident defendants when the cause was called for trial; but in the case at bar it was the request of the defendants themselves that brought about their dismissal, in opposition to respondent's contention. This question is distinctly settled in *Whitcomb v. Smithson*, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248, a late case, decided in January, 1900, and one which seems to us to be exactly in point. In answer to the proposition urged here, the court in that case said: "This might have been so if, when the cause was called for trial in the state court, plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants;" citing *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264. "But," said the court, "that is not this case. The joint liability was insisted on here to the close of the trial, and the nonliability of the railway company was ruled in *invitum*. . . . The case was prosecuted by plaintiff accordingly, and at the close of the evidence a motion was made to instruct the jury to return a verdict in behalf of the railway company because the evidence did not sustain the allegations of the complaint as to the negligence of that defendant, and the court granted the motion on that ground in view of the rules of the company, which it found 'to amply cover all the contingencies arising in the prosecution of the various duties incident to railroad service at the point.' This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried." We think this case is decisive of the question raised, and that no error was committed by the court in refusing to transfer the case to the Federal court.

We have examined the record in detail, and, although it is voluminous, we have been unable to discover any reversible error, either in the admission or rejection of testimony or in the giving or refusing to give instructions. But even if slight error had crept into some of the proceedings in relation to the proof of negligence, we think, under the theory of the appellant, that it would not have been prejudicial, and that the court would have been justified in instructing the jury that negligence had been proved. It is settled law that a rear-end or head-end collision is *prima facie* the result of negligence, where the rights of passengers and of railroad companies are in controversy. If any different rule obtains in a liti-

gation between the railroad company and an employee who is injured, it must be upon the theory that the employee is in some way responsible for the negligence, either through contribution on his part or contribution by a fellow servant. It is conceded and asserted in this case that the conductors on both the trains, *viz.*, the passenger train No. 13 and the snowplow train, were guilty of negligence, and that the accident would not have happened had it not been for such negligence. After discussing the rules which provide the duty incumbent upon the conductor to use certain precautions in cases of this kind, and referring to the fact that train No. 13 left Almira only ten minutes after the snowplow train, and the assertion that the officers are charged by the rules with the duty of assuming that another train is coming when their train is delayed; that explosive caps or torpedoes are provided for placing upon the tops of the rails as signals to be used in addition to the regular signals; and many other precautionary provisions,—the appellant says: "It is shown by the record that trains very often lose time or actually have to stop between stations. This has been true ever since railroad trains commenced running, and because of this all trains were equipped, as this snowplow train was equipped, with appliances to protect them ahead and in the rear. These appliances are so effective and so easily used that there is no occasion and no reason for a rear-end collision of this sort, except in the instance where the train crews are wholly negligent and careless in the use of the signals, or in the entire failure to use them. It will be noted that there was no careless or negligent use of the signal appliances which were on this snowplow train. They had the appliances, they had torpedoes, they had fuses, and they had lanterns; but, instead of there being a negligent or careless use of them, they did not use them at all. Any one of these signals would have avoided a collision or accident of this sort. A torpedo placed on the track, even though there be but one, is a signal for any following train to stop until it has burned out. . . . There was a conductor on the train, who could have done these things; there was a rear brakeman on the train, who could have done these things; and every single one of these men knew and must have known that train was losing time from the moment that it left Almira; and every one of these men knew and must have known that a fast-running passenger train was behind them, running in the same direction. It is almost inconceivable under such circumstances, and almost impossible to believe, that these appliances for their protection were not used; but they were not, and thus the injury was caused." Like negligence is attributed by the appellant to the managers of both the snowplow train and the passenger train. This charge must be made upon the theory that the fireman was a fellow servant with the conductor of the train, and that, therefore, the negligence of the conductor was the 60 L. R. A.

negligence of the fireman. We cannot conceive that it is the duty of the fireman to assume or know that the conductor has not done his duty,—a duty so plain and palpable as is charged upon him by the appellant in this case; or that he is to leave his box, and establish a surveillance over the conductor and other operators of the train. Such conduct on his part would not only be unbecoming or intolerable, but, if tolerated, might lead to the gravest results. There must be some one in control of trains of cars while in transit. There must be some directing mind, some particular person in whom responsibility is lodged; and it would lead to most disastrous confusion if the practice obtained to confer responsibility and directing power equally and miscellaneously upon conductors, brakemen, engineers, firemen, and other operators of a railroad. The proof of such a practice would be the strongest proof of negligence. But it may be confidently asserted that no such practice prevails. It is matter of common knowledge that the conductor of a train under ordinary circumstances is the controlling power. His official title indicates it; and the assumption of the master's authority by him, together with the actions of the company towards him, proves it. As was pertinently said by the Supreme Court of the United States in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184: "The conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company; and therefore that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner." But, whatever may be said of the doctrine of fellow servants in other jurisdictions, under the uniform holdings and announcements of this court the fireman on this train cannot be held to be a fellow servant of the conductors on both or either of the trains which collided, and the negligence which led to this collision is proved upon both equally. The negligence of the company was so overwhelmingly proved in many instances in this case that, even if there had been negligence on the part of someone who might be construed to be a fellow servant of the respondent, the appellant would not thereby be relieved of its responsibility. *Northern P. R. Co. v. O'Brien*, 1 Wash. 599, 21 Pac. 32. It is uniform authority that, if negligence of the master contributes to the injury, he is liable, even though the negligence of a fellow servant was contributory. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493. This principle has been uniformly followed by this court, and was again announced in *Ralph v. American Bridge Co.* (Wash.) 70

Pac. 1098, where it is said: "It is also well settled that, if the negligence of a fellow servant concur with the negligence of the master, it does not excuse the primary negligence of the master for injury to another fellow servant."

An investigation of the whole case convinces us that no substantial error was committed in any respect.

The judgment is therefore affirmed.

Reavis, Ch. J., and Fullerton and Anders, JJ., concur. Mount, J., being disqualified, did not take part in this decision.

CANADIAN BANK OF COMMERCE,
Appt.,
v.

C. E. BINGHAM, Resp't.

(.....Wash.....)

Payment by the drawee of forged checks made payable to a fictitious person to one who cashed them upon an indorsement purporting to be that of the payee, without requiring identification of the one to whom payment was made, will not prevent his recovering back the money so paid, where he was ignorant of the facts, and relied upon the indorsement of the one who cashed the checks; and the latter will not be placed in a worse position by the recovery than he would have been had the checks not been paid.

(December 20, 1902.)

APPEAL by plaintiff from a judgment of the Superior Court for Skagit County in favor of defendant in an action brought to recover the amount which had been paid on a check having a worthless indorsement. *Reversed.*

The facts are stated in the opinion.

Messrs. Milliom & Houser, for appellant:

In the absence of actual fault or negligence on the part of the drawee bank, its constructive fault in not knowing the signature of the drawer, and detecting the forgery, will not preclude its recovering back the amount, or recalling its certificate as against one who has received the money, or taken the check with knowledge of the forgery; or who took the check under circumstances of suspicion without proper precaution; or whose conduct has been such as to mislead the bank, or to induce payment or certification of the check, without the usual scru-

NOTE.—As to drawee's duty to know signature of drawer, see also, in this series, *Germania Bank v. Boutell* (Minn.) 27 L. R. A. 635, and note; *First Nat. Bank v. First Nat. Bank* (Ohio) 41 L. R. A. 584; *First Nat. Bank v. Marshalltown State Bank* (Iowa) 44 L. R. A. 131; and *Woods & Malone v. Colony Bank* (Ga.) 56 L. R. A. 929.

As to who must bear loss of check or bill issued or indorsed to imposter, see *Land Title & Trust Co. v. Northwestern Nat. Bank* (Pa.) 50 L. R. A. 75, and note; also *Tolman v. American Nat. Bank* (R. I.) 52 L. R. A. 877, 60 L. R. A.

tiny or precautions against fraud or mistake.

Dan. Neg. Inst. 3d ed. § 1657; 3 Am. & Eng. Enc. Law, p. 223; *First Nat. Bank v. First Nat. Bank*, 4 Ind. App. 355, 30 N. E. 808; *People's Bank v. Franklin Bank*, 88 Tenn. 299, 6 L. R. A. 724, 12 S. W. 716; *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280, 24 N. E. 44; *First Nat. Bank v. State Bank*, 22 Neb. 769, 36 N. W. 289; *Germania Bank v. Boutell*, 60 Minn. 189, 27 L. R. A. 635, 62 N. W. 327; *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610; Chitty, Bills & Notes, 13th Am. ed. 431, 485; 2 Morse, Banks & Banking, 3d ed. §§ 464-466; 2 Dan. Neg. Inst. 4th ed. §§ 1361, 1362; *Waterloo Milling Co. v. Kuenster*, 158 Ill. 259, 29 L. R. A. 794, 41 N. E. 906; *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 26 L. R. A. 289, 38 N. E. 739; *Birmingham Nat. Bank v. Bradley*, 103 Ala. 109, 15 So. 440; *National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349; *Levy v. First Nat. Bank*, 27 Neb. 557, 43 N. W. 354; *City Bank v. First Nat. Bank*, 45 Tex. 203; *Third Nat. Bank v. Allen*, 59 Mo. 310; *Central Nat. Bank v. North River Bank*, 44 Hun, 114; *Leather Mfrs. Nat. Bank v. Merchants' Nat. Bank*, 128 U. S. 26, 32 L. ed. 342, 9 Sup. Ct. Rep. 3; *Espy v. First Nat. Bank*, 18 Wall. 604, 21 L. ed. 947.

There is a steady tendency of the modern courts to enlarge, rather than restrict, this rule of law. Many of the authorities seem to hold it sufficient to rest the right to recover on the strength of the prior indorsement of the paying bank, independent of the question of negligence.

1 Dan. Neg. Inst. §§ 669, 672, 673; *First Nat. Bank v. First Nat. Bank*, 4 Ind. App. 355, 30 N. E. 808; *People's Bank v. Franklin Bank*, 88 Tenn. 299, 6 L. R. A. 724, 12 S. W. 716; *Cochran v. Atchison*, 27 Kan. 732; *Leather Mfrs. Nat. Bank v. Merchants' Nat. Bank*, 128 U. S. 26, 32 L. ed. 342, 9 Sup. Ct. Rep. 3; *Espy v. First Nat. Bank*, 18 Wall. 604, 21 L. ed. 947.

Mr. Thomas Smith, for respondent:

The cases making an exception to the general rule are not in harmony with the great weight of authority.

First Nat. Bank v. First Nat. Bank, 58 Ohio St. 207, 41 L. R. A. 584, 50 N. E. 723.

The drawee or bank is presumed to know the signature of its depositors and customers, and, if payment is made upon the forged signature of the drawer, the loss must fall on the drawee or bank.

Price v. Neale, 3 Burr. 1355; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310; *Goddard v. Merchants' Bank*, 4 N. Y. 149; *Marine Nat. Bank v. National City Bank*, 59 N. Y. 67, 17 Am. Rep. 305; *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, 6 L. ed. 334; *Levy v. Bank of United States*, 4 Dall. 234, 1 L. ed. 814; *Germania Bank v. Boutell*, 60 Minn. 189, 27 L. R. A. 635, 62 N. W. 327; *First Nat. Bank v. Marshalltown State Bank*, 107 Iowa, 327, 44 L. R. A. 131, 77 N. W. 1047; *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190; *Deposit Bank v. Fayette Nat.*

Bank, 90 Ky. 10, 7 L. R. A. 849, 13 S. W. 339; *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 207, 41 L. R. A. 584, 50 N. E. 723; 1 *Edwards, Bills, Notes, & Neg. Inst.* 3d ed. § 272.

Dunbar, J., delivered the opinion of the court:

The plaintiff (appellant) is a banking institution doing a general banking business in Seattle. The defendant is a banker doing a general banking business in the town of Sedro-Woolley. The Tyee Logging Company is a logging company operating in Skagit county, and having its principal place of business near Sedro-Woolley, the place of business of defendant, and a patron and depositor of plaintiff, upon whom its checks were from time to time drawn in the course of its business. On the 9th of September, 1901, some unknown person issued seven certain checks in the name of the Tyee Logging Company, on plaintiff, all made payable to fictitious persons, and aggregating the total sum of \$429.85. The checks so issued were forgeries, written out on the regular blank checks of the Tyee Logging Company. Some time between the 9th and 11th days of September, 1901, said checks were presented by some one unknown (presumably the person who committed the forgeries) to defendant at his banking house in Sedro-Woolley, and were by him cashed after being indorsed by the person presenting the same, in the name of the fictitious payee. Thereafter said checks were duly indorsed by defendant, and presented to plaintiff at its banking house in Seattle, and were by it paid in ignorance of the fictitious indorsements and of the same having been forged. On the same being presented to the Tyee Logging Company, they were repudiated as forgeries, whereupon demand was made by plaintiff upon defendant for the amount so paid out on said checks, and, payment being refused, this action was brought to recover the same. To plaintiff's complaint, defendant interposed a demurrer challenging the sufficiency of the allegations therein contained to state a cause of action, which demurrer was by the court sustained; and, plaintiff electing to stand upon its complaint, judgment was entered in favor of defendant, dismissing plaintiff's action, from which plaintiff appeals to this court.

The ground of error is the action of the court in sustaining the demurrer to the complaint and in dismissing the action. The two essential allegations of the complaint are as follows: "That at the time of the payment of said check this plaintiff was without knowledge or notice that the same had been forged, and without knowing that the indorsement thereon of the said name thereon, as the same appeared upon said check, was not genuine, but believing that said check had been regularly issued by the said Tyee Logging Company, and believing that the same had been properly indorsed by the owner and holder thereof, and relying upon the subsequent indorsements thereon of the defendant, did pay the said check as 60 L. R. A.

aforsaid." "That at the time of the cashing of said check by the defendant, he was guilty of negligence, in this: that he failed and neglected to have the holder and the person in whose possession said check was at the time of presentation for payment as aforesaid properly identified, or identified at all, and he failed in any manner to use reasonable diligence or care to ascertain whether or not said person so presenting said check was the owner thereof, or was the person named in said check as payee, or was the identical person to whom said check was issued, or to whom it purported to be issued, or that he had any lawful authority, or any authority whatever, to indorse said check, or that he was the lawful holder thereof; that, had defendant used any care or caution, he would have easily discovered that said check was a forgery."

The respondent relies upon the general doctrine that the drawee bank is bound to know the signature of its own depositor, and that, having failed to detect the forgery, and having paid the money on the check, which was presented by the paying bank, it was estopped from recovering back the money so paid. While the appellant concedes the general law to be as so stated, it insists that there is a well-defined exception to the general rule, viz., that, if it appears that the one to whom payment was made was not an innocent sufferer, but was guilty of negligence in not doing something which plain duty demanded, and which, if it had been done, no loss would have been entailed upon anyone, he is not entitled to retain the moneys paid through a mistake on the part of the drawee bank. We think that this exception must be sustained, and that it has a proper application to the allegations of the complaint. There are several principles of law to be considered in the discussion of this case. One is, as is contended by respondent, that a bank is supposed to know the signatures of its depositors, and that constructive negligence is imputed to it if it pays money on checks over the forged signature of its depositor. This rule, however, must be considered in connection with a second well-established rule of law, that money paid through a mistake can be recovered back, and also of a third universal rule, that the transfer of stolen property conveys no title, and that each successive purchaser has recourse upon the party from whom he purchased, because, the consideration for the transaction having failed, and nothing having been conveyed, the contract is void, and the party, having received money for nothing, has no right to retain it. Neither of these rules must be invoked to the entire exclusion of the others, but each is frequently modified by another. Thus, while it is true that constructive negligence is imputed to the bank which pays out money on a check over the forged signature of its depositor, it is also true that it received nothing of value for the money paid for the check, and that no title to the check was transferred by the paying bank. In such a case it might appropriately be said that the doctrine of com

parative negligence applies, and that the constructive negligence of the drawee bank was overcome by the active negligence of the paying bank in not using the ordinary precautions which are used by banks, *viz.*, demanding an identification of the person presenting the check, and putting forth some inquiry as to its genuineness before paying it and sending it on, dignified and accredited by its own indorsement, which would tend to lull the suspicious and abate the watchfulness of the drawee bank. In such case, it seems to us, the original and potent negligence which caused the loss to fall on one of two innocent persons should be imputed to the paying bank. Unquestionably the loss would have been its if the drawee bank had recognized the forgery and refused to honor the check. Why should the mere accident, occurring afterwards, of the bank failing to detect the forgery, permit it to shift the loss, which had already been entailed on it, to another? If the delay of the drawee bank in not promptly reporting the forgery had been the means of preventing the payee bank from obtaining recourse on the forgers, and placing it in a worse position than it would have been in if payment had been refused, that would be a question worthy of consideration, but is not a question involved in this case. Certainly the governing principle upon which the respondent is entitled to retain the appellant's money, if he is so entitled, is that by the action of the appellant he has been prevented from recovering the money out of which he had been defrauded by the forger before the appellant had taken any action in the premises, or, stated affirmatively, that he has been prejudiced by the action of the appellant in paying the check instead of allowing it to go to protest. This is in harmony with the undisputed rule that a drawer or maker of a check, who is deceived by a forgery of his own signature, may recover the payment back, unless his mistake has placed an innocent holder of the paper in a worse position than he would have been in if the discovery of the forgery had been made on presentation, and with the rule that allows the maker of a note, who pays it over his own forged signature, to recover, from the person who received it, for money paid by mistake, unless his negligence has caused loss to an innocent purchaser. There are no arbitrary rules of law governing these cases, and none are contended for. There is no reason why there should be in the case at bar. It is stated in many of the authorities that there is a great conflict of authority on this question, but an investigation leads us to the conclusion that this conflict is more seeming than real; for, while the language of several of the earlier cases gives some color to respondent's contention, and while the general rule is that a bank is responsible for a knowledge of its depositor's signature, and this is asserted in some of the cases with something of vehemence, the language of an opinion must always be construed with reference to the circumstances of the case; and, so construing the cases cited by the ap-

pellant, and all other cases which our independent investigation has been able to collate, they have, with few, if any, exceptions, gone beyond the establishment of the general principle above announced, without attempting to deny the exceptions contended for by appellant, and many of them openly indorse such exceptions.

The case upon which the doctrine contended for by respondent is founded, and which is universally quoted in support of such rule, is an old English case,—*Price v. Neale*, decided by Lord Mansfield and reported in 3 Burr. at page 1354. This case seems to have attracted some attention from the fact that Lord Mansfield stopped the attorney who was arguing the case, with the remark that the case could not be made plainer by argument. This was an action for money had and received, brought by Price against Neale. In this case two bills had been forged and paid, as in the case at bar. There is a meager statement of the case, and a still more meager argument by the court. One of the bills, it seems, had been accepted by the drawee before it had been bought by the defendant, and the court remarks: "The plaintiff lies by for a considerable time after he has paid these bills, and then found out 'that they were forged,' and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side. The defendant had actually encouragement from the plaintiff himself for negotiating the second bill, from the plaintiff's having, without any scruple or hesitation, paid the first; and he paid the whole value, bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man; but in this case, if there was any fault or negligence in anyone, it certainly was in the plaintiff, and not in the defendant." It will be seen that, even in this case, while stating the general doctrine that it was incumbent upon the plaintiff to be satisfied that the signatures were not forgeries, it is expressly stated that there was no fault or negligence on the part of the defendant, who paid the bills, while the complaint in the case at bar alleges, not only general negligence, but specific negligence, to the effect that the paying respondent failed and neglected to have the holder and the person in whose possession the check was at the time of presentation for payment properly identified, or identified at all, outside of the other allegations that, had he used any care or caution, he would have easily discovered that the check was a forgery. So that, construing this opinion in accordance with the rule above announced, *viz.*, with reference to the circumstances of the case, it can scarcely be said to be an authority in favor of sustaining the demurrer to this complaint. One of the cases cited by the respondent, *viz.*, *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 10, 7 L. R. A. 849, 13 S. W. 339, decided that where forged checks on a bank, pur-

porting to be drawn in the name of one of its principal depositors, and running through a period of five months before the forgery is discovered, are accepted and paid by the drawee bank to other banks, which accept and pay them in good faith after inquiry of the drawee as to the depositor's account, the drawee bank must stand the loss. After quoting from Lord Mansfield's opinion, *supra*, and stating that the doctrine had never been departed from, the court recognized the exception contended for by appellant as follows: "Nor is it just to say that the rule adopted, requiring the bank to know the signature of its depositor, is without an exception; for it is undoubtedly true that the neglect or knowledge of intervening parties who come into the possession of the check, and receive the money on it from the bank where it is payable, will in some instances be of such a character as to enable the bank to recover back the money." That case was distinguished from the cases maintaining the exception to the rule, and was decided upon the circumstances surrounding it, viz., that, as the court said: "These checks were continued to be paid during a period of near five months before the forgery was discovered,—a fact, it seems to us, that should be decisive of this case." It is true that Edwards, Bills, Notes, & Neg. Inst. § 272, announces the rule in *Price v. Neale*, 3 Burr. 1354, accrediting that case as the foundation of the text, but, recognizing the distinction for which we are contending, says, in § 276: "It is now settled, both in England and in this country, that money paid under a mistake of fact may be recovered, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund." It will be found that, in all cases where repayment has been refused, it has been on the ground, either that no negligence at all by the paying party has been shown, or that the payment by the drawee bank had placed the paying party in a worse position than he would have been had the payment been refused. Another case cited,—*First Nat. Bank v. Marshalltown State Bank*, 107 Iowa, 327, 44 L. R. A. 131, 77 N. W. 1045,—after announcing the general rule, says: "The rule, however, has one qualification, introduced by some cases, and which we feel inclined to adopt. When the holder of the check has been negligent in not making due inquiry, if the circumstances were such as to demand an inquiry when he took the check, the drawee may recover." It would seem that the remark of the court was pertinent to the case at bar, for certainly it is the duty and the ordinary rule of banks, when dealing with strangers, in the payment of checks presented by them, to demand at least an identification. *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190, announces the rule that the drawee of a check is bound, at his peril, to know the handwriting of the drawer, and that, if he pay a check in which the signature of the drawer had been forged,

he must suffer the loss, as between himself and the drawer or an innocent holder to whom he has made payment. That was the case of a raised check, and is not pertinent to the discussion of the case at bar. *Levy v. Bank of United States*, 4 Dall. 234, 1 L. ed. 814, does not seem to us to be in point. *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310, is simply an announcement of the general rule, relying upon the case of *Price v. Neale*, 3 Burr. 1354; *Germania Bank v. Boutell*, 60 Minn. 189, 27 L. R. A. 635, 62 N. W. 327, which is asserted by the respondent to be a case in point, it seems to us is not in point, so far as the circumstances of the two cases are concerned, for there the paying bank took the precaution which the court says any prudent bank would take,—to have the payee identified and the check indorsed by a responsible person. It is the allegation of the complaint in this case that the failure of the respondent to have the payee identified was an act of imprudence and negligence, and the case cited sustains this contention, in asserting that any prudent bank would have taken that precaution. So, with all the cases we have been able to find, there are none that have gone so far as to hold that, where the paying bank had been guilty of such negligence as failing to have the payee identified, or failing to make any inquiries in regard to the genuineness of the check, when presented by an absolute stranger, it could retain moneys which had been paid by the drawee bank through an inadvertence or mistake in failing to detect the forgery of the depositor's signature. But the authorities affirmatively sustaining the exception to the general rule speak with no uncertain sound. In *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610, the court, after mentioning the general rule, holds: "But this exception does not apply when, either by express agreement or a settled course of business between the parties, or by a general custom in the place, and applicable to the business in which both parties are engaged, the holder takes upon himself the duty of exercising some material precaution to prevent the fraud, and, by his negligent failure to perform it, has contributed to induce the payee to act upon the paper as genuine, and to advance the money upon it." The exception spoken of by the court there was the exception to the rule that money paid under a mistake of facts and without consideration may, as a general rule, be recovered back. In this case the respondent did not exercise the material precaution to prevent the fraud which the court, in *Germania Bank v. Boutell*, 60 Minn. 189, 27 L. R. A. 635, 62 N. W. 327, said that any prudent bank would exercise. "Nor," said the court in *Ellis v. Ohio L. Ins. & T. Co.* "does it apply in any case where the parties are in a mutual fault, or where the money is paid upon a mistake of facts, in respect to which both were bound to inquire." In *National Bank v. Bangs*, 106 Mass. 441, 8 Am. Rep. 349, it was held that the responsibility of a drawee, who pays a

forged check, for the genuineness of the forged signature, is absolute only in favor of one who has not by his own fault or negligence contributed to the success of the fraud or to mislead the drawee; and if the payee took the check, drawn payable to his order, from a stranger or other third person, without inquiry, although in good faith and for value, and gave it currency and credit by indorsing it before receiving payment of it, the drawee may recover back the money paid. The court cited *Price v. Neale*, 3 Burr. 1354, in support of the general doctrine therein declared, but stated: "But this responsibility, based upon presumption alone, is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made;" citing *Gloucester Bank v. Salem Bank*, 17 Mass. 33, to the effect that, if the loss can be traced to the fault or negligence of either party, it shall be fixed upon him.

The confusion which has crept into the decisions of the courts is based upon the fact that the responsibility is an absolute responsibility, instead of a presumption of negligence which may be overcome. If this doctrine is carried to its legitimate conclusion, a case might arise where the forger was so skilful that no expert would be able to detect it, and yet the paying bank might, under circumstances showing indisputable negligence and carelessness in the purchasing of such check, shift the loss which its negligence brought upon it on to an innocent party, upon the theory that the rule was ironclad and absolute, instead of being a presumption alone. In *Third Nat. Bank v. Allen*, 59 Mo. 312, a bank, having paid to a stranger a check drawn upon a sister bank, collected from the latter the amount of the check. The paper turned out to have been forged, and, at the time of the payment, neither bank was aware of, or had reason to suspect, the fact. Next day the paying bank ascertained the forgery, and on that day or the succeeding day notified the other bank of the fact. It was held that the notification was given in reasonable time, and that the money could be recovered back. In *People's Bank v. Franklin Bank*, 88 Tenn. 299, 6 L. R. A. 724, 12 S. W. 716, it was held that where a bank had negligently cashed a forged check purporting to be drawn upon another bank, and had, upon its indorsement of that check, received payment of the drawee bank, it was liable to the latter bank for the amount received, upon subsequent discovery that the check was forged. In that case the defendant answered, admitting that it received and cashed the check, and stating that it was unable to furnish the name of the party or parties by whom the check had been presented and to whom it had been paid; presumed that it required identification, but of this it was not certain. In the discussion of the case, it was said: "Notwithstanding some conflict of authority upon the subject, a careful investigation of the adjudged cases and of the textbooks leads us to the conclusion that the

bank can recover of a party to whom payment is made on a forged check, indorsed by the party to whom paid, where the party to whom paid has been guilty of negligence in receiving and indorsing the check." *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280, 24 N. E. 44, seems to be a case directly in point. There a forged check, purporting to be drawn upon a bank by a firm which was one of its customers, was made payable to a payee named, or bearer. Another bank, of which the firm was not a customer, when the check was presented to it by an unknown person, without attempting to identify him, and upon his indorsing it in the payee's name, cashed it, and was credited with the amount as money by the drawee. The drawee negligently failed to discover the forgery for a month or two, but then immediately notified the bank cashing the check, which was not prejudiced by the delay. Held, that the bank cashing the check must bear the loss. The opinion in this case is written by Devens, J., who, after noticing the general rule which we have discussed, said: "This presumption is conclusive only when the party receiving the money has in no way contributed to the success of the fraud or the mistake of fact under which the payment has been made. In the absence of actual fault on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who took the check under circumstances of suspicion, without proper precaution, or whose conduct has been such as to mislead the drawee, or induce him to pay the check without the usual security against fraud." "The bank is bound to know the signature of its depositor, and, if it pays out money on a forged check, it cannot charge the depositor with the amount, but, as against him, must bear the loss itself. Where, however, the loss can be traced to the fault or negligence of the drawer (or holder), it will be fixed upon him." 3 Am. & Eng. Enc. Law, pp. 222, 223. "But on the other hand, it may be observed that the holder who obtained payment cannot be considered as having altogether shown sufficient circumspection. He might, before he discounted or received the instrument in payment, have made more inquiries as to the signatures and genuineness of the instrument,—even of the drawer or indorsers themselves; and, if he thought fit to rely on the bare representation of the party from whom he took it, there is no reason that he should profit by the accidental payment, when the loss had already attached upon himself, and why he should be allowed to retain the money, when by an immediate notice of the forgery he is enabled to proceed against all other parties precisely the same as if the payment had not been made, and consequently the payment to him has not in the least altered his situation, or occasioned any delay or prejudice. It seems that of late, upon questions of this nature, these latter considerations have influenced the court in determining whether or not the

money shall be recoverable back; and it will be found, on examining the older cases, that there were facts affording a distinction, and that, upon attempting to reconcile, they are not so contradictory as might on first view have been supposed." Chitty, Bills, p. 431. Dan. Neg. Inst. p. 684, under the title, "Exceptions to the rule holding bank responsible when it pays forged checks," says: "Even where the general doctrine that the bank has no remedy, where it has certified or paid a forged check, against the holder, is recognized as a fixed principle of law, there are some exceptions which are insisted upon as reasonable and just. As the responsibility of the bank is based upon the presumption that it has greater means and better opportunities to become familiar with the handwriting of depositors than are afforded the holder, it is declared to be decisive alone when the party holding the check has in no way contributed to the success of the fraud. And if the loss can be traced to the fault or negligence of any party, it will be fixed upon him. In the absence of actual fault or negligence on the part of the drawee bank, its constructive fault in not knowing the signature of the drawer, and detecting the forgery, will not preclude its recovering back the amount, or recalling its certificate, as against one who has received the money or taken the check with knowledge of the forgery, or who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the bank, or to induce payment or certification of the check without the usual scrutiny or precautions, against mistake or fraud." Mr. Morse, in his work on Banks and Banking, 3d ed., § 464, under the title, "The old rule 60 L. R. A.

unreasonable," says: "The old doctrine was that a bank was bound to know its correspondent's signature. A drawee could not recover money paid upon a forgery of the drawer's name, because, it was said, the drawee was negligent not to know the forgery, and it must bear the consequences of its negligence. This doctrine is fast fading into the misty past, where it belongs, . . . for it was founded in misconception of the fundamental principles of law and common sense." In § 466 the same author says: "But it follows, obviously, that, if the payee, holder, or presenter of the forged paper has himself been in default, if he has himself been guilty of a negligence prior to that of the banker, or if by any act of his own he has at all contributed to induce the banker's negligence, then he may lose his right to cast the loss upon the banker." Many of the cases go so far as to hold that the indorsement of a check by a purchasing bank is a warranty of the genuineness of the check, and that the drawee bank can recover back the money paid on such check. We are not able, however, to say that such is the weight of authority; but the overwhelming weight of (if not universal) authority undoubtedly sustains the right of the drawee bank to recover back money paid upon a forged check under the circumstances shown by the allegations of the complaint in this case.

The judgment will be reversed, with instructions to overrule the demurrer to the complaint.

Reavis, Ch. J., and Anders and Mount, JJ., concur.

Petition for rehearing denied.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the Fourth Quarter of the Judicial Year Beginning with October 1, 1902, Classified as Follows.

- I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.
- II. CONTRACTUAL AND COMMERCIAL RELATIONS.
- III. CORPORATIONS AND ASSOCIATIONS.
- IV. DOMESTIC RELATIONS.
- V. FIDUCIARY RELATIONS.
- VI. TORTS; NEGLIGENCE; INJURIES.
- VII. PROPERTY RIGHTS; WILLS; LIENS; DEEDS.
- VIII. CIVIL REMEDIES.
- IX. CRIMINAL LAW AND PRACTICE.

I. PUBLIC, OFFICIAL, AND STATUTORY MATTERS.

A statute requiring every railroad company to drain off the water accumulating along its right of way from the construction of the road, without regard to whether such water is detrimental to the public health and welfare or injurious to contiguous lands, and providing that, if any company, after due notice, fails to comply with the statute, a proper ditch may be constructed by the public authorities upon petition of any owner or tenant of land contiguous to the road feeling himself aggrieved, and the cost assessed upon the railroad company, is held to be unconstitutional as a taking of private property for private use. (Ohio) 525.

Requiring an owner of property, who has made and filed a valid contract for the placing of a building thereon, under which, by the terms of the statute, the entire contract price may be applied to the claims of laborers and material men, to furnish a bond which will make him liable to them in an additional amount in case their claims are not satisfied by the contractor, is held to be unconstitutional. (Cal.) 815.

A statute forbidding the purchase of a stock of goods in bulk without ascertaining the seller's creditors, and having their claims settled, is held not to deprive the seller of his property without due process of law, and not to be void as class legislation, or as in restraint of trade. (Wash.) 947.

Amending unconstitutional statute.

A statute so framed as to be wholly or in part unconstitutional, but having a title expressing a constitutional object, is held to be capable, by amendatory legislation, of being rendered constitutional, without having recourse to an enactment independent throughout its provisions. (N. J. Err. & App.) 564.

Municipal corporations; ordinances.

The authority of a municipal corporation to provide fuel for paupers is sustained, but the right of the legislature to empower it to buy and sell fuel in competition with private enterprise is denied, although it is scarce and high in price, and the cost to 60 L. R. A.

consumers may be thereby reduced, unless there is such a scarcity as to create a general and wide-spread distress in the community, which cannot be met by private enterprise. (Mass.) 592.

General charter authority to define nuisances is held not to empower a municipal corporation to declare anything a nuisance *per se* which in fact was not recognized as such by common law. (Ind.) 831.

An ordinance subjecting one in possession of premises on which liquor is sold, disposed of, obtained, or furnished in violation of law, to fine, whether the act is with his knowledge or consent or not, is held to violate a constitutional provision that absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in the republic. (Ky.) 723.

A municipal corporation is held to have power to stipulate as to the maximum rates to be charged by a gas company when allowing it to lay pipes in the streets, under a statute giving it exclusive power over its streets, highways, and alleys. (Ind.) 822.

An ordinance requiring the closing of stores at 7:30 P. M. excepting Saturday night, is held not to be authorized by general charter authority to make by-laws, rules, and regulations for preserving the health of the citizens, and such as are deemed necessary for the better government of the town. (N. C.) 634.

An ordinance limiting the speed of trains of an interstate railway which carries United States mail to 10 miles an hour within the corporate limits of the municipality, which is passed for the safety of the public and the protection of life and property, is held not to be void as imposing an unreasonable restriction upon interstate commerce and the speedy transportation of the mail. (Ill.) 391.

Bankruptcy.

Since the national bankruptcy law contains no provision for involuntary proceedings against persons engaged chiefly in the tillage of the soil, it is held that it does not supersede the provision of the state law authorizing such proceedings. (Md.) 577.

Persons negotiating for the sale and purchase of goods are held not to occupy a fiduciary relation toward each other within the meaning of the section of the bankruptcy act of 1898 which prevents a release from affecting debts created by fraud while acting in any fiduciary capacity, so as to prevent the release from being operative in case the goods were obtained by the purchaser through fraud and false representations. (Mo.) 885.

Executors and administrators.

The allowance of \$455 out of an undertaker's bill for \$526 for the burial of an aged janitor, whose companions were laboring men, and whose most intimate friend was a street sweeper, and whose estate was less than \$5,000, is held to be excessive. (Iowa) 571.

Anti-trust act.

A combination of the manufacturers of a product of a state, the market for four fifths of which is found in other states, to limit production and raise the price, is held to be a violation of the anti-trust act of July 2, 1890. (C. C. App. 9th C.) 152.

Drains.

Requiring citizens to become members of drainage districts, and share the expense of drainage, against their wills, is held not to make a drainage law unconstitutional. (Mo.) 190.

Power to condemn property injured by a sewer system for a temporary period necessary to perfect some other method of disposing of the sewage is held not to be conferred by general authority to construct sewers and acquire by eminent domain the property necessary for that purpose. (Conn.) 211.

A statute providing for the drainage of wet and overflowed lands in certain cases is held not to be unconstitutional merely because it fails to declare expressly that it was enacted in the interests of the public welfare, and does not expressly make it the duty of the county commissioners, in whom is vested authority to construct drains and sewers when they find the same to be necessary, to determine whether the proposed ditch will be a public benefit. (Minn.) 161.

Carriers.

A statute providing that, when freight which has been shipped, to be conveyed by two or more carriers to its destination under a contract by which the responsibility of one carrier ceases on delivery to the next in good order, has been lost, damaged, or destroyed, it shall be the duty of the initial or connecting carrier, on application, to trace such freight within thirty days after the application, and inform the applicant, in writing, as to the time, place, and manner of the loss or injury, and the names of the parties by whom the truth of the facts can be established; and making a carrier who fails to trace the freight and give such information within the prescribed time liable for the value of the freight,—is held not to be unreasonable or unconstitutional. (Ga.) 817.

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Public improvements.

A provision in a street paving contract requiring the contractor to maintain the work for a period during which such pavement, if properly made, ought to wear, is held to place no illegal burden on abutting property owners, who are required to bear the original cost of the paving, although the duty to repair pavements is, by statute, placed on the city at large. (N. Y.) 768.

Homestead.

The right of a man to convey or encumber his homestead without the co-operation of his wife, as allowed by law, is held to be a vested one, which the legislature cannot destroy, notwithstanding it may be defeated by the filing by the wife of a claim as prescribed by statute. (Mo.) 880.

Schools.

The natural right of parental dominion is held not to render unconstitutional a statute requiring children to be sent to school. (N. H.) 739.

Militia.

A statute requiring the board of county commissioners in each county in which there is a company or battery of state troops to provide each company or battery with an armory for its meetings, drills, etc., is held to be unconstitutional and void. (Fla.) 539.

Courts.

The right of the court to prohibit the publication of testimony taken in a trial in which no obscenity is involved is denied where the Constitution guarantees a public trial and the liberty of the press. (Tex. Crim. App.) 631.

Master and servant.

A statute making a railroad company liable for injuries to servants through the negligence of fellow servants is held not to violate the equality clause of the Federal Constitution, although it does not confine such liability to acts performed in the operation of trains, but extends it to risks similar to those incurred by the employees of persons or corporations engaged in other lines of work. (Mo.) 249.

Sunday.

Forbidding a barber to exercise his trade on Sunday, is held to be a proper exercise of the police power, and not to restrain him unconstitutionally of personal liberty, or deprive him of liberty or property without due process of law. (Utah) 468.

Whether the pumping of an oil well on Sunday is a work of necessity within the meaning of a Sunday law is held to be a question for the jury, where the evidence is conflicting as to the injury which will be caused by not pumping it. (W. Va.) 638.

The hearing of charges against a member of a benefit society, and expelling him from membership because of violation of the rules, are held not to be a judicial proceeding within the rule which forbids such proceedings on Sunday. (R. I.) 626.

Taxes.

The constitutional requirement of uni-

formity and equality in taxation is held not to be violated by taxing shares of stock in foreign corporations and exempting those in domestic corporations, whose property is taxed within the state. (Mich.) 321.

Shares in a joint-stock association are held to be properly dealt with as personality in applying the laws providing a transfer or succession tax, although the property of the association is real estate. (N. Y.) 476.

The use of property in the business of interstate commerce is held not to exempt it from liability to taxation like other property within the jurisdiction in which it is situated. (C. C. A. 6th C.) 641.

A waterworks plant owned and operated by a city is held to be exempt from taxation, and the fact that water is furnished by the city to citizens and other consumers at prescribed rentals is held not to affect the exemption. (Kan.) 850.

The fact that a telegraph line is engaged in interstate commerce is held not to prevent a state tax on the value of that portion of the property which is within the state, although the value of the whole line as a unit is taken into account in fixing such value. (Ind.) 671.

The right of corporations to consolidate is held to be a grant of a corporate franchise subject to Miss. Const. § 180, so that any exemption of one of the old companies from taxation is cut off, although § 181 provides for the continuation of exemptions to which corporations "are legally entitled" at the adoption of the Constitution, and § 279 of the schedule provides for the continuation of rights and charters of corporations. (Miss.) 33.

Smuggling.

The attempted smuggling of goods into the United States is held to justify their forfeiture, as against the claims of one from whom they were obtained by the smuggler by a fraudulent purchase, which remains unrescinded. (C. C. App. 6th C.) 595.

Attempt.

A statute making the penalty for attempt one half that prescribed for the commission of the offense is held to be void for uncertainty in cases where the penalty for the offense is imprisonment for life. (Cal.) 270.

Street railways.

Purchasing the consent of abutting owners to the construction of a street railroad in a city street is held not to be contrary to public policy. (Ohio) 531.

Redemption of pay checks.

An act requiring the redemption in money of checks issued in payment of assigned wages, which is applicable only to merchants on the one hand and coal miners on the other, is held to be void as class legislation. (Ind.) 308.

Eminent domain.

Authority to condemn the right to construct a telegraph line along a railroad right of way is held to be conferred by a statute permitting the condemnation of any lands, whether owned by private persons in fee or in any less estate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation. (Tex.) 145.

A reservoir company is held to have no power to take, by right of eminent domain, land devoted to the purposes of a railroad, unless such taking is required by public necessity; and the facts that the site is the only available one on the stream, and that the railroad company might procure an equally available location for its purposes elsewhere, are held to be immaterial. (Colo.) 383.

The financial returns which a water plant can be made to bear are held to be necessarily considered in determining the value of the franchises of its owner when taken by right of eminent domain. (Me.) 856.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

Contracts; validity; consideration.

An agreement between parties to a contract that neither shall maintain a suit thereon after breach, all differences to be settled by arbitration, is held to be without binding force, as tending to oust the courts of their jurisdiction. (Neb.) 436.

A contract between an attorney at law and one who is not such an attorney, by which the latter agrees to procure the employment of the former by third persons for the prosecution of suits in courts of record, and to assist in looking after and procuring witnesses whose testimony is to be used in the cases, in consideration of a share of the fees which the attorney shall receive, is held to be against public policy, and void. (Neb.) 429.

A clause in a contract for a tour to conduct entertainments, the performance of which will extend into several countries, that suits upon it shall be brought in the 60 L. R. A.

country where the contracting parties are domiciled, is held to be valid, and enforceable by the courts of other countries. (Mass.) 812.

The naming of a child for promisor in accordance with his previous request is held to be a sufficient consideration for a subsequent promise to convey to the child a particular tract of land because of such act. (Iowa) 840.

Bills and notes.

A promissory note is held not to be rendered nonnegotiable by an agreement to pay the sum named "with exchange" on a point other than that at which it is payable. (Neb.) 434.

Notice of dishonor of a promissory note is held to be sufficient if sent to the last indorser by the first mail of the day following dishonor, even though such indorser is an agent for collection merely. (Neb.) 431.

The amount of a note given for medical services by an unlicensed practitioner is held to be recoverable by a bona fide purchaser, notwithstanding the provisions of a statute prohibiting the practice of medicine without a license. (Neb.) 737.

A promissory note payable at a future day to an incorporated charitable educational institution dependent, for the most part, on voluntary contributions for its support, the amount thereof to form, by itself, or with other similar contributions, a permanent endowment fund for such institution, which is accepted by the board of directors, and, in reliance upon which, such institution continues its work and incurs debts and obligations, and solicits subscriptions from others, is held to be supported by a sufficient consideration, and not to be revoked by the maker's death before its maturity. (Minn.) 870.

Banks.

Payment by the drawee of forged checks made payable to a fictitious person, to one who cashed them upon an indorsement purporting to be that of the payee, without requiring identification of the one to whom payment was made, is held not to prevent his recovering back the money so paid, where he was ignorant of the facts, and relied upon the indorsement of the one who cashed the checks; and the latter will not be placed in a worse position by the recovery than he would have been had the checks not been paid. (Wash.) 955.

Landlord and tenant.

An option to renew a lease in accordance with the terms of the instrument giving the lessee the privilege of renewal is held to be exercised, so as to be binding on the lessee, by the statement of his authorized agent, shortly before the expiration of the term, that the lease will be renewed, on the faith of which the landlord makes improvements which he is under no obligations to make, followed by the assurance of the agent of intention to remain, and that no written renewal is necessary, when pressed for such writing after the expiration of the term, and while the lessee is still in possession. (Iowa) 399.

A landlord who leases a building in separate sections is held to be under no implied obligation to keep the portion remaining in his possession in repair, so that damages resulting to property through breach of it can be set up as a counterclaim in an action for rent. (Wis.) 585.

Insurance.

Carrying a loaded gun from one room of a house, in which it had been left by another person, to an adjoining room, is held to be "handling firearms" within the meaning of a clause in an accident insurance policy limiting to \$500 the recovery for any injury received while hunting, or while using or handling loaded firearms. (Neb.) 424.

After-born children of a subsequent marriage are held to be entitled to share in the benefit of a policy of life insurance taken 60 L. R. A.

for the benefit of the children of the insured. (N. C.) 615.

In distributing the loss upon a building, machinery, and stock between insurance policies covering all the items for a gross sum and those specifically liable on each item, all of which provided that the liability should not be greater "than the amount hereby insured shall bear to the whole insurance," it is held that the blanket policies should be regarded as insuring each item to the entire amount unappropriated when it is reached, making the adjustment item by item in the order of greatest loss, if that will work substantial equity and justice to all concerned, and deducting the sums appropriated to the respective items as they are adjusted and passed. (Conn.) 536.

Receiving the premium after the destruction of all the insured property, so that nothing remains to which insurance might attach, is held to waive a provision in a policy that the insurer shall not be liable for a loss occurring before payment of the premium. (Neb.) 918.

The breaking of a plate-glass window by the explosion of gas generated by the use of gasoline to clean clothes is held not to be caused by the blowing up of the building, within the meaning of an insurance policy thereon, which exempts the insurer from loss caused by the blowing up of buildings. (Iowa) 838.

Carriers; baggage.

Only what a passenger takes with him for his own personal use and convenience is held to be within the meaning of a statute requiring carriers to check baggage. (Ky.) 846.

Chattel mortgages.

A stipulation in a chattel mortgage authorizing the mortgagee to take possession of the mortgaged property upon failure of the mortgagor to make payments secured thereby is held not to be contrary to public policy, and to authorize the mortgagee to take peaceable possession of the property, even against the will of the mortgagor. (Tex.) 143.

A mortgage executed in the name of a third person, on chattels not yet acquired by the mortgagor, which does not purport to cover after-acquired property, is held not to bind such property as against a mortgage to another person, executed by the mortgagor in his own name after the property has come into his possession. (Mo.) 256.

Where a hotel building is affixed to land, and is held and conveyed with the land upon which it stands as real estate, it is held that it cannot thereafter, by mere agreement of the parties, become a chattel or personal property, and be legally encumbered by a chattel mortgage, until after its severance from the land. (Idaho) 283.

Sale of good will.

One who sells a trade, good will, and business, covenanting to warrant and defend the same, is held to have no right, after resuming business, to solicit trade from his for-

(CORPORATIONS AND ASSOCIATIONS.—DOMESTIC RELATIONS.)

mer customers to the injury of the buyer. (Ill.) 291.

Warranty.

One who purchases from the manufacturer an emery wheel, upon which the manufacturer has placed a placard warranting the speed capacity of the wheel, and who

sells it in the same condition as when received from the manufacturer, but without any express representation as to its capacity, is held not to adopt the warranty of the manufacturer as his own by such sale. (Minn.) 311.

III. CORPORATIONS AND ASSOCIATIONS.

A holder of stock in a national bank who, without knowledge or suspicion that the bank is insolvent or is likely to prove so, sells the stock, and who does everything reasonably possible to procure a transfer of the shares on the books of the bank, is held not to be liable as a stockholder, although the bank is declared insolvent before the transfer is effected, and both the bank and the purchaser were insolvent when the sale was made. (C. C. App. 3d C.) 266.

Corporations.

All the stockholders of a corporation whose by-laws, adopted by the stockholders in pursuance of authority given by the act of incorporation, provide that a majority vote at a stockholders' meeting shall be binding on the corporation, are held to be bound by all acts and proceedings within the scope of the power and authority con-

ferred by the charter, which are approved and sanctioned by the vote of a majority of the stockholders, duly taken and ascertained according to law. (N. J. Err. & App.) 742.

Stockholders who have acquired their shares and their interests in the corporation from alleged wrongdoers, and through prior mismanagement, are held to have no standing to complain thereof. (Neb.) 927.

Camp-meeting association.

Power to adopt a regulation requiring lessees of lots to purchase all supplies from the lessor is held not to be reserved to an association organized for the maintenance of a camp meeting by a provision in the leases that the lessee shall keep and perform all such conditions or rules as the lessor shall from time to time impose, since such requirement is not reasonable. (N. Y.) 786.

IV. DOMESTIC RELATIONS.

See also *Injunction*, VIII., *infra*.

Marriage.

If a marriage contracted in good faith is void by reason of some impediment, it is held that the parties may, after the removal of the impediment, become lawfully united by continuing to live together with the intention of sustaining toward each other the relation of husband and wife; and that, even where the existence of the impediment and its removal were unknown, continued cohabitation evidences consent to live in wedlock. (Neb.) 605.

Divorce.

A woman who consented to a decree of divorce against her to enable her husband to obtain a grant of property is held to have no right, after her husband had married another woman, to have the decree annulled, although, in consideration of her consent, he promised to remarry her after the grant was procured, and the decree was obtained by suppression of facts, and false testimony. (Utah) 294.

A withdrawal of an action for divorce, brought by a wife, is held not to be sufficient to support a conveyance by the husband to the wife of his interest in his father's estate as against the claims of his creditors. (Wis.) 406.

The resumption of marital relations by a wife living separate from her husband, and

about to commence proceedings for divorce against him, to which she was entitled because of his wrongdoing, is held to be a sufficient consideration for his promise to convey property in trust for the benefit of their children, and, in the event of their death, for her benefit. (Ky.) 415.

Wife as witness.

A husband is held not to be able to waive the provisions of a statute that his wife shall in no case testify against him in a criminal prosecution except for an offense committed against her. (Tex. Crim. App.) 465.

Infants; necessities.

Services of an attorney in prosecuting for an infant an action to recover damages for an indecent assault upon her are held to be necessities. (R. I.) 128.

Bastardy.

The marriage, after the birth of a child, of a woman who was unmarried at the time such child was begotten and born, is held not to prevent her from maintaining an action in bastardy under a statute providing that such action may be maintained by any unmarried woman who shall thereafter be delivered of a bastard child, or is pregnant with a child which, if born alive, may be a bastard. (Neb.) 699.

V. FIDUCIARY RELATIONS.

See also *Bankruptcy*, I., *supra*.

Principal and agent.

An agent who is authorized by his principal to sell or exchange the property of the latter upon specified prices and terms is held to be in duty bound, upon learning that a more advantageous sale or exchange can

be made, the facts concerning which are unknown to the principal, to communicate the same to him before making the sale as expressly authorized, and his failure to do so is held to amount to a fraud in law. (Minn.) 734.

V. TORTS; NEGLIGENCE; INJURIES.

Coasting in street.

A municipal corporation is held not to be liable for injuries caused by failure to prevent coasting in its streets, since the duty of preventing such conduct rests on the officers as servants of the state. (Ky.) 575.

Death; right of action for.

The mother of an illegitimate child is held to have no right of action for his homicide, under a statute giving to a mother a right of action for the homicide of a child who contributes to her support. (Ga.) 555.

General statutory language providing indemnity to the next of kin of a person negligently killed is held not to apply in favor of nonresident aliens in case deceased is instantly killed, or dies without conscious pain. (Wis.) 589.

Injury to children.

An occupier of land who undertakes to burn rubbish thereon is held to be under no obligation to guard children of tender years, who are in the habit of resorting there to play, from injury by approaching the fire. (R. I.) 133.

The storing of dynamite in a partially buried box on a vacant lot to which children are accustomed to resort to play is held to be negligence which will render the one guilty thereof liable for injuries to a child by the explosion of one of the sticks, which was taken from the box by children who had resorted to the lot to play, and ignited by one of them in ignorance of its explosive character. (Wash.) 793.

A city, in clearing an alley of weeds, is held to be exercising its police power, so that it is not responsible for negligence in the performance of the work by one whom it has employed for that purpose, which results in the injury of a child attracted there by his operations. (Iowa) 401.

A mother who owns the property, takes care of the family, and who, by express direction amounting to a relinquishment of the father's right, is entitled to the earnings of their child, is held to have the right to maintain an action to recover for the loss and expense to which she is subjected by injuries negligently inflicted by a third person upon the child. (R. I.) 122.

Injury to passenger.

The attempt of a street railway company to operate its cars during a strike of its employees is held not to be negligence, so as to make it liable for an injury to a passenger struck by a stone thrown from the street into the car by a strike sympathizer. 60 L. R. A.

in no way under the control or direction of the company. (Minn.) 601.

The construction of a freight platform so near a railroad track that the elbow of a passenger may come in contact with freight on the platform as the passenger is seated inside of a passing car, with his elbow resting on the sill of one of the windows of the car, and protruding but slightly, is held to be gross negligence on the part of the railroad company, rendering it responsible in damages to a passenger injured thereby. (La.) 727.

Wrongful arrest of passenger.

A railroad company is held not to be liable to a passenger illegally arrested by officers of the law under color of their office, for failure to interfere and prevent the arrest, or for stopping the train to allow the officers to remove their prisoner therefrom. (Ga.) 713.

Injury to guest.

The proprietors of a saloon are held to be liable for an injury to a guest therein, caused by a third person pouring over his feet, while he was asleep, alcohol procured from the bartender, and setting fire to the same. (Minn.) 733.

Injury to servant.

The proximate cause of the death of an employee mortally burned in the employer's burning building, which he had entered to telephone an alarm of fire after he had failed to give an alarm elsewhere, as he had left the building to do, is held not to be the employer's negligence in constructing and maintaining the building so as to be likely to burn, but the employee's act in re-entering the building after he had reached a place of safety. (Tenn.) 459.

The negligence of a bridge foreman, whose duty it is to see that the bridge is free from obstructions on the approach of trains, in failing to see a maul left by a workman in such a way as to interfere with the passage of the train, and not that of the workman in so leaving it, is held to be the proximate cause of an injury to a member of the bridge gang who is struck by the maul as it is hurled from the track by the train. (C. C. App. 5th C.) 462.

One whose duty it is to do the blacksmith work necessary upon the implements used in the construction of a manufacturing plant is held to be, in making a link for the chain used to hold in position the box of a dump car, a fellow servant of one engaged in operating the car, so that the common

employer is not liable for injury to the latter through insufficiency of the link made by the former. (Pa.) 453.

Omission to block a guard rail is held not to render a railroad company liable for injury to a servant whose foot is caught between the rails while he is attempting to uncouple cars, where the evidence shows that there are wide differences of opinion between railroad companies with respect to the relative safety to their servants and the public of the blocked and unblocked guard rails. (Neb.) 443.

A servant undertaking to clean a drain filled with decaying animal matter is held not to assume the risk of injuries from dangerous gases of which he has no knowledge, the effect of which it requires special scientific knowledge to measure and determine, although he knows the character of the contents of the drain, and that it emits offensive odors. (R. I.) 629.

Negligence of servant.

Negligence committed by a servant in the course of his employment, although he acts without the knowledge, or contrary to the known wishes of his master, is held to render the master liable. (Neb.) 313.

A railroad company is held to be liable for the act of its engineer, in whose custody it has placed signal torpedoes, in placing one on the track, in dangerous proximity to bystanders, and moving the engine over it for his own amusement, in consequence of which one of the bystanders is injured. (Wis.) 158.

Libel.

The publication, after due investigation, by a railroad company, that the reason for discharging an employee was that he had made statements which had been proved to be untrue, to the effect that one officer of the company had cast reflections upon the female ancestry of another officer, is held to be privileged, and not to be sufficient to sustain an action for libel unless it was inspired by malice. (Va.) 472.

Words spoken by a witness in a judicial proceeding concerning a stranger to the suit, which are pertinent to the issues involved, and fairly responsive to questions propounded to him, are held to be absolutely privileged notwithstanding actual malice. (Tenn.) 139.

Nuisance.

The storage of gunpowder by a fuse manufacturer in quantities necessary for his business, which is located in a proper place and is conducted with the utmost care, is held not to be a nuisance *per se*, so as to render him liable for injuries caused to neighboring property by the malicious explosion of the magazine by an employee. (Cal.) 377.

Fright.

Physical injury or disease resulting from fright or nervous shock caused by negligent acts, where such result might with reasonable certainty have been anticipated, or the negligence was gross, is held to give a right of action for damages. (N. C.) 617.

Fright, though resulting in physical in-

jury, is held to give no right to recovery of damages, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant. (Minn.) 403.

Malicious disbarment.

A judge of a court of record, is held not to be subject to a private action for oppressively, maliciously, and corruptly entering a decree disbarring an attorney. (Tenn.) 791.

Mail crane; frightening horse.

Erecting in or beside a highway a crane for delivering mail to passing trains, which, when the mail bag is strung upon it, is calculated to frighten horses of ordinary gentleness, is held to be negligence which will render the railroad company liable to one who is injured by the frightening of his horse thereby, although the bag is actually placed in position by government employees. (Ala.) 269.

Defect in sidewalk.

The purchaser of a lot at sheriff's sale, who has not obtained any possession or control of the premises except such as arises constructively from the delivery and recording of the sheriff's deed, is held not to be responsible to the city, which has paid a judgment for injuries received by one falling into a negligently constructed coal hole in front of such lot three weeks after the issuance of the sheriff's deed, and while the former owner is still in possession. (Neb.) 923.

Injury to trees.

A telephone company which removes, destroys, or injures trees planted by an abutting owner along the street adjacent to his property under the terms of a city ordinance, in erecting poles and wires under its franchise, is held to be liable for the resulting damage, though no unnecessary injury is inflicted. (Neb.) 426.

Charivari.

One participating in a charivari of a wedding party is held to have no right to recover for injuries inflicted by the negligent discharge of a pistol by a coparticipant, where the statute imposes a fine upon whoever disturbs the peace of a family or neighborhood by loud and unusual noises, or disturbs any assembly of people met for a lawful purpose. (Ill.) 286.

Injury to tenant's family or property.

Mere failure of a landlord to comply with his agreement to make repairs on the leased premises is held not to render him liable for personal injuries suffered by a member of the tenant's family because of want of repair. (Md.) 580.

A landlord is held not to be relieved from liability for injury to tenants of a lower floor by the freezing and bursting of an automatic fire extinguisher in the portion of the building retained by him, by the fact that he has employed an independent contractor to keep the building heated. (N. H.) 116.

VII. PROPERTY RIGHTS; WILLS; LIENS; DEEDS.

The news of market quotations and sporting items, gathered and furnished by a telegraph company to its patrons by means of tickers, is held to be property which will be protected by equity against appropriation by rival companies who intend to furnish it to their patrons in competition with complainant, to the injury or destruction of the service. (C. C. A. 7th C.) 805.

Facts with reference to contemplated buildings or improvements, which have been ascertained promptly by effort and expense, and compiled and put in form for the use of contractors, having a commercial value so long as they are not generally known, are held to be property, and entitled to protection as such. (Mass.) 810.

Waters.

Appropriation of considerable quantities of water in seasons when that may be done without sensible injury to lower owners is held not to give a prescriptive right to divert the whole stream in dry seasons. (Neb.) 910.

The right to the use of water, when acquired by appropriation, is held to be, in its nature, a property right, and to become a superior and better title to the use and enjoyment of such water than that of a riparian proprietor whose right attaches subsequently. (Neb.) 889.

Corpse.

The right to the custody and to decide upon the place of burial of the body of a deceased unmarried person is held to reside ordinarily in his next of kin; and it is held that the courts will not treat this right as having been waived or relinquished, except upon clear and satisfactory evidence of conduct indicative of a free and voluntary intent and purpose to that end. (Neb.) 440.

Entry for condition broken.

A right of entry for condition broken is held to be transferable after breach, independent of statute, as the English law against maintenance, which forbade such a transfer, is not in force in New Jersey. (N. J. Err. & App.) 750.

Wills.

Under a will by which a testator devises all his property to his widow during her life, with a provision that at her death his

whole estate shall be equally divided between his children, and that the effects going into the hands of his daughters shall not be subject to the control of any husband, but shall belong to his "said daughters and their children;" and that, in case any of the children die without leaving issue, their part of the estate shall be equally divided between his other children, to be controlled in the same way,—it is held that the children of a daughter of the testator who, with such daughter, survive the life tenant, are entitled to share in common with their mother in the remainder interest which on the death of the testator vested in their mother, subject to open and let in any children subsequently born and living at the death of the life tenant; and their rights are held not to be affected by a deed of all her interests in certain realty belonging to the testator at his death, executed by their mother during the existence of the life tenancy. (Ga.) 274.

Mechanic's lien.

Consent to the erection of buildings on the land within the meaning of the mechanics' lien law, so as to make the property liable for liens after the contract has been forfeited and the vendor has resumed possession, is held not to be shown by a clause in an executory land contract: "that the vendee shall have a right to immediate possession" for the purpose of erecting buildings. (N. Y.) 315.

Deeds.

A deed by one to whom an undivided interest in certain land is conveyed, of all the "surface" of such land, retaining the right to maintain on the land such openings as may be necessary for ventilation, drainage, and taking out of coal, without liability for injuries to the surface by reason of mining such coal, and the right to remove the same, given to the owner of the other half interest in such land, who had previously conveyed to the grantor all the coal in, on, or underlying his undivided half of such land, with the right to make and maintain openings for ventilation and taking out of the coal, is held to convey to the grantee the surface only, and not to pass the grantor's right to oil and gas in and under such land. (W. Va.) 795.

VIII. CIVIL REMEDIES.

Garnishment.

Violation of a state statute in sending a claim out of the state for the purpose of garnishment is held not to deprive the garnishee of the protection of the foreign judgment, under which he pays the claim, from liability to pay the debt a second time to his creditor within the state, if he has disclosed all defenses within his knowledge to the foreign court, and notified the debtor of 60 L. R. A.

the proceedings, notwithstanding which the foreign court, which has jurisdiction over the parties and the *res*, compelled him to pay the claim. (Ind.) 396.

A writ of garnishment against a county is held not to be authorized by a statute giving a right to a writ of garnishment to any person bringing a suit in any court of a state against any person, natural or corporate, and providing that officers, agents, and

employees of companies or corporations shall be, as regards such companies or corporations, third persons, and as such subject to garnishment after judgment against the companies or corporation. (Fla.) 549.

Evidence.

The mere fact that the verdict of a coroner's jury must be returned to and filed with the clerk of a court of record in a state where the coroner has no judicial functions is held not to make it judicial in character, so as to entitle it to admission, in an action at law, as evidence of the facts found by him. (Or.) 620.

Assault.

In a civil action for assault and battery it is held that opprobrious words and abusive language cannot be considered by the jury in justification of the assault, but only in mitigation of damages, under a statute providing that, on the trial of the indictment for assault, defendant may give in evidence any opprobrious words or abusive language used by the person assaulted, and the jury shall determine whether they amount to a justification. (Ga.) 559.

Cloud on title.

To enable a reversioner to maintain a suit in equity to remove the cloud from his title, where the lessee, after having covenanted to pay the taxes, neglects to do so, and acquires title to the property at a tax sale, it is held that possession is not necessary. (Md.) 729.

Writ and process.

A member of the legislature is held to be subject, in a proper case, to be served with summons while at the seat of government for the purpose of attending the legislative session. (Neb.) 609.

Ejectment.

Possessory rights only are held not to be sufficient to sustain an action of ejectment without showing the legal title. (Conn.) 706.

Injunction.

An injunction against a husband in a suit

which does not seek the dissolution of the marriage, to restrain him from further interference with his wife's separate estate, is held to be properly granted, notwithstanding the statute gives him the sole management of her estate during marriage, where he refuses to support her, and so diverts the income of her property as to deprive her of the benefit which the law entitles her to receive therefrom through his management. (Tex.) 941.

The draining, collecting, and diverting by a land owner of percolating waters on his premises for the sole purpose of wasting them is held to be properly enjoined, where such acts will destroy or materially injure the spring of a water company which makes use of the water thereof for supplying the people of a municipality with water for domestic use. (Minn.) 875.

Damages.

The measure of damages for wrongfully disconnecting a telephone because of a mistake as to the payment of rent is held to be the amount which will compensate the patron for the injuries caused by the breach of contract. (Ky.) 849.

Joinder of parties.

The joinder of master and servant as defendants in an action for injuries to another servant caused by the act of the defendant servant for which the master is responsible, is held to be proper. (Wash.) 949.

Conclusiveness of judgment.

A judgment in a suit between the owner of property abutting on a highway and the municipality to establish the boundary of the highway is held not to be conclusive on the owner of property located on the opposite side of the street, who is not made a party to the suit, and whose access to and from his property will be interfered with if the boundary so established prevails. (Iowa.) 720.

IX. CRIMINAL LAW AND PRACTICE.

Murder.

A master who whips a servant so that he dies is held to be guilty of murder, although he has a right to inflict the punishment, and the instrument is proper, if the punishment is so prolonged and barbarous as to indicate malice. (S. C.) 801.

Extradition.

A person who was not corporeally present in the demanding state at the time of the commission of a crime with which he is charged is held not to be a fugitive from justice in another state within the meaning of the United States Constitution, requiring the delivery up of fugitives from justice for punishment. (N. Y.) 774.

Lottery.

A scheme whereby a common fund is to be

produced by the contributions of various parties, and afterwards distributed among the parties contributing thereto, and a valuable preference or privilege in the distribution thereof is made to depend upon chance, is held to be a lottery. (Neb.) 448.

Larceny of fish.

The taking with felonious intent of fish which are inclosed in a net, or in any other inclosed place which is private property, from which they may be taken at any time at the pleasure of the owner of the net or inclosure, is held to constitute larceny. (Ohio) 481.

Separation of jurors.

The mere separation of jurors impaneled to try a capital case, from their fellows, without the attendance of an officer, al-

**RÉSUMÉ OF DECISIONS.
(CRIMINAL LAW AND PRACTICE.)**

though an irregularity, is held not to be a sufficient cause for setting aside the verdict, if the court is satisfied that the prisoner has not sustained any injury from such separation. (Fla.) 547.

Reading testimony of dead witness.

Reading on a second trial of a criminal case testimony of a witness who died after the first trial, at which accused was present and represented by counsel, who was accorded the right of cross-examination, is held not to infringe the right of the accused to be confronted with the witnesses against him, in the presence of the court. (N. Y.) 318.

Coram nobis.

The writ of error *coram nobis* is held not to lie to vacate a judgment of conviction
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and secure a retrial of the accused, because of his inability within the statutory limit of time to prepare a record on appeal showing the errors of which complaint was made. (Kan.) 572.

Remarks of prosecutor.

The conduct of the assistant prosecutor on a trial for rape, repeatedly asking the son of the accused, on cross-examination, if he had not stated to a specified person that he suspected his father of having committed a similar offense with other girls, and that such conduct on the part of the accused caused the death of the witness's mother, and that, if at such conversation the witness did not cry out, and say, "I cannot go against my father even if he is guilty,"—is held to be ground for reversal. (Id.) 716.

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TO

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1. A plaintiff must recover on the strength of his own case instead of the weakness of the defendant's case, as it is his right, instead of the defendant's wrongdoing, that is the basis of recovery. *Home F. Ins. Co. v. Barber* (Neb.) 927

2. The motive which induces a person to bring an action is immaterial, if he has a legal right to the remedy he is seeking. *Hamilton, G. & C. Traction Co. v. Parrish* (Ohio) 531

3. The only remedy of a landowner whose land is injured by water accumulated along a railroad right of way is an action at law for damages, and the legislature cannot give him a right to have the water drained off by the public authorities at the expense of the railroad company. *Chicago & E. R. Co. v. Keith* (Ohio) 525

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4. An infant named for the promisor is in such privity to his father as to be entitled to enforce a promise made to the latter to convey land to the child in consideration of such naming. *Daily v. Minnick* (Iowa) 840

5. One who has given a deed of trust on property to secure a debt may maintain an action for an injury to it, if the security is ample for the debt, so that the loss from the injury will fall on him. *Watkins v. Kaolin Mfg. Co.* (N. C.) 617

6. An action under Ga. Civ. Code, §§ 2317, 2318, against a carrier for failure to trace and give information as to the time, place, 60 L. R. A.

and manner of loss or injury to goods shipped over a connecting line to which such goods had been delivered by the carrier in good condition, is properly brought in the name of the shipper, although he was not the owner of the goods. *Central of Ga. R. Co. v. Murphey* (Ga.) 817

7. A traveling salesman who is responsible to his employer for the loss or damage to samples in his possession has such an interest in them that, in case they are checked as baggage by a railroad company, and injured in transportation, he may maintain an action to recover for the injury. *Illinois C. R. Co. v. Matthews* (Ky.) 846

8. A municipal corporation may, for the protection of the citizens, maintain an action to enjoin a gas company from violating its contract as to the maximum rate to be charged for gas in consideration of receiving permission to place mains in the streets, although the municipality itself is not a consumer, and its rights in its municipal capacity are therefore not affected. *Muncie Natural Gas Co. v. Muncie* (Ind.) 822

9. A municipal corporation which has made a contract with a gas company laying pipes in its streets as to the maximum rates to be charged may maintain an action to enforce the contract as a trustee of an express trust, under a statute allowing action by such trustees, and providing that the term "trustee" shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. Id.

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10. Master and servant may be joined as defendants in an action for injuries to another servant caused by the act of the one made defendant, for which the master is responsible. *Howe v. Northern Pacific R. Co.* (Wash.) 949

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1. No appeal lies from an order granting a motion for judgment notwithstanding the verdict. *Sanderson v. Northern P. R. Co. (Minn.)* 403

2. A denial of the right to take property by right of eminent domain upon the issues made by the pleadings after hearing testimony introduced upon motion for the appointment of commissioners, and motion to 60 L. R. A.

dismiss, is a final judgment, which may be reviewed by the appellate court. *Denver Power & Irrig. Co. v. Colorado & S. R. Co. (Colo.)* 383

Record.

3. A motion to modify the decree cannot be considered on appeal, where it was not made a part of the record. *Muncie Natural Gas Co. v. Muncie (Ind.)* 822

4. An objection to a bill of exceptions on the ground that part of the evidence is omitted therefrom is untenable, where the evidence referred to consists of ponderous articles which do not admit of physical attachment to the record, and these are all referred to in the written portion of the bill of exceptions, and articles answering to such reference were filed with the record in the case and produced at the hearing on appeal, bearing the marks of identification of the official reporter of the trial court. *O'Neill v. Chicago, R. I. & P. R. Co. (Neb.)* 443

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5. Words used by the court in instructing the jury must, in determining whether or not they were erroneous, be construed in the sense in which they were used. *Cox v. Royal Tribe of Joseph (Or.)* 620

6. That instructions requested by the defeated party, embodying correct principles of law, were given to the jury, will not prevent a reversal if contradictory and erroneous instructions were given for his adversary. *Gilmore v. Fuller (Ill.)* 286

7. The reasonableness of an ordinance limiting the speed of trains within municipal limits, passed under general statutory authority, which merely prescribes the minimum rate, without prescribing the details of the regulation, is subject to review by the courts. *Chicago & A. R. Co. v. Carlinville (Ill.)* 391

Presumptions.

8. The improper separation of jurors during the trial of a capital case is presumed, if the prisoner is convicted, to have been prejudicial to him; and the burden of proof is upon the prosecution to show that the prisoner has suffered no injury thereby. *Gamble v. State (Fla.)* 547

9. A third extension of time to file statement of evidence on a motion for new trial will be presumed to be within the time of a former extension, where it was duly allowed by the trial judge, and the statute requires extensions to be within the time of former ones, although the second one is not on file. *Crafts v. Carr (R. I.)* 128

Review of finding or verdict.

10. Whether or not the construction of a granite curb in place of an old one of blue-stone is new work or the repair of old work is a question of fact, upon which the determination of the trial court is not reviewable on appeal. *People ex rel. North v. Featherstonhaugh (N. Y.)* 768

11. A decision of the trial court on conflicting evidence as to the misconduct of counsel will not be disturbed on error. *German Ins. Co. v. Shader (Neb.)* 918

12. That the verdict is against the clear weight of evidence is not assignable for error. *Bouvier v. Baltimore & N. Y. R. Co.* (N. J. Err. & App.) 750

Questions not raised below.

13. An objection to the declaration in an action for personal injuries, based on a formal defect in that it did not set forth any duty owing from defendant to plaintiff, cannot be raised before the appellate court in the first instance. *Cox v. American Agri. Chemical Co.* (R. I.) 629

Prejudicial error.

14. An instruction directing the jury to do substantial justice between the parties, although not to be commended, is not prejudicial error, where they are told to do so by finding a verdict "solely from the evidence in the case, applying the law as given in these instructions." *German Ins. Co. v. Shader* (Neb.) 918

15. That the personality was erroneously directed to be exhausted before the real estate, by a judgment subjecting to payment of debts of the assignor property assigned in fraud of the rights of creditors, will not require a reversal of the judgment if the entire property is insufficient to satisfy the creditors' claims. *Oppenheimer v. Collins* (Wis.) 406

16. Refusal to instruct the jury, upon a trial for violation of a Sunday law, that the burden of proof is on the state to show that the work was not a work of necessity or charity within the exception of the statute, is error. *State v. McBee* (W. Va.) 638

17. Submission to the jury of the question whether or not services rendered to an infant were necessities is not available as error to defendant, who is sought to be held liable therefor, where the jury found them to be necessities, and the court would have been compelled to make the same ruling had it undertaken to decide the question. *Crafts v. Carr* (R. I.) 128

18. The conduct of the assistant prosecutor on a trial for rape in repeatedly asking the son of the accused on cross-examination if he had not stated to a specified person that he suspected his father of having committed a similar offense with other girls, one of whom was a member of his family, and that such conduct on the part of the accused caused the death of the witness's mother, and that if at such conversation the witness did not cry and say "I cannot go against my father, even if he is guilty," is ground for reversal. *State v. Irwin* (Idaho) 716

19. The moderate use of intoxicants by the jurors in a capital case, though improper, will not require the reversal of a verdict against the prisoner, where none of the jurors became intoxicated, and it is clearly shown that no injury resulted therefrom to the accused. *Gamble v. State* (Fla.) 547

Judgment.

20. An appellate court may grant a new 60 L. R. A.

trial when there is no evidence to support the verdict. *State v. Shaw* (S. C.) 801

Filing new opinion.

21. The court has a right to file a new and fuller opinion containing every reason for the decision that was included in the first opinion and an additional reason also, although the cause has been remanded to a lower court. *Adams v. Yazoo & M. V. R. Co.* (Miss.) 33

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ASSUMPSIT.

1. Money or assets of a corporation withdrawn by a majority stockholder and converted to his own use, the transactions being concealed by means of opportunities afforded him as an officer of the company until a change in management, may be recovered back by the corporation, although no one but subsequent stockholders will derive benefit from such recovery. *Home F. Ins. Co. v. Barber* (Neb.) 927

2. Payment by the drawee of forged checks made payable to a fictitious person to one who cashed them upon an indorsement purporting to be that of the payee, without requiring identification of the one to whom payment was made, will not prevent his recovering back the money so paid, where he was ignorant of the facts, and relied upon the indorsement of the one who cashed the checks; and the latter will not be placed in a worse position by the recovery than he would have been had the checks not been paid. *Canadian Bank of Commerce v. Bingham* (Wash.) 955

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1. An assault with intent to commit a robbery may be prosecuted as an attempt to commit robbery. *People v. Burns* (Cal.) 270

2. The offense of attempt to commit robbery is created by a statute providing that every person who attempts to commit any crime, but fails, is punishable. *Id.* 270

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1. Since the national bankruptcy law contains no provision for involuntary proceedings against persons engaged chiefly in the tillage of the soil, it does not supersede the provision of the state law authorizing such proceedings. *Old Town Bank v. McCormick* (Md.) 577

Discharge.

Impeaching Judgment to Prevent Release from, by Debtor's Discharge in Bankruptcy, see **JUDGMENT**, 6.

2. No fiduciary relation exists between persons negotiating for the sale and purchase of goods, within the meaning of the section of the bankruptcy act of 1898, which prevents a release from affecting debts created by fraud while acting in any fiduciary capacity, so as to prevent the release from being operative in case the goods were obtained by the purchaser through fraud and false representations. *Goodman v. Herman* (Mo.) 885

3. An affidavit for attachment in an action upon an account for goods sold and delivered cannot be looked to in determining whether or not the action was for fraud, so that a discharge in bankruptcy will not release liability on the judgment therein. *Id.*

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BASTARDS.

1. At common law a bastard child was one who was not born in lawful wedlock nor within a competent time after its termination, or one who was born under circumstances rendering it impossible that the husband of its mother could be its father. *Parker v. Nothomb* (Neb.) 699

2. The marriage, after the birth of a child, of a woman who was unmarried at the time such child was begotten and born, does not prevent her from maintaining an action in bastardy, under the Nebraska statute of 1875 entitled "An Act for the Maintenance and Support of Illegitimate Children," amending the act of 1869 entitled "An Act to Provide for the Support of Illegitimate Children," authorizing such an action on complaint made to any justice of the peace "by any unmarried woman" resident therein who shall hereafter be delivered of a bastard child, or is pregnant with a child which, if born alive, may be a bastard. *Id.*

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1. A member of a benefit society having actual notice of the charge against him for which he is expelled from the society cannot reverse the decision because such charge is not specially stated in the form of proceedings against him. *Pepin v. Société St. Jean Baptiste* (R. I.) 626

2. Benefit societies being charitable organizations, their proceedings may be lawfully transacted on Sunday, even to the hearing and determination of charges against members which result in their expulsion. *Id.*

3. The hearing of charges against a member of a benefit society, and expelling him from membership because of violation of the rules, are not a judicial proceeding within the rule which forbids such proceedings on Sunday. *Id.*

REQUESTS.

See WILLS.

BILL OF EXCEPTIONS.

See APPEAL AND ERROR, 4.
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BILLS AND NOTES.

Recovery Back of Money Paid on Forged Check, see ASSUMPSIT, 2.

Parol Evidence as to Consideration, see EVIDENCE, 16.

Negotiability.

1. A promissory note is not rendered non-negotiable by an agreement to pay the sum named "with exchange" on a point other than that at which it is payable. *Haslack v. Wolf* (Neb.) 434

Notice of nonpayment.

Admissibility as to, Under Pleading, see EVIDENCE, 22.

2. Notice of dishonor of a promissory note is sufficient, if sent to the last indorser by the first mail of the day following dishonor, even though such indorser is an agent for collection, merely, and he is entitled to one additional day to notify the indorser immediately preceding him. *Oakley v. Carr* (Neb.) 431

3. The notice served by the last indorser of a promissory note need not be actually prepared by him, but he may adopt and utilize for that purpose a notice sent him by the protesting officer, addressed to the next prior indorser. *Id.*

4. Where the last indorser of a promissory note receives notice of dishonor on Saturday, his notice to the next prior indorser is timely if served on the following Monday. *Id.*

Rights of transferees.

See also STATUTES, 4.

5. A note given to an unlicensed practitioner for medical services is valid in the hands of a bona fide purchaser, notwithstanding the provisions of Neb. Comp. Stat. art. 1, requiring all persons practicing medicine to obtain a license, and providing that no person shall recover any sum of money for any medical services unless he has obtained a license, and making it unlawful and a misdemeanor for any unlicensed person to practice medicine. *Citizens' State Bank v. Nore* (Neb.) 737

6. A promissory note payable at a future day to an incorporated charitable educational institution, dependent for the most part on voluntary contributions for its support, the amount thereof to form, by itself, or with other similar contributions, a permanent endowment fund for such institution, which is accepted by the board of directors, in reliance upon which and other similar donations such institution continues its work and incurs debts and obligations, and solicits subscriptions from others, all of which is known to the maker of the note, —is supported by a sufficient consideration, and is not revoked by the maker's death before its maturity. *Albert Lea College v. Brown* (Minn.) 870

NOTES AND BRIEFS.

Notice of nonpayment; service of; necessity of forwarding notice to prior indorser; time of mailing notice. 432

Negotiability of; provision for "exchange." 434

Illegality of consideration; effect on bona fide holder's right to recover. 737

Note of donor as gift; sufficiency of consideration; revocation by maker's death. 870

BONA FIDE HOLDER.

Of Note, see **BILLS AND NOTES**, 5, 6.

BONDS.

From Owner of Property on Which Building Constructed, see **CONSTITUTIONAL LAW**, 13.

NOTES AND BRIEFS.

Requiring owner to furnish bond for payment of contractor's claims. 815

BOUNDARIES.

Of Highway, Conclusiveness of Judgment as to, see **JUDGMENT**, 5.

BROKERS.

1. An agent, employed to exchange real estate for other specified property on specified prices and terms, who makes such exchange without disclosing to his principal a more advantageous exchange which he learns can be made, is liable to the principal for the damages resulting thereby. *Holmes v. Cathcart* (Minn.) 734

2. An agent, employed to exchange real estate, who is told by his principal that the amount received on the exchange must include all commissions to be received or claimed by such agent, is not entitled to any part of the commissions received from the other party on making the exchange on the terms and for the prices fixed by the principal. *Id.*

NOTES AND BRIEFS.

Brokers; accepting commissions from other party; concealing important facts from principal. 735

BUILDINGS.

Protection of Facts Gathered as to, see **INJUNCTION**, 2, 4.

BURDEN OF PROOF.

See **EVIDENCE**, 8-11.

BURIAL.

See **CORPSE**.

CAMP-MEETING ASSOCIATION.

1. Streets shown on the plan of the park of an association organized to maintain a camp meeting and lease lots to persons desiring the advantages of the ground are dedicated to the use of the lessees and those, at their request, using them for access to their lots, so that the association cannot prevent such use. *Thousand Island Park Asso. v. Tucker* (N. Y.) 786

2. Exclusive rights are not given by a statute merely authorizing an association 60 L. R. A.

organized to maintain a camp meeting to purchase and deal in provisions and other commodities for supplying the needs of lot lessees and visitors, and to maintain stores and shops for that purpose, and to authorize others to engage in such pursuits, and to make and establish regulations therefor. *Id.*

3. Power to prohibit hawking and peddling within a camp-meeting ground does not authorize the prohibition of the delivery therein of produce ordered by mail by lot lessees, although the price is not fixed until the goods are delivered. *Id.*

4. Power to adopt a regulation requiring lessees of lots to purchase all supplies from the lessor is not reserved to an association organized for the maintenance of a camp meeting by a provision in the leases that the lessee shall keep and perform all such conditions or rules as the lessor shall from time to time impose, since such requirement is not reasonable. *Id.*

NOTES AND BRIEFS.

Camp meeting association; prohibition against delivery of goods on grounds of, as restraint of trade. 786

CARRIERS.

Duty and Liability towards passengers generally.

1. A carrier of passengers is charged with the highest degree of care and foresight consistent with the orderly conduct of its business, in respect to the protection of its passengers from injuries resulting from its acts or omissions, from the acts or omissions of its servants, and from the acts of strangers, who are under its control or direction; but it is charged with ordinary care and prudence only to guard against the lawless acts of third persons not under its direction or control. *Fewings v. Mendenhall* (Minn.) 601

2. A railroad company is bound to use extraordinary diligence to protect a passenger, while in transit, from violence or injury by third persons. *Brunswick & W. R. Co. v. Ponder* (Ga.) 713

3. A railroad company owes no duty towards a passenger arrested by officers under color of their office to see that they use only such force as is necessary to make the arrest. *Id.*

4. A railroad company owes no duty towards a passenger arrested by the officers of the law acting under color of their office to inquire into the legality of the arrest. *Id.*

5. A railroad company is not liable to a passenger illegally arrested by officers of the law under color of their office for failure to interfere and prevent the arrest, or for stopping the train to allow the officers to remove their prisoner therefrom. *Id.*

6. A statement by a passenger on a railroad train in the hearing of the conductor to officers attempting to arrest him, that he has paid them all he owes them, is not of itself sufficient to put the conductor on

notice that the arrest is for a debt instead of for a crime. *Id.*

7. The attempt of a street railway company to operate its cars during a strike of its employees is not negligence so as to make it liable for an injury to a passenger struck by a stone thrown from the street into the car by a strike sympathizer in no way under the control or direction of the company. *Fewings v. Mendenhall* (Minn.) 601

8. Failure of a street railway company, attempting to operate its cars during a strike of its employees, to pull down the blinds of a car or stretch a heavy canvas over the window outside the car, is not such negligence as will justify a recovery of damages by a passenger injured by a stone thrown into the car by a strike sympathizer. *Id.*

9. For a railroad company to have its freight platform so near the track that the elbow of a passenger projecting only 3' or 4 inches through an open window is broken by coming in contact with a bale of cotton on such platform is gross negligence, rendering the company liable for the injury sustained. *Kird v. New Orleans & N. W. R. Co.* (La.) 727

Contributory negligence of passenger.

10. A passenger is not, as a matter of law, guilty of such contributory negligence in permitting his elbow to project 3 or 4 inches through an open window as to relieve the company from liability for its gross negligence in constructing a freight platform so near the track that the passenger's arm is broken by contact with a bale of cotton thereon. *Id.*

Baggage.

Traveling Salesman; Right of Action after Loss of, see ACTION OR SUIT, 7.

11. Only what a passenger takes with him for his own personal use and convenience is within the meaning of a statute requiring carriers to check baggage. *Illinois C. R. Co. v. Matthews* (Ky.) 846

12. Notice to the carrier that a package delivered to it for transportation as baggage contains articles which are not such is not imputed by the fact that the passenger pays a charge for excessive weight. *Id.*

13. A carrier may assume liability for merchandise delivered to it by a passenger, equal to that which is imposed upon it in case of baggage, by accepting it for transportation as baggage, with knowledge of its character. *Id.*

Governmental control; connecting carriers.

Shipper's Right of Action for Failure to Trace Goods, see ACTION OR SUIT, 6.

See also CONTRACTS, 15.

14. The provision of Ga. Civ. Code, §§ 2317, 2318, requiring a carrier to trace and give information within thirty days after application as to the time, place, and manner of injury to goods shipped, under a contract relieving any of two or more connecting carriers from responsibility on delivery to the next carrier in good order, is not 60 L. R. A.

unreasonable or arbitrary as to the time allowed for tracing the goods when applied to a shipment from Georgia to Nebraska. *Central of Ga. R. Co. v. Murphey* (Ga.) 817

15. The provisions of Ga. Civ. Code, §§ 2317, 2318, that when freight which has been shipped, to be conveyed by two or more carriers to its destination, under a contract by which the responsibility of one carrier ceases on delivery to the next in good order, has been lost, damaged, or destroyed, it shall be the duty of the initial or connecting carrier on application by the shipper, consignee, or their assigns, within thirty days after the application, to trace such freight and inform the applicant in writing as to the time, place, and manner of the loss or injury, and the names of the parties and their official position, if any, by whom the truth of the facts can be established; and making a carrier who fails to trace the freight and give such information within the prescribed time liable for the freight lost, damaged, or destroyed,—are not unreasonable and arbitrary, nor an unlawful regulation by the state of interstate commerce, nor an infringement of the correlative liberty of silence, nor a compulsory private discovery by statutory terror. *Id.*

16. That the system employed by a carrier in tracing goods delivered by it to a connecting line, under a contract exempting it from responsibility on delivery of such goods to a connecting line in good order, was inadequate to enable it to trace the goods and give information as to the time, place, and manner of loss or injury thereto within thirty days as required by Ga. Civ. Code, §§ 2317, 2318, does not relieve it from liability for the loss or injury to the goods if the tracing within such time was not an impossibility. *Id.*

NOTES AND BRIEFS.

Carrier; measure of responsibility to passenger; duty towards passenger arrested on train. 714

Measure of care required from; duty to protect passengers from violence of strikers; contributory negligence of passenger; difference between assumption of risk by, and contributory negligence of, passenger. 601

Ejecting passenger without tendering back tickets taken up. 404

Passenger's right to carry other people's goods as baggage; merchandise as baggage. 847

Negligence in constructing platform near track; contributory negligence of passenger riding with arm resting on car window. 727

CARRYING WEAPONS.

NOTES AND BRIEFS.

Care required of persons using firearms. 288

CERTIORARI.

The proceedings of a public improvement commission in awarding a contract for street improvement are not reviewable by certiorari. *People ex rel. North v. Featherstonhaugh* (N. Y.) 768

NOTES AND BRIEFS.

Certiorari; to review determination of public improvement commission in awarding contract. 768

CHAMPERTY.**NOTES AND BRIEFS.**

Agreement to relieve litigant of costs of litigation. 430

CHARIVARI.

One participating in a charivari of a wedding party cannot recover for injuries inflicted by the negligent discharge of a pistol by a coparticipant, where the statute imposes a fine upon whoever disturbs the peace of a family or neighborhood by loud and unusual noises, or disturbs any assembly of people met for a lawful purpose. *Gilmore v. Fuller* (Ill.) 236

CHattel MORTGAGE.

See **MORTGAGE.**

CHECKS.

Forged, Recovery Back by Bank Paying, see **ASSUMPSIT**, 2.

For Wages, Requiring Redemption of, in Money, see **CONSTITUTIONAL LAW**, 4.

Construction of Act for Redemption of, when Given for Wages, see **STATUTES**, 6.

CIVIL LAW.

Provisions of, As to Rights in Water by Prior Appropriation, see **WATERS**, 20.

CLASS LEGISLATION.

See **CONSTITUTIONAL LAW**, 4-7.

CLOSING STORES.

During Evening, Validity of Ordinance for, see **MUNICIPAL CORPORATIONS**, 5.

CLOUD ON TITLE.

1. Possession is not necessary to enable a reversioner to maintain a suit in equity to remove the cloud from his title, where the term lessee, after having covenanted to pay the taxes, neglects to do so, and acquires title to the property at a tax sale. *Oppenheimer v. Levi* (Md.) 729

2. Equity has jurisdiction of a suit by a reversioner to remove, as a cloud on his title, a tax deed acquired by a lessee for years, who has covenanted to pay the taxes, under the power to relieve from fraud and enforce trusts. *Id.*
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NOTES AND BRIEFS.

Cloud on title; suit for removal of, by creditor or mortgagee not in possession. 729

Bill to quiet title on invalid sale of property for sewer assessment. 243

COAL HOLE.

Defective, Liability for Injury by, see **HIGHWAYS**, 2.

NOTES AND BRIEFS.

Liability of purchaser continuing coal hole with defective covering in sidewalk. 924

COASTING.

Municipal Liability for Failure to Prevent, see **MUNICIPAL CORPORATIONS**, 7.

COLLATERAL INHERITANCE TAX.

See **TAXES**, 16, 17.

COLLEGE.

Subscription to, see **BILLS AND NOTES**, 6.

COMBINATIONS.

See **CONSPIRACY.**

COMMERCE.

Provision as to Carrier's Liability as Regulation of, see **CARRIERS**, 15.

Right to Tax Interstate Business, see **TAXES**, 9, 15.

An ordinance limiting the speed of trains on an interstate railway which carries United States mail to 10 miles an hour within the corporate limits of the municipality, which is passed for the safety of the public and the protection of life and property, is not void as imposing an unreasonable restriction upon interstate commerce and the speedy transportation of the mail. *Chicago & A. R. Co. v. Carlville* (Ill.) 391

NOTES AND BRIEFS.

Commerce; unlawful combination in restraint of; power to prevent. 153

Interstate; corporate taxation as interference with. 641

State taxation of telegraph company as regulation of commerce. 679

Ordinance regulating speed of interstate trains. 391

COMMISSIONS.

Of Broker, see **BROKERS**, 2.

COMMON LAW.

As to Riparian Rights, see **WATERS**, 1-3.

The power of the courts to declare established doctrines of the common law inapplicable to the state of Nebraska should be used sparingly, and its exercise is not justified unless the inapplicability of a rule is general, extending to the whole or a greater

part of the state, or at least to an area capable of definite judicial ascertainment. Meng v. Coffey (Neb.) 910

COMPULSORY EDUCATION.

See COURTS, 4; SCHOOLS.

CONDITION.

Right of Entry for Condition Broken, see COVENANT; EJECTMENT, 1.

Pleading Performance of, see PLEADING, 5.

See also REAL PROPERTY, NOTES AND BRIEFS.

CONFLICT OF LAWS.

A clause in a contract for a tour to conduct entertainments, the performance of which will extend into several countries, that suits upon it shall be brought in the country where the contracting parties are domiciled, is valid, and will be enforced by the courts of other countries. Mittenthal v. Mascagni (Mass.) 812

NOTES AND BRIEFS.

Conflict of laws; agreement to be governed by *lex loci contractus*. 813

CONNECTING CARRIER.

See CARRIERS, 14-16.

CONSENT.

By Vendor to Construction of Buildings, see LIENS.

Of School Board to Child's Remaining Away from School, see SCHOOLS, 2.

To Construction of Street Railroad, see EMINENT DOMAIN, 15.

CONSIDERATION.

For Contract, see CONTRACTS, 2-4.

CONSOLIDATION.

Of Corporations, see CORPORATIONS.

CONSPIRACY.

A combination of the manufacturers of a product of a state, the market for four-fifths of which is found in other states, to limit production and raise the price, is a violation of the anti-trust act of July 2, 1890. Gibbs v. McNeeley (C. C. App. 9th C.) 152

NOTES AND BRIEFS.

Conspiracy; unlawful combination in restraint of trade and commerce. 153

CONSTITUTIONAL LAW.

Impairment of Obligation, see CONTRACTS, 15.

Delegation of power.

1. Vesting in township committees the power to divide the townships into districts for street lighting and road purposes is not an unconstitutional delegation of legislative power. State, Allison, Prosecutor, v. Corker (N. J. L.) 564

2. The sections of the Nebraska irrigation act of 1895, chap. 69, creating a state board of irrigation, are not unconstitutional, as conferring judicial powers on executive officers, as the primary object of such board is for the purpose of supervising the appropriation, distribution, and diversion of water, which is an administrative, rather than a judicial, function. Crawford Co. v. Hall (Neb.) 880

Vested rights.
3. The right of a man to convey or encumber his homestead without co-operation of his wife, as allowed by law, is a vested one, notwithstanding it may be defeated by the filing by the wife of a claim as prescribed by statute; and the legislature cannot destroy the right as to existing homesteads. Gladney v. Sydnor (Mo.) 880

Equal protection and privileges.
Equality in Taxation, see TAXES 2, 3.

Making Railroad Companies Liable for Injuries to Fellow Servants, see MASTER AND SERVANT, 7.
4. An act requiring the redemption in money of checks issued in payment of assigned wages, which is applicable only to merchants on the one hand and coal miners on the other, is void as class legislation. Dixon v. Poe (Ind.) 308

5. Forbidding the keeping open of a barber shop on Sunday, while permitting hotels, boarding houses, baths, restaurants, taverns, livery stables, and retail drug stores to be open, is not unconstitutional as depriving barbers of the equal protection of the laws, since the classification is not arbitrary. State v. Sopher (Utah) 468

6. Forbidding a barber to exercise his trade on Sunday is a proper exercise of the police power, and does not unconstitutionally restrain him of personal liberty, or deprive him of liberty or property without due process of law. Id.

7. A statute forbidding the purchase of a stock of goods in bulk without ascertaining the seller's creditors, and having their claims settled, does not deprive the seller of his property without due process of law, and is not void as class legislation; nor is it in restraint of trade. McDaniels v. J. J. Connelly Shoe Co. (Wash.) 947

Due process of law.

Provision for Appeal in Drainage Proceedings, see DRAINS AND SEWERS, 1.

Requiring Railroad Company to Drain Water Accumulating along Right of Way, see EMINENT DOMAIN, 5.

See also *supra*, 6, 7.

8. The constitutional provision as to due process of law is not violated by filing a new and fuller opinion after the cause has been remanded to a lower court. Adams v. Yazoo & M. V. R. Co. (Miss.) 33

9. An owner of property who, before it can be included in a drainage district, is given a day in court, is not deprived of his property without due process of law. Mound City Land & Stock Co. v. Miller (Mo.) 190

10. Failure to afford a railroad company an opportunity to be heard in opposition to the construction of a ditch to drain off waters accumulating along its right of way from the construction of its road renders a statute providing for the construction of such ditch upon petition of the owner or tenant of contiguous land unconstitutional as a taking of property without due process of law. *Chicago & E. R. Co. v. Keith* (Ohio) 525

11. Notice of the time and place at which tax assessors will meet in sessions which are not secret, with the right of the taxpayer to appear and be heard, is sufficient to constitute due process in the assessment. *Sandford v. Poe* (C. C. App. 6th C.) 641

12. An ordinance subjecting one in possession of premises on which liquor is sold, disposed of, obtained, or furnished in violation or evasion of law, to fine, whether the act is with his knowledge or consent or not, violates a constitutional provision that absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in the republic. *Campbellsville v. Odewalt* (Ky.) 723

13. An owner of property who has made and filed a valid contract for the placing of a building thereon, under which, by the terms of the statute, the entire contract price may be applied to the claims of laborers and material men, cannot constitutionally be required to furnish a bond which will make him liable to them in an additional amount in case their claims are not satisfied by the contractor. *Gibbs v. Tally* (Cal.) 815

NOTES AND BRIEFS.

Husband's vested right to sell or encumber homestead. 881

Power to cure unconstitutional statute by amendment. 564

Due process of law in taxation and assessment; legislative power as to police regulations. 527

Due process of law in taxation. 673

Due process and equal protection of law as to taxation. 648

Corporate taxation in the United States as affected by the contract clause in the Federal Constitution. 33

Constitutional equality in the United States in relation to corporate taxation. 321

Denial of right of appeal as unconstitutional deprivation of liberty. 573

Class legislation. 308

Police power, delegation of; what are subjects of, a judicial question. 391

Discrimination against barbers working on Sunday. 469

CONSTRUCTION.

Of Contract, see **CONTRACTS**, 10.

Of Statutes, see **STATUTES**, 2-6.

Of Wills, see **WILLS**.

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CONTEMPT.

1. The court cannot, of its own motion, adjudge the publisher of a newspaper in contempt for disobeying its oral order not to publish the testimony in a case on trial, and then attach him to show cause why the judgment should not be made final. *Ex parte Foster* (Tex. Crim. App.) 631

2. The court cannot prohibit the publication of the testimony taken in a trial in which no obscenity is involved, where the Constitution guarantees a public trial and the liberty of the press. *Id.*

CONTRACTS.

Action on, by Third Party, see **ACTION OR SUIT**, 4.

For Public Improvement, see **PUBLIC IMPROVEMENTS**, 2-4.

Consideration of Note to Educational Institution as Part of Permanent Endowment Fund, see **BILLS AND NOTES**, 6.

Specific Performance of, see **SPECIFIC PERFORMANCE**.

Implied contracts.

1. A promise by an infant to pay for necessities consisting of services of an attorney in conducting a lawsuit will be implied, where the suit was brought by her next friend, was legally proper, and the infant conferred with the attorney, appeared as a witness, and profited by the successful prosecution of the suit. *Crafts v. Carr* (R. I.) 128

Consideration.

See also *infra*, 7-9.

2. The naming of a child for promisor in accordance with his previous request is a sufficient consideration for a subsequent promise to convey to the child a particular tract of land because of such act. *Daily v. Minnick* (Iowa) 840

3. A withdrawal of an action for divorce, brought by the wife, is not sufficient to support a conveyance by defendant to plaintiff of his interest in his father's estate as against the claims of his creditors. *Oppenheimer v. Collins* (Wis.) 406

4. The resumption of marital relations by a wife living separate from her husband, and about to commence proceedings for divorce against him, to which she was entitled because of his wrongdoing, is a sufficient consideration for his promise to convey property in trust for the benefit of their children, and, in the event of their death, for her benefit. *Moayon v. Moayon* (Ky.) 415

Mutuality.

5. A contract by a man whose wife is living separate from him, and about to begin a suit for divorce because of his wrongdoing, that, in case she will resume her marital relations, he will convey one third of his property in trust for their children, and for her in the event of their death, is not void because it is not mutually binding upon the parties, and the remedy for its enforcement is not mutual to them. *Id.*

Formal requisites; statute of frauds.

Parol Evidence to Designate Particular Property, see EVIDENCE, 14.

See also HUSBAND AND WIFE, 4.

6. The description of the property is sufficient to uphold the contract, where the agreement is to convey one third of all grantor's estate, real, personal, or mixed, of whatever kind or nature, belonging to him in his own right, which he acquired under the will of his mother, as well as all the other estate otherwise acquired and now owned by him. *Moayon v. Moayon* (Ky.) 415

7. Naming a child for grantor is sufficient performance of consideration to take an oral agreement to convey land to him in consideration thereof out of the statute of frauds, where payment of the purchase money, or part thereof, is allowed to do so. *Daily v. Minnick* (Iowa) 840

8. The purchase by promisor of a tract of land, and his declaration that it is the land he intends to convey in fulfillment of his promise, are sufficient to render certain his promise to convey to an infant a certain quantity of land in case he is named for him. *Id.*

9. A consideration previously received may constitute a sufficient performance of an oral promise to convey land to take it out of the statute of frauds. *Id.*

Construction.

10. Public contracts should be construed liberally in favor of the public. *Muncie Natural Gas Co. v. Muncie* (Ind.) 822

Validity.

Agreement as to Place to Sue for Breach, see CONFLICT OF LAWS.

Provision for Chattel Mortgagee taking Possession on Nonpayment, see MORTGAGE, 1.

11. An agreement between parties to a contract that neither shall maintain a suit thereon after breach—all differences to be settled by arbitration—is without binding force, as tending to oust the courts of their jurisdiction. *Hartford F. Ins. Co. v. Hon* (Neb.) 430

12. An agreement by which parties thereto stipulate in advance not to enforce, by a resort to a court of justice, a substantial right which may subsequently be involved in dispute between them, but to submit such right to the decision of a private tribunal, although other questions involved may be reserved for adjudication by the courts, cannot be enforced. *Id.*

13. Contracts in which a corporation, in consideration of stated payments made to it, makes promises, which are the main inducement to such contract, and are impossible to perform, are unlawful, being against public policy. *State ex rel. Prout v. Nebraska Home Co.* (Neb.) 448

14. A contract between an attorney at law and one who is not such an attorney, by which the latter agrees to procure the employment of the former by third persons for the prosecution of suits in courts of record, and also to assist in looking after and pro-

curing witnesses whose testimony is to be used in the cases, in consideration of a share of the fees which the attorney shall receive for his services, is against public policy, and void. *Langdon v. Conlin* (Neb.) 429

Impairing obligation.

15. The provision of Ga. Civ. Code, §§ 2317, 2318, that one of two or more connecting carriers which fails, on application, to trace and give information of the time, place, and manner of loss or injury to goods shipped, shall be liable for the value of the goods lost, damaged, or destroyed, in the same manner as if the loss, damage, or destruction occurred on its line, notwithstanding a provision in the contract of shipment relieving each carrier from responsibility on delivery to the next carrier in good order,—is not an impairment of the obligation of a contract of shipment entered into after the enactment of such statute. *Central of Ga. R. Co. v. Murphey* (Ga.) 817

NOTES AND BRIEFS.

Contracts, Specific Enforcement of, see SPECIFIC PERFORMANCE.

'Unlawful combination in restraint of trade; what constitutes. 153

By public improvement commission; validity of requirement for observing provisions of labor law. 768

To abstain from resorting to Federal court; invalidity of. 812

Validity of contract between husband and wife to compromise pending or contemplated divorce suit:—(I.) Introduction; (II.) when the agreement is that the parties shall live separate; (III.) where the agreement is that the parties shall resume marital relations; (IV.) when specific performance will be decreed; (V.) when inadequate as against creditors of insolvent husband; (VI.) English decisions on application to reinstate divorce suit; (VII.) necessity of third party: (a) third party unnecessary; (b) third party necessary; (c) third party, but necessity for, not stated; (d) contract held valid without third party; but absence of, not mentioned; (e) agreement without third party void; but not for that reason; (f) third party to contract; but contract void for other reason; (g) cases in which it does not appear whether there was, or was not, a third party; (VIII.) other cases; (IX.) conclusion. 406

Invalidity of investment scheme as against public policy. 449

Consideration for; agreement not to sue for divorce as. 417

Necessity of writing in contract relating to real estate; taken out of statute of frauds by tenant's continuance in possession; surrender of right to name infant as consideration for promise. 841

Statute of frauds; lease for more than a year. 399

Statute of frauds; act possible of performance within year. 429

COPYRIGHT.

The market quotations and sporting news gathered by a telegraph company, and delivered to its patrons by means of tickers, are not, as so delivered, within the protection of the United States copyright laws. *National-Telegraph News Co. v. Western Union Telegraph Co.* (C. C. App. 7th C.) 805

NOTES AND BRIEFS.

Copyright; what constitutes publication of copyrighted article. 810

Of reports sent over ticker; what constitutes publication of uncopyrighted article. 805

CORAM NOBIS.

The writ of error *coram nobis* will not lie to vacate a judgment of conviction and secure a retrial of the accused, because of his inability within statutory limits of time to prepare a record on appeal showing the errors of which complaint was made, as such writ lies only to correct errors of fact in ignorance or disregard of which the judgment was pronounced, and to relieve from which no other remedy exists. *Collins v. State* (Kan.) 572

NOTES AND BRIEFS.

Coram nobis; as remedy for unconstitutional denial of right of appeal. 573

CORONERS.

Admissibility of Inquest of, see EVIDENCE, 13.

NOTES AND BRIEFS.

Sufficiency of verdict of coroner's jury as to cause of death. 622

CORPORATIONS.

Right to Recover Corporate Assets Converted by Majority Stockholder, see ASSUMPSIT, 1.

Power to Exercise Right of Eminent Domain, see EMINENT DOMAIN, 2.

Presumption of Existence of Corporate Deed, from Possession, see EVIDENCE, 6.

Taxation of, see INJUNCTION, 11; TAXES.

1. A corporation organized for the drainage of a large tract of land is not private, but a political subdivision of the state. *Mound City Land & Stock Co. v. Miller* (Mo.) 190

Consolidation.

Right of Consolidated Company to Exemption from Taxation, see TAXES, 8.

2. A consolidation of the stock of corporations results uniformly and necessarily in the creation of a new corporation. *Adams v. Yazoo & M. V. R. Co.* (Miss.) 33

3. A consolidation which results in the formation of a new company, and not merely a merger of the constituent companies, retaining their separate existences, is authorized by statutes providing for the consolidation of companies under the name of one of 60 L. R. A.

them, without saying it shall be under its charter, and giving to the new company all the benefits, rights, franchises, and property of the original companies. Id.

4. The phrase "such terms as they may agree upon," in a statute authorizing the consolidation of railroad companies, relates to the mere administrative details attending consolidation, and conveys no substantive powers or rights. Id.

Compensation of officers.

5. The general manager of a corporation who, after the expiration of a contract fixing his salary at \$5,000 per year, continues in the same employment, without any new agreement, and afterwards voluntarily reduces his salary to \$3,000 per year, drawing it from month to month thereafter on that basis for many years, until he gives up the office, cannot subsequently recover the balance of the \$5,000 per annum at which the salary was originally fixed. *Home F. Ins. Co. v. Barber* (Neb.) 927

Dealing with directors.

6. A contract by corporate directors, in the benefit of which one of their number participated, is voidable only, and not void *per se*, and may be subsequently ratified by the stockholders when the facts are disclosed to them. *Hodge v. United States Steel Corp.* (N. J. Err. & App.) 742

7. Directors cannot lawfully enter into a contract in the benefit of which even one of their number participates without the knowledge and consent of the stockholders. Id.

Reduction of stock.

8. A corporation whose act of incorporation provides for the payment to preferred stockholders of a yearly dividend at the rate of 7 per cent per annum in quarterly payments, which has declared and paid four such dividends in successive quarters before calling a meeting on the question of retiring part of the preferred stock, is within the provision of the New Jersey act of 1902, authorizing corporations which have issued preferred stock entitling the holders to receive dividends at a rate exceeding 5 per cent per annum, and which shall have "continuously" declared and paid dividends at such rate on such preferred stock "for the period of at least one year next preceding the meeting," to retire such preferred stock. Id.

Rights of stockholders.

9. Stockholders, as such, have no title to the corporate property which they may convey or encumber in their own name, as the corporation must act through its proper agents and in the prescribed way. *Home F. Ins. Co. v. Barber* (Neb.) 927

10. Subsequent stockholders have no standing to attack prior mismanagement of the corporation, unless such mismanagement or its effects continue and are injurious to them specially and peculiarly in some other manner. Id.

11. Stockholders who have acquired their shares and their interest in the corporation

from alleged wrongdoers, and through prior mismanagement, have no standing to complain thereof. *Id.*

12. Stockholders in a corporation who are injured by the mismanagement thereof may, if they so elect, acquiesce in and treat such transactions as binding, where they are not absolutely void; and the discretion to acquiesce therein or bring suit to set them aside cannot be transferred. *Id.*

13. Individual stockholders of a corporation cannot question in judicial proceedings corporate acts of directors if the same are within the powers of the corporation and in furtherance of its purposes, and are not unlawful or against good morals, and are performed in good faith and in the exercise of an honest judgment. *Hodge v. United States Steel Corp.* (N. J. Err. & App.) 742

14. Although a corporation is regarded as a person separate and distinct from its stockholders, or any of them, when proceeding at law or asserting a title to property, or when the title to property is involved, a court of equity will not, when rights of an equitable nature are asserted, or relief on rules or principles of equity is sought, forget that the stockholders are the real and substantial beneficiaries of a recovery; and if such stockholders have no standing in equity, and are not equitably entitled to the remedy sought to be enforced by the corporation in their behalf and for their advantage, no recovery will be permitted to the corporation. *Home F. Ins. Co. v. Barber* (Neb.) 927

Liability of stockholders.

15. A holder of stock in a national bank who, without knowledge or suspicion that the bank is either then insolvent or is likely to prove so, sells the stock, and who does everything reasonably possible to procure a transfer of the shares on the books of the bank, cannot be held liable as a stockholder, although the bank is declared insolvent before the transfer is effected, and both the bank and the purchaser are insolvent when the sale is made. *Earle v. Carson* (C. C. App. 3d C.) 266

Stockholders' meetings.

16. Stockholders in a corporation are under no disability to vote on the question of entering into a contract with directors of the corporation because they are also directors, as they do not vote in their fiduciary capacity, but, like other stockholders, in the right of the shares of stock held by them. *Hodge v. United States Steel Corp.* (N. J. Err. & App.) 742

17. Corporate stockholders may, at a duly convened meeting of the stockholders, lawfully enter into or authorize a contract between the company and a third party, in which directors are personally interested, if it is done by them with notice of such interest. *Id.*

18. All the stockholders of a corporation are bound by all acts and proceedings within the scope and authority conferred by the charter, which are approved or sanctioned 60 L. R. A.

by the vote of a majority of the stockholders duly taken and ascertained according to law, where the by-laws of the corporation, adopted by the stockholders in pursuance of authority given by the act of incorporation, provide that a majority vote at a stockholder's meeting shall be binding on the corporation. *Id.*

Dissolution.

19. A corporation, organized under the laws of Nebraska, which is engaged in a business forbidden by statute, or unlawful as against public policy, may be deprived of its charter and dissolved by proceedings in quo warranto. *State ex rel. Prout v. Nebraska Home Co.* (Neb.) 448

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Taxation of, see TAXES.

Corporation; purpose of creation; to supply water for irrigation purposes; loss of right to acquire property for corporate purposes. 383

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Right of officers to use corporate funds; adjudging officers trustees of profits from unlawful transactions; corporate office as subject of bargain and sale; right of sole stockholder to convey property by deed in own name; ratification by corporation of fraudulent transaction by officer; estoppel of corporation by what will estop stockholder. 928

Liability for publication of libel. 473

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Consolidation of; power as to exemption of consolidated company from taxation; unlawfulness of. 36

Corporate taxation in the United States as affected by the contract clause in the Federal Constitution. 33

Constitutional equality in the United States in relation to corporate taxation. 321

Corporate taxation and the commerce clause. 641

CORPSE.

The right to the custody and to decide upon the final place of burial of the body of a deceased unmarried person resides, ordinarily, in his next of kin, and this right will not be treated as having been waived or relinquished, except upon clear and satisfactory evidence of conduct indicative of a free and voluntary intent and purpose to that end. *McEntee v. Bonacum* (Neb.) 440

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Corpse; injunction against removal of; removal of, as felony; property rights in. 440

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Duty to Maintain Armory, see MILITIA, 2.

Liability for Maintenance of Militia, see MILITIA.

Liability to Garnishment, see GARNISHMENT, 1.

COURTS.

Power as to Contempt, see CONTEMPT.
See also COMMON LAW.

Relation to legislative department.

1. The question as to the propriety and necessity of legislation authorizing the taking of private property for public use belongs exclusively to the legislature, in the exercise of whose judgment in regard thereto the courts have no power to interfere. *State ex rel. Utick v. Polk County Comrs.* (Minn.) 181

2. Whether a particular improvement under a statute providing a general system for draining wet and overflowed land will inure to the public health, convenience, or welfare is a judicial question which the legislature cannot determine to the exclusion of the courts. *Id.*

3. The determination of a public improvement commission to construct a new curb, sustained by some evidence of its necessity, is not reviewable by the courts where the commission has statutory authority to construct curbing whenever they deem the same necessary, and whenever, in their judgment, the public convenience requires it. *People ex rel. North v. Featherstonhaugh* (N. Y.) 768

4. Whether or not a statute requiring the attendance of children at school is "wholesome and reasonable" is a legislative, and not a judicial, question, where the legislature has constitutional power to pass all manner of wholesome and reasonable laws as they may judge for the benefit and welfare of the state. *State v. Jackson* (N. H.) 739

Judges.

5. A judge of a court of record is not subject to a private action for oppressively, maliciously, and corruptly entering a decree disbarring an attorney. *Webb v. Fisher* (Tenn.) 791

Effect of decision.

See also JUDGMENT, 2.

6. The doctrine of *stare decisis* cannot be invoked in favor of decisions on former statutes which were merely similar to, but not identical with, one under review. *Adams v. Yazoo & M. V. R. Co.* (Miss.) 33

7. The fact that a case argued and duly considered in a state court was a friendly one will not prevent the decision therein on the construction of the state Constitution from being conclusive in Federal courts. *Sandford v. Poe* (C. C. App. 6th C.) 641
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8. A Federal court should render judgment depending on the construction of a state Constitution, in accordance with a previous decision by the highest state court on the subject, although, before such state decision was rendered, the Federal court had rendered an opinion to the contrary. *Id.*

NOTES AND BRIEFS.

Courts; what are judicial questions; power to set aside legislative discretion as unreasonable. 361

Authority to review legislative decision as to necessity of exercising right of eminent domain. 213

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Control over legislative decision as to necessity for drainage. 167

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COVENANT.

Tender back of the consideration money is not a prerequisite to re-entry for condition broken, under the deed authorizing such re-entry on failure to perform the condition. *Bouvier v. Baltimore & N. Y. R. Co.* (N. J. Err. & App.) 750

NOTES AND BRIEFS.

Transferability of a right of entry for condition broken:—(I.) Nature of the right; (II.) rule against transferability: (a) before breach of condition; (b) after breach of condition; (III.) exceptions to rule: (a) statutory; (b) after breach where the law against maintenance is not in force; (c) as to devises; (d) easements on condition; (IV.) summary 750

CREDITORS' BILL.

Error in Judgment on, see APPEAL AND ERROR, 15.

1. In applying assets which have been wrongfully assigned in fraud of creditors to the payment of debts of the assignor, real estate should be first exhausted, to the exoneration of personality. *Oppenheimer v. Collins* (Wis.) 406

2. The mere fact that a debtor's interest in his father's estate consists in part of real estate, upon which an execution might be levied, will not prevent the maintenance of a creditor's bill to reach such interest if an execution has been returned "no property found," and it is not shown that the value of such real estate was sufficient to satisfy the costs of sale. *Id.*

3. Personal judgment should not be entered against defendants for the full amount of the claim, in the absence of anything to show that they had become personally liable therefor, in a creditor's suit to subject assets in the hands of third persons to the payment of a judgment debt. *Id.*

CRIMINAL LAW.

Right of Accused to Meet Witnesses,
see TRIAL, 3.

1. A statute making the penalty of an attempt one half that prescribed for the commission of the offense is void for uncertainty in cases where the penalty for the offense is imprisonment for life. *People v. Burns* (Cal.) 270

2. Conviction of attempt to commit robbery after conviction of prior crimes punishable by imprisonment in the state prison does not require imposition of punishment under a statute providing for life imprisonment after such conviction of one guilty of a crime which upon a first conviction would be punishable, at the discretion of the court, by imprisonment for life, although one convicted of robbery under such circumstances would be within the terms of such statute, where there was no discretion to punish one guilty of an attempt to commit robbery by imprisonment for life. *Id.*

3. Under statutes fixing the punishment for robbery at imprisonment for not less than one year, and permitting the court, in its discretion, to sentence the offender to imprisonment during his natural life, and making the punishment for an attempt, imprisonment for a term not exceeding one half the longest term of imprisonment prescribed upon conviction of the offense so attempted,—an attempt to commit robbery may be punished by imprisonment for a definite term of years. *Id.*

CUSTOM.

As to Irrigation; Judicial Notice of,
see EVIDENCE, 2.

DAMAGES.

For Fright Resulting in Physical Injury, see FRIGHT.

Punitive.

1. In an action to recover damages resulting from an assault and battery committed on the plaintiff, if there be aggravating circumstances either in the act or intention, punitive or exemplary damages may be recovered. *Berkner v. Dannenberg* (Ga.) 559

Wrongful disconnection of telephone.

2. The measure of damages for wrongfully disconnecting a telephone because of mistake as to payment of rent is the amount which will compensate the patron for the injuries caused by the breach of contract. *Cumberland Teleph. & Teleg. Co. v. Hendon* (Ky.) 849

3. The compensatory damages to be awarded a patron of a telephone company for wrongful discontinuance of the service are the amount paid for the service for the time during which it was refused, in the absence of any proof of specific loss because of the disconnection. *Id.*

Personal injuries.

4. Loss of the child's society is not an element of the damage to be awarded a parent for negligent injuries to it. *McGarr v. National & P. Worsted Mills* (R. I.) 122
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Condemnation or depreciation in value by eminent domain.

Evidence as to, see EVIDENCE, 18-20.

See also EMINENT DOMAIN, 16.

5. Although a riparian proprietor has the right, as an abstract proposition of law, to the ordinary natural flow of a stream, such rule furnishes no basis for compensation where water is appropriated for irrigation purposes; but in order to entitle him to compensation in such case, he must suffer an actual loss or injury to his riparian estate, which the law recognizes as belonging to him because of his right to the use and enjoyment of the water of which he is deprived. *Crawford Co. v. Hall* (Neb.) 889

6. The financial returns which a water plant can be made to bear must be considered in determining the value of the franchises of its owner when taken by right of eminent domain. *Kennebec Water Dist. v. Waterville* (Me.) 856

7. In determining how much income a water plant can be made to produce, for the purpose of ascertaining the value of the franchises of its owner which are sought to be taken by right of eminent domain, it must be allowed a fair amount, based upon the fair value of its property, taking into account the cost of maintenance or depreciation and current operating expenses, allowing something for the risk of the original enterprise, if any, over and above income which it has received at rates which would have been excessive but for such risk, so far as such fair amount can be allowed, and no more should be exacted from the public than the service is worth. *Id.*

8. Whether or not the franchises of a water company are exclusive, and how far it is without competition, as well as the period for which they are to endure, are to be taken into consideration in determining their value, when sought to be taken by the right of eminent domain. *Id.*

9. The quality of water furnished and of the services rendered, and the fitness of the plant, and the source of the water supply to meet reasonable requirements in the present and future, are to be considered in determining the value of a water plant taken by eminent domain. *Id.*

10. The faithfulness, or unfaithfulness, even to the extent of rendering the franchises liable to forfeiture, of a water company in performing its duties, should not be considered in determining the value of its plant when taken by eminent domain. *Id.*

11. That a water company has received more than reasonable rates for services rendered should not be considered in determining the amount which must be paid for its plant when taken by eminent domain. *Id.*

12. Upon taking, by eminent domain, the system supplying one municipal corporation from a water company operating several plants in different places, no increased burden upon, or impairment of value of, the remaining plants because of the severance of the property can be considered as an ele-

ment of damage, where the various plants are separate and distinct, although some additional cost of management may be thereby imposed upon the remaining ones. Id.

13. The cost of replacing a water plant with one substantially like it must be considered in determining its value when appropriated by eminent domain; but such consideration must be made in the light of the fact that the plant is a completed structure and a going concern. Id.

14. Property of a water company not directly connected with the water system or plant which is taken from it by right of eminent domain should be appraised at its fair market value, not at a forced sale, but at what it is fairly worth to the seller under conditions permitting a prudent and beneficial sale. Id.

15. In determining the structure value of a plant for a municipal water supply to be taken by eminent domain, the appraisers should consider the present efficiency of the system, the length of time necessary to construct the same *de novo*, the time and cost needed after construction to develop the new system to the level of the present one in respect to business and income, and the added net incomes and profits, if any, which, by its acquirement as a going concern, would accrue to a purchaser during the time required for the new construction and development of business and income. Id.

16. The element of good will should not be considered in estimating the value of a water plant to be taken by eminent domain so far as the system is practically exclusive. Id.

17. The possibility of future development of the use of the franchises of a water company should be considered in determining the amount to be allowed for them when taken by eminent domain, in the light of the facts that further investigation may be necessary therefor, and that at any stage of the development the owner of the franchises will be entitled to charge only reasonable rates under the conditions then existing. Id.

18. That a statute provides for the taking of the property and franchises of a water company by eminent domain in no way impairs the value for which compensation must be made. Id.

19. The capitalization of the income of a water company, even at reasonable rates, cannot be adopted as a test of the present value of the plant, upon which to calculate the amount to be paid to it when the plant is taken by eminent domain,—especially where the franchises are not exclusive or perpetual. Id.

NOTES AND BRIEFS.

Damages; nominal, for appropriation of railroad right of way for telegraph line. 147

For fright, terror, or mental distress. 617

Liability for injuries resulting from fright. 404

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For assault and battery. 560

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Punitive, for discontinuing telephone service. 849

DEATH.

Revocation of Note by Maker's Death, see **BILLS AND NOTES**, 6.

1. General statutory language providing indemnity to the next of kin of a person negligently killed does not apply in favor of nonresident aliens in case deceased is instantly killed, or dies without conscious pain. *McMillan v. Spider Lake Sawmill & Lumber Co.* (Wis.) 589

2. The mother of an illegitimate child has no right of action for his homicide under Ga. Civ. Code, § 3828, giving to a mother a right of action for the homicide of a child who contributes to her support. *Robinson v. Georgia R. & Bkg. Co.* (Ga.) 555

NOTES AND BRIEFS.

Death; right of nonresident alien to recover for. 589

DEDICATION.

Of Streets in Camp-Meeting Association, see **CAMP-MEETING ASSOCIATION**, 1.

DEEDS.

A deed by one to whom an undivided interest in certain land is conveyed, of all the "surface" of such land, retaining the right to make and maintain on the land such openings as may be necessary for ventilation, drainage, and taking out of all the coal, without liability for injuries to the surface or anything thereon by reason of mining such coal, and the right to remove the same given the owner of the other half interest in such land, who had previously conveyed to the grantor all the coal in, on, or underlying his undivided half of such land, with the right to make and maintain openings for ventilation, drainage, and taking out all the coal, conveys to the grantee the surface only, and does not pass the grantor's right to oil and gas in and under such land. *Williams v. South Penn Oil Co.* (W. Va.) 795

NOTES AND BRIEFS.

Deeds; what passes by grant of "surface" of land. 796

DEFINITION.

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DESCRIPTION.

Of Proposed Drain, see **DRAINS AND SEWERS**, 4.

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DIRECTORS.

Of Corporation, see **CORPORATIONS**, 6, 7.

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In Bankruptcy, see **BANKRUPTCY**, 2, 3.

DISMISSAL.

Of One Defendant, Right to Remove Cause after, see **REMOVAL OF CAUSES**.

DISSOLUTION.

Of Corporation, see **CORPORATIONS**, 19.

DISTRICT AND PROSECUTING ATTORNEYS.

It is the duty of the prosecutor in a criminal trial to see that the accused has a fair trial, and that nothing but competent evidence is submitted to the jury; and he should specially guard against anything that would prejudice the minds of the jurors, and tend to hinder them from considering only the evidence introduced. *State v. Irwin (Idaho)* 716

DIVORCE.

See **HUSBAND AND WIFE**, 6, **NOTES AND BRIEFS**.

DOCUMENTARY EVIDENCE.

See **EVIDENCE**, 12, 13.

DRAINAGE DISTRICT.

As Political Subdivision, see **CORPORATIONS**, 1.

Due Process in Including Property in, see **CONSTITUTIONAL LAW**, 9.

1. Basing the voting power in a drainage district on acreage, rather than on membership, is not unlawful. *Mound City Land & Stock Co. v. Miller (Mo.)* 190

2. Requiring citizens to become members of drainage districts, and share the expense of drainage, against their wills, does not make the law unconstitutional. *Id.*

NOTES AND BRIEFS.

Drainage district; as public corporation; power of legislature to create. 196

DRAINS AND SEWERS.

Conclusiveness of Legislative Decision as to, see **COURTS**, 2.

Drainage District, see **DRAINAGE DISTRICTS**.

Judicial Notice as to Benefits from, see **EVIDENCE**, 1.

Power to Condemn Property for, see **EMINENT DOMAIN**, 1, 4.

1. Provision for appeal from an order 60 L. R. A.

directing the construction of a ditch is not essential to the validity of a drainage statute, since other modes of renewing the proceedings are open to parties injured thereby. *State ex rel. Utick v. Polk County Comrs. (Minn.)* 161

2. The failure of Minn. Gen. Stat. 1901, chap. 258, providing a general system for draining wet and overflowed lands of the state, to expressly require the board of county commissioners to determine whether a proposed improvement thereunder will result beneficially to the public, does not render it unconstitutional, as the power to make such determination must be implied from the provisions contained therein for filing a petition for the location of a proposed ditch with the county auditor and the giving of notice by him to all interested parties of a time and place of "hearing to be had thereon," at which hearing the board must determine whether to entertain the petition or not, and for a subsequent hearing after the viewers appointed shall have made their report as to the damages and benefits to accrue from its construction. *Id.*

3. Failure to expressly declare that the public welfare is intended to be promoted by a statute for the drainage of wet and overflowed lands, and to provide for the determination of that question by the county commissioners, in whom is vested the power to construct any ditch or drain upon a petition setting forth the necessity thereof, does not render the act unconstitutional as a taking of private property for private use, where, from a consideration of the whole statute, it is apparent that the legislature intended to provide exclusively for the public welfare, and ample opportunity is given to all parties interested to appear and be heard, while the levying of assessments is expressly limited to public ditches. *Id.*

4. The description of a proposed drain in the petition therefor need not be set out with precise accuracy, but is sufficient if the starting point, course, and terminus are stated with approximate accuracy. *Id.*

NOTES AND BRIEFS.

Drainage of wet and swampy lands; purpose a public one; legislature as judge of necessity; certainty of description in proceeding; constitutional right of appeal. 162

Procedure for establishment of:—(I.) General observations as to right to establish; (II.) institution of proceedings: (a) by petition of landowner; (b) by municipal ordinance; (c) by organization of drainage district; (III.) jurisdiction over proceedings: (a) in general; (b) of courts; (c) conflicting authority; (IV.) plans and specifications: (a) practicability: (1) in general; (2) choice of route; (3) lack of outlet; (4) expensiveness; (b) necessity of designating: (1) in general; (2) estimates of cost; (3) route; (4) dimensions; (5) material and openings; (c) departure from: (1) route; (2) plans; (3) default of contractor; (d) departure from statute; (V.)

necessity must be shown: (a) to make establishment legal; (b) to uphold assessment; (c) who to determine necessity; (VI.) acquisition of right of way: (a) right to acquire; (b) how acquired: (1) by contract; (2) by eminent domain; (c) compensation must be made: (1) in general; (2) when and how made; (d) procedure; (e) measure of damages; (VII.) completion of improvement: (a) statutory provisions must be followed; (b) jurisdictional facts; (c) effect of irregularities; (d) notice; hearing: (1) general rules; (2) to whom; (3) of what; (4) form; (5) hearing; (6) other matters; (e) letting contract; (f) remonstrance; (g) statutory matters; (h) details of work; (i) wrongful acts; (j) compensation for injury; (k) other matters; (VIII.) supervision by court: (a) by appeal; (b) on collateral attack; (IX.) acquisition of funds: (a) use of public funds or credit; (b) local assessment: (1) authority to make; (2) what is liable: (a) in general; (b) by whom selected; (3) procedure; method of assessment; (4) apportionment and equalization; (5) for what may be laid; (6) rights of property owner; (7) other matters; (8) lien; (9) enforcement; (c) collection and distribution of fund; (d) curing defects; (X.) contesting assessment: (a) who may contest; (b) method of contesting; (c) grounds of contesting; (d) benefit must be paid; (e) laches; (f) waiver; (g) estoppel; (h) suit to recover back money paid; (i) other matters; (XI.) abandonment of drain. 161

DUE PROCESS.

See CONSTITUTIONAL LAW, 6-13.

DUTIES.

The attempted smuggling of goods into the United States will justify their forfeiture, as against the claims of one from whom they were obtained by the smuggler by a fraudulent purchase, which remains unrescinded. 581 *Diamonds v. United States* (C. C. App. 6th C.) 595

DYNAMITE.

Negligence in Storing, see NEGLIGENCE, 5.

EASEMENTS.

NOTES AND BRIEFS.

Easements; prescriptive right to fish. 490

ECCELESIASTICAL LAW.

See RELIGIOUS SOCIETIES.

EJECTMENT.

Evidence of Ownership of Land, see EVIDENCE, 17.

1. One of two or more persons holding a vested right of entry for condition broken may, without actual entry, maintain ejectment for the land involved. *Bouvier v. Baltimore & N. Y. R. Co.* (N. J. Err. & App.) 750

2. Possessory rights only will not sustain an action of ejectment without showing the legal title. *Cahill v. Cahill* (Conn.) 706

3. Title to real estate which will sustain an action of ejectment cannot be created or established by the presumptions flowing from peaceable possession of it for a period of years short of the time prescribed by the statute governing title by adverse possession. *Id.*

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Ejectment; recovery against wrongdoer by plaintiff proving possession under claim of title. 706

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Conclusiveness of Legislative Determination as to, see COURTS, 1.

Measure of Damages, see DAMAGES, 5-19.

For What Purpose, see also DRAINS AND SEWERS, 3.

Who may exercise right.

1. Power to condemn property injured by a sewer system for a temporary period necessary to perfect some other method of disposing of the sewage is not conferred by general authority to construct sewers and acquire by eminent domain the property necessary for that purpose. *Waterbury v. Platt Bros. & Co.* (Conn.) 211

2. A private corporation may exercise the right, given by the Constitution, to take private property for purposes of a reservoir, upon property of a railroad company which is not held for public use. *Denver Power & Irrig. Co. v. Colorado & S. R. Co.* (Colo.) 383

For what purpose.

3. The legislature has no power to authorize the taking of private property for a private use, nor to compel the payment of assessments for the construction of any public improvement which furthers private interests only. *State ex rel. Utick v. Polk County Comrs.* (Minn.) 161

4. A constitutional prohibition of the taking of private property for private purposes is not applicable to a statute providing for the drainage of large tracts of land. *Mound City Land & Stock Co. v. Miller* (Mo.) 190

5. A statute requiring every railroad company to drain off the water accumulating along its right of way from the construction of the road, without regard to whether such water is detrimental to the public health and welfare or injurious to contiguous lands, and providing that if any company, after due notice, fail to comply with the statute, a proper ditch may be constructed by public authorities, upon petition of any owner or tenant of land contiguous to the road feeling himself aggrieved, and the cost assessed upon the railroad company, is unconstitutional as a taking of

private property for private use. *Chicago & E. R. Co. v. Keith* (Ohio) 525

6. Absence of power to condemn, for a reservoir, land situated within a government forest reserve cannot be urged by a private individual to defeat the condemnation proceedings. *Denver Power & Irrig. Co. v. Colorado & S. R. Co.* (Colo.) 383

7. Authority to condemn land for a reservoir for agricultural and milling purposes is sufficient to cover its condemnation for power, manufacturing, and "other beneficial uses and purposes," where no suggestion is made of an intended use which is not directly or indirectly associated or connected with uses expressly authorized. *Id.*

What may be taken.

8. Franchises possessed, but not in fact exercised, are included in a statute authorizing one water company to acquire, by right of eminent domain, "the entire plant, property, and franchises" of another. *Kennebec Water Dist. v. Waterville* (Me.) 856

9. A company seeking to acquire for a reservoir site, by right of eminent domain, land claimed by a railroad company cannot, for the purpose of defeating the latter's right in the property, attack its corporate existence, or assert that it has not sufficiently complied with the law to give it a right to the property. *Denver Power & Irrig. Co. v. Colorado & S. R. Co.* (Colo.) 383

10. A reservoir company cannot take, by right of eminent domain, land devoted to the purposes of a railroad, unless such taking is required by public necessity; and the facts that the site is the only available one on the stream, and that the railroad company might procure an equally available location for its purposes elsewhere, are immaterial. *Id.*

11. The mere laying of rails upon a right of way is not sufficient to protect the property from appropriation for other public uses, if the property has been held by various railroad companies for many years without any attempt by them to utilize it, and the rails are laid only a short time before the proceedings are instituted to acquire adverse title to the property, and three years after the one seeking title has commenced to expend money on the property; and the fact that the corporation laying them comes into existence only a short time before it begins to lay the rails is immaterial if its rights are acquired from other corporations which never made any attempt to construct a road. *Id.*

12. The condemnation of the right to construct a telegraph line along a railroad right of way is not prevented by the fact that a right of way for the line might be obtained over other property or in other ways. *Ft. Worth & R. G. R. Co. v. Southwestern Teleg. & Teleph. Co.* (Tex.) 145

13. Authority to condemn the right to construct a telegraph line along a railroad right of way is conferred by a statute permitting the condemnation of any lands, whether owned by private persons in fee or 60 L. R. A.

in any less estate, or by any corporation, whether acquired by purchase or by virtue of any provision in the charter of such corporation. *Id.*

14. The condemnation of the right of a private riparian proprietor to the use and enjoyment of a natural stream flowing past his land, or its impairment by an appropriation of such water for irrigation purposes, is authorized by Neb. Comp. Stat. 1901, chap. 93a, art. 2, § 41, and by Neb. Const. art. 1, § 21, and such proprietors may recover damages in the same way and subject to the same rules as a person whose property is affected injuriously by the construction and operation of a railroad. *Crawford Co. v. Hall* (Neb.) 889

15. The consents of owners of lots abutting on a street to the construction and operation of a street railroad on such street are not property rights that can be appropriated under the power of eminent domain. *Hamilton, G. & C. Traction Co. v. Parrish* (Ohio) 531

Right to compensation.

16. A riparian owner whose property rights are appropriated or impaired in making appropriations of water for irrigation or other purposes for a public use, as authorized and regulated by the Nebraska irrigation act of 1895, is entitled to compensation for the injuries actually sustained, to be recovered in a suitable action or proceeding instituted for such purpose. *Crawford Co. v. Hall* (Neb.) 889

Additional burdens.

17. Poles and wires which permanently and exclusively occupy portions of a public street or highway constitute an additional burden for which the abutting owner is entitled to compensation in case he is damaged thereby. *Bronson v. Albion Teleph. Co.* (Neb.) 426

NOTES AND BRIEFS.

Eminent domain; conclusiveness of legislative decision as to necessity; interest acquirable. 213

Power to exercise for private purposes; for drainage of lands; legislature judge of necessity; certainty of description in proceedings; constitutional right of appeal. 162

Who may exercise power of, for irrigation purposes; condemning land previously taken for public use; power to construct railroad through land acquired for reservoir. 383

By telegraph and telephone company; when may be appropriated; railroad right of way; necessity for taking. 146

Determination of value of franchise of waterworks plant sought to be condemned. 858

ENTRY.

Right of, for Condition Broken, see COVENANT; EJECTMENT, 1; LIMITATION OF ACTIONS, 1; PARTITION; REAL PROPERTY.

EQUAL PROTECTION.

See CONSTITUTIONAL LAW, 4-7.

EQUITY.

1. A suit in equity to determine the rights to use or divert the waters of a stream by virtue of riparian rights, appropriation, prescription or otherwise, when claimed by a large number of persons, and to enjoin infringement, under color thereof, of rights acquired under the Nebraska irrigation act of 1895, may be maintained in order to avoid a multiplicity of suits. *Crawford Co. v. Hall* (Neb.) 889

2. The avoidance of a multiplicity of suits will give equity jurisdiction of a suit by a municipal corporation to enjoin a company which has laid gas mains in its streets from violating its contract as to maximum rates, where it is entitled to nominal damages at law, and each inhabitant has a right of action to vindicate his rights. *Muncie Natural Gas Co. v. Muncie* (Ind.) 822

3. The plaintiff in a suit in equity to determine conflicting claims to the right to use or divert the waters of a stream by virtue of riparian rights, appropriation, prescription or otherwise, and enjoin infringement, under color thereof, of rights acquired under the Nebraska irrigation act of 1895, may offer to do equity by compensating riparian owners whose rights are affected by the construction and operation of an irrigation canal; and in such case the amounts due the several parties by way of damages may become a proper subject of inquiry and adjudication therein. *Crawford Co. v. Hall* (Neb.) 889

NOTES AND BRIEFS.

Equity; jurisdiction of, where remedy at law inadequate. 729

ESTOPPEL.

As to Insurance, see INSURANCE, 2-6.

NOTES AND BRIEFS.

Estoppel; of corporation by what will estop stockholder. 929

EVIDENCE.**Judicial notice.**

1. The Minnesota supreme court takes judicial notice of the topography of all sections of the state, and that certain portions thereof are, for want of natural drainage, wet and swampy during the greater portion of the year and wholly unfit for agricultural or other purposes, but that they would, when properly drained, be extremely valuable and productive. *State ex rel. Utick v. Polk County Comrs.* (Minn.) 161

2. The supreme court of Nebraska will take judicial notice of the fact that since the early settlements of the western portions of the state, where irrigation has been found essential to successful agriculture, a custom or practice has existed of appropriating and diverting waters from the natural channels thereof into irrigation canals, and 60 L. R. A.

the application of such waters to the soil for agricultural purposes. *Crawford Co. v. Hall* (Neb.) 889

Presumptions.

Of Title from Peaceable Possession of Land, see EJECTMENT, 3.

3. The presumption of death from natural causes may be considered by the jury in determining the cause of death of a member of a mutual benefit society, who was found dead in the water, where the evidence is not such as to explain or indicate how the body came to be there. *Cox v. Royal Tribe of Joseph* (Or.) 620

4. The presumption that a publication of the reason of the discharge of an employee was made in good faith must prevail, where it was made after investigation, and embodied the result of the inquiry in accordance with the weight of evidence, if clothed in temperate and decorous language and there is no extrinsic fact or circumstance having a tendency to show malice. *Brown v. Norfolk & W. R. Co.* (Va.) 472

5. Service under a contract of employment for a fixed period, continued after the expiration of such period, will be presumed to be under the same contract; but such presumption must yield to evidence showing a change of terms. *Home F. Ins. Co. v. Barber* (Neb.) 927

6. Direct proof of the existence of a deed may be aided by the presumption to be derived from possession and repeated acts of ownership in establishing the title to real estate. *Cahill v. Cahill* (Conn.) 706

7. A crime will not be presumed to have been committed on a day when accused was in the state, for the purpose of upholding extradition proceedings against him as a fugitive from justice, if the indictment charges its commission on an earlier date, and no claim or suggestion is made of error in the charge. *People ex rel. Cockran v. Hyatt* (N. Y.) 774

Burden of proof.

That No Injury Resulted from Separation of Jurors, see APPEAL AND ERROR, 8.
To Show Harmlessness of Use of Intoxicants by Jury, see NEW TRIAL, 5.

8. The burden of proving that the act was not with his knowledge or consent does not rest upon one on whose premises liquor is illegally sold, where the evidence of the prosecution shows merely that the liquor was procured in defendant's building from a person unknown. *Campbellsville v. Odewalt* (Ky.) 723

9. The burden of proving the fact is upon one alleging that another availed himself of the opportunity to publish a communication of a privileged class, not to protect his interests, but to gratify ill-will against plaintiff. *Brown v. Norfolk & W. R. Co.* (Va.) 472

10. To defeat recovery upon a mutual benefit certificate because of suicide of the member, the burden of establishing suicide is

upon the society. *Cox v. Royal Tribe of Joseph (Or.)* 620

11. On the trial of an indictment for violation of a Sunday law, the burden of proof is on the state to satisfy the jury that the labor was not in household work, or other work of necessity or charity, within the exception of the statute. *State v. McBee (W. Va.)* 638

Documentary evidence.

12. The mere fact that the verdict of a coroner's jury must be returned to and filed with the clerk of a court of record in a state where the coroner has no judicial functions does not make it judicial in character, so as to entitle it to admission, in an action at law, as evidence of the facts found by him. *Cox v. Royal Tribe of Joseph (Or.)* 620

13. The inclusion of an authenticated copy of a coroner's inquest in the proofs of death of a member of a mutual benefit society does not render it admissible in evidence against the beneficiary in an action on the certificate, where the proofs were furnished by the subordinate lodge of which deceased was a member. *Id.*

Parol evidence concerning writings.

14. Parol evidence is admissible to designate the particular property described and identified by a written contract for its conveyance, and which was in the contemplation of the parties in making the contract. *Moayon v. Moayon (Ky.)* 415

15. Parol evidence is admissible that an insurance company knew of the facts and circumstances entitling it to enforce the provisions of a policy as to forfeiture or not at its option, and that the company continued to treat the policy as in force and declined to exercise such option, notwithstanding a provision in the policy that the agents of the company should have no power to waive any conditions in the policy. *German Ins. Co. v. Shader (Neb.)* 918

16. Parol evidence of the consideration for a note is admissible where the note contains nothing further in regard thereto than the statement "for value rec'd." *Albert Lea College v. Brown (Minn.)* 870

Relevancy and materiality.

See also WITNESSES, 3.

17. That a man refrained from all manner of acts appropriate to ownership is admissible in evidence in a suit to recover, in the right of his wife, real estate occupied by them jointly, as tending to show who was in possession. *Cahill v. Cahill (Conn.)* 706

18. The selling price of the stock of a water company is not competent evidence of the value of a portion of its system which is to be taken from it by right of eminent domain. *Kennebec Water Dist. v. Waterville (Me.)* 856

19. The actual rates which have been charged by a water company, and its actual earnings, are admissible in evidence in determining the value of its franchises which are to be taken by right of eminent domain. *Id.*

20. Evidence of the actual cost of the plant and property of a water company, together with a proper allowance for depreciation, is admissible, but not controlling, upon the question of the amount which must be allowed for it when the plant is taken by right of eminent domain. *Id.*

21. Evidence that, in repairing a belt which parted where the ends were laced together, causing injury to an employee, a double row of holes was substituted for a single one, is inadmissible upon the question of the employer's negligence. *McGarr v. National & P. Worsted Mills (R. I.)* 122

22. In an action on a promissory note, an averment by the holder that he caused due notice of dishonor to be served on the last indorser but one is sufficient, in the absence of a motion to make more specific, to admit evidence that the notice was given to the last indorser, and by him transmitted to the one next prior. *Oakley v. Carr (Neb.)* 431

23. A witness's estimate of the reasonableness of the expenses of a funeral is binding on neither jury nor court, in an action to recover therefor from decedent's estate. *Foley v. Broeksmit (Iowa)* 571

NOTES AND BRIEFS.

Burden of proof as to bill of sale regular on face. 259

Burden of proving fraud in assignment of stock to avoid liability of stockholder. 266

Burden of proving that contract contrary to public policy. 451

Burden of proof as to necessity of work on Sunday. 638

Burden of proving validity of transactions between principal and agent. 928

Presumption of bank's knowledge of signature of depositors and customers. 955

Presumption of constitutionality of statute. 646

Presumption of validity of statutory ordinance. 391

Presumption of husband's death on remarriage of wife. 606

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Conclusiveness of facts proved over opinions of experts. 794

Of validity of claim in foreign suit. 396

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Admissibility and sufficiency of verdict of coroner's jury as to cause of death. 622

Admissibility of evidence on former trial. 318

EXCHANGE.

Effect of, on Negotiability of Note, see **BILLS AND NOTES, 1.**

EXECUTORS AND ADMINISTRATORS.

Conclusiveness of Witness's Estimate of Reasonableness of Funeral Expenses, see **EVIDENCE**, 23.

1. The allowance of \$455 out of an undertaker's bill for \$526 for the burial of an aged janitor, whose companions were laboring men, and whose most intimate friend was a street sweeper, and whose estate was less than \$5,000, is excessive. *Foley v. Brooksmit* (Iowa) 571

NOTES AND BRIEFS.

Executors and administrators; liability to garnishment. 409

EXEMPTION.

From Taxation, see **TAXES**, 4-10.

EXPERTS.

Instructing Jury to Discriminate against Testimony of, see **TRIAL**, 13.

EXPLOSION.

Of Gunpowder by Servant; Master's Liability, see **NUISANCES**, 2.

Destruction of Plate Glass Windows by, see **INSURANCE**, 8, 9.

Of Torpedo by Servant; Master's Liability for, see **MASTER AND SERVANT**, 15, 16.

NOTES AND BRIEFS.

Explosion; proximate cause of injury by. 377

EXPLOSIVES.

Negligence in Storing, see **NEGLIGENCE**, 5.

EXPRESS COMPANY.

Taxation of Property of, see **TAXES**, 12.

NOTES AND BRIEFS.

Express companies; constitutionality of act for taxation of. 646

Taxation of; effect of; effect of commerce clause of Federal Constitution. 687

EXTRADITION.

Review of Determination in Proceedings for, see **HABEAS CORPUS**, 2.

See also **EVIDENCE**, 7.

1. The power which independent nations have to surrender criminals to other nations as a matter of favor or comity is not possessed by the states of the Union, and no person can be surrendered by one state to another unless the case falls within the provisions of the United States Constitution. *People ex rel. Corkran v. Hyatt* (N. Y.) 774

2. A person who was not corporeally present in the demanding state at the time of the commission of a crime with which he is charged is not a fugitive from justice in another state within the meaning of the United States Constitution requiring the delivery up of fugitives from justice for punishment. *Id.* 60 L. R. A.

3. The presence of an alleged criminal in a state for a single day after the alleged commission of the crime, and nearly a year before the institution of any proceedings against him, is not sufficient to require his surrender by another state, in which he is found, as a fugitive from justice. *Id.*

NOTES AND BRIEFS.

Extradition; of person not within demanding state when crime committed. 774

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Involuntary Proceedings in Insolvency against, see **BANKRUPTCY**, 1.

FELLOW SERVANT.

See **MASTER AND SERVANT**, 6-13, **NOTES AND BRIEFS**.

FICTITIOUS PERSON.

Forged Check Payable to, Recovery Back by Bank Paying, see **ASSUMPSIT**, 2.

FINDINGS.

Review on Appeal, see **APPEAL AND ERROR**, 10, 11.

FIRE.

As Cause of Breaking Insured Window, see **INSURANCE**, 9.

Liability for Injury to Infant, see **NEGLIGENCE**, 4.

FISHERIES.

Fish as Subject of Larceny, see **LARCENY**, 2.

NOTES AND BRIEFS.

Fisheries; when fish subject of larceny. 483

Right to fish:—(I.) Public right of fishery; (II.) grant of exclusive right to individual: (a) right to make; (b) how made; (c) private grants; (III.) prescriptive rights: (a) in general; (b) by custom; (IV.) kinds of fishery; (V.) public regulation; (VI.) how exercised; (VII.) rights in lakes and ponds; (VIII.) other rights; (IX.) shell fisheries: (a) public rights; (b) private rights; (X.) extinction; (XI.) protection of. 481

FIXTURES.

A hotel building, affixed to land, and held and conveyed with the land upon which it stands as real estate, cannot thereafter, by mere agreement of the parties, become a chattel or personal property, and be legally encumbered by a chattel mortgage, until after its severance from the land. *Beeler v. C. C. Mercantile Co.* (Idaho) 283

NOTES AND BRIEFS.

Fixtures; what constitutes; intention of parties as element; effect of executing chattel mortgage, on necessity of actual severance. 283

FOREIGN JUDGMENT.

Against Garnishee, see GARNISHMENT, 3.

FORGED CHECK.

Recovery Back by Bank Paying, see ASSUMPSIT, 2.

FRANCHISE.

Condemnation of, see EMINENT DOMAIN, 8.

Exclusiveness of Water Franchise for Court, see TRIAL, 8.

See also CORPORATIONS, NOTES AND BRIEFS.

FRAUD.

Preventing Release from Debts by Discharge in Bankruptcy, see BANKRUPTCY, 3.

Suits attacking Fraudulent Conveyances, see CREDITORS' BILL.

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Fraud; of purchaser in obtaining goods; seller's right to rescind. 597

Conveyance by insolvent debtor; grantee not a party to fraud; fraudulent gift to wife. 409

In chattel mortgage; relationship of parties as badge of. 257

Setting aside divorce proceedings for. 295

FRIGHT.

Allegations as to, see PLEADING, 6.

1. There can be no recovery for fright which results in physical injuries, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant. *Sanderson v. Northern P. R. Co.* (Minn.) 403

2. An action will lie for physical injury or disease resulting from fright or nervous shock caused by negligent acts, when defendant should have known that such acts would, with reasonable certainty, cause such result, or the negligence was gross, showing utter indifference to the consequences which should have been contemplated by him. *Watkins v. Kaolin Mfg. Co.* (N. C.) 617

NOTES AND BRIEFS.

Fright; recovery of damages for. 617

Liability for injuries resulting from. 404

FUEL.

Municipal Authority to Provide for Poor, see MUNICIPAL CORPORATIONS, 1.

FUGITIVE.

From Justice, see EXTRADITION.

FUNERAL EXPENSES.

See EVIDENCE, 23; EXECUTORS AND ADMINISTRATORS.

GARNISHMENT.

1. A writ of garnishment against a 60 L. R. A.

county is not authorized by a statute providing that every person who shall have brought a suit in any court of the state against any person, natural or corporate, shall have a right to a writ of garnishment, to subject any indebtedness due to the defendant by a third person, and any goods, moneys, chattels, or effects of the defendant in the possession or control of a third person, and that the officers, agents, and employees of companies or corporations shall be, as regards such companies or corporations, third persons, and as such subject to garnishment after judgment against the companies or corporations. *Duval County v. Charleston Lumber & Mfg. Co.* (Fla.) 549

2. Violation of a state statute in sending a claim out of the state for the purpose of garnishment will not deprive the garnishee of the protection of the foreign judgment, under which he pays the claim, from liability to pay the debt a second time to his creditor within the state, if he has disclosed all defenses within his knowledge to the foreign court, and notified the debtor of the proceedings, notwithstanding which the foreign court, which has jurisdiction over the parties and the *res*, compelled him to pay the claim. *Baltimore & O. S. W. R. Co. v. Adams* (Ind.) 396

3. The effect of a foreign judgment against a garnishee to protect him from paying the claim a second time to the principal debtor will not be defeated by the fact that, after the foreign proceedings were instituted, the principal debtor brought suit upon the claim against the garnishee within the state, which he pressed to judgment before the foreign judgment was entered. *Id.*

4. Affidavits controverting a denial by the garnishee of possession of goods of the debtor under a statute permitting such affidavits stating reason to believe the answer to be incorrect and the particulars wherein it is so, are sufficient to raise an issue, where they state that plaintiff believes with good reason that the answer is incorrect, because garnishee took into his possession the debtor's stock of goods and attempted to acquire title thereto without complying with the terms of the statute requiring the purchaser of a stock of goods to ascertain the creditors of the seller, and have the purchase price applied to their claims. *McDaniels v. J. J. Connelly Shoe Co.* (Wash.) 947

NOTES AND BRIEFS.

Garnishment; liability of administrator to. 409

GAS.

Action by Municipality to Enjoin Violation of Contract as to Maximum Rate, see ACTION OR SUIT, 8, 9; EQUITY, 2; INJUNCTION, 5.

Inclusion of, in Deed, of "Surface" of Land, see DEEDS.

1. A municipal corporation has power to stipulate as to the maximum rates to be charged by a gas company when allowing it

to lay pipes in the streets, under a statute giving it exclusive power over its streets, highways, and alleys. *Muncie Natural Gas Co. v. Muncie* (Ind.) 822

2. A gas company, while enjoying a contract permitting it to lay pipes in the streets of a city, cannot attack the power of the city to stipulate in the contract as to the maximum rates to be charged for gas. *Id.* 823

NOTES AND BRIEFS.

Gas; grant of right to lay pipes in city streets; power to fix prices to consumers; right of municipality to bring suit to enjoin increase of charges. 823

GIFT.

NOTES AND BRIEFS.

Gift; note of donor as; revocation by donor's death. 870

GOOD WILL.

Consideration of, in Fixing Value of Water Plant, see DAMAGES, 16.

1. The sale of the good will of a business and the personal property used in conducting it, upon which appears the name of the seller, will not prevent him from resuming business under his own name. *Ranft v. Reimers* (Ill.) 291

2. One who has sold the good will of a business to persons who change the name under which it is conducted has a right, upon resuming business under the old name, to have mail directed to such name delivered to him. *Id.*

3. One who sells a trade, good will, and business, covenanting to warrant and defend the same, cannot, after resuming business, solicit trade from his former customers to the injury of the buyer. *Id.*

4. One who sells and warrants the good will of a business, a large part of the orders of which come by telephone, cannot, upon resuming business, appropriate the old telephone number to the injury of the buyer. *Id.*

NOTES AND BRIEFS.

Good will; right of vendor of, to canvass old customers; injunction against. 292

GOVERNMENT.

Review of Determination of, in Extradition Proceedings, see HABEAS CORPUS, 2.

GRADE CROSSINGS.

Power to Abolish, see MUNICIPAL CORPORATIONS, 2.

GUNPOWDER.

Storage of, as Nuisance, see NUISANCES, 2.

NOTES AND BRIEFS.

Proximate cause of injury by explosion of. 377
60 L. R. A.

HABEAS CORPUS.

1. The right to a writ of habeas corpus is not defeated on the ground that petitioner is not in custody, where he has been placed under arrest by the sheriff, and told that his movements must be under the control of the sheriff, although he is given the liberty of the city to aid him in procuring the writ. *Ex parte Foster* (Tex. Crim. App.) 631

2. The determination by the governor that a person whose rendition for trial on a criminal charge is sought by another state is a fugitive from justice is reviewable by habeas corpus. *People ex rel. Corkran v. Hyatt* (N. Y.) 774

NOTES AND BRIEFS.

Habeas corpus; extent of review on appeal. 775

HAWKING.

On Camp Meeting Ground, Right to Prohibit, see CAMP MEETING ASSOCIATION, 3.

HIGHWAYS.

Dedication of, in Park of Camp Meeting Association, see CAMP MEETING ASSOCIATION, 1.

Telephone Poles and Wires on, as Additional Burden, see EMINENT DOMAIN, 17.

Fixing Maximum Rates in Allowing Gas Pipes in, see GAS.

Enjoining Cutting of Trees in, see INJUNCTION, 8, 9.

Conclusiveness of Judgment as to Boundary of, see JUDGMENT, 5.

Conclusiveness, on Lot Owner, of Judgment against City for Personal Injuries, see JUDGMENT, 4.

Running of Limitations against Lot Owner's Liability over to City, see LIMITATION OF ACTIONS, 2.

Improvement of, see PUBLIC IMPROVEMENTS.

Power of Road District to Raise Money by Taxation, see TAXES, 1.

Liability of Telephone Company Injuring Trees In, see TELEPHONES.

1. Erecting in or beside a highway a crane for delivering mail to passing trains, which, when the mail bag is strung upon it, is calculated to frighten horses of ordinary gentleness, is negligence which will render the railroad company liable to one who, in the exercise of ordinary care, is injured by the frightening thereby of the horse which he is driving, although the bag is actually placed in position by government employees. *Cleghorn v. Western R. Co. of Ala.* (Ala.) 269

2. A purchaser of a lot at sheriff's sale, who has not obtained any possession or control of the premises, except such as arises constructively from the delivery or recording of the sheriff's deed, is not responsible to the city, which has paid a judgment for injuries received by falling into a negli-

gently constructed coal hole in front of such lot three weeks after the issuance of the sheriff's deed, and while the former owner was still in possession. *Lincoln v. First Nat. Bank* (Neb.) 923

NOTES AND BRIEFS.

Highways; trees in; enjoining owner's title to and right to recover for injuries to. 427

Power of city to vacate street; rights of abutting owner. 720

Right of abutting owner to have streets remain open. 786

Conclusiveness, against lot owner, of judgment for personal injuries against city; liability of purchaser for continuing coal hole with defective covering in sidewalk; invalidity of act requiring abutting owner to repair sidewalk. 924

HOLDING OVER.

See LANDLORD AND TENANT, 6.

HOMESTEAD.

Husband's Vested Right to Convey, see CONSTITUTIONAL LAW, 3.

1. A vested right of a man to convey his homestead without the co-operation of his wife is impaired by a statute making him incapable of conveying it unless his wife joins in the conveyance. *Gladney v. Sydnor* (Mo.) 880

2. A deprivation of right, and not merely a change in remedy or procedure, is effected by a statute which forbids a man to sell his homestead without the co-operation of his wife where, theretofore, he might do so unless the wife filed a claim as prescribed by statute. *Id.*

NOTES AND BRIEFS.

Homestead; husband's vested right to sell or encumber. 881

HOMICIDE.

A master may be found guilty of murder for whipping a servant so that he dies, although he has a right to inflict the punishment, and the instrument is proper, if the punishment is so prolonged and barbarous as to indicate malice. *State v. Shaw* (S. C.) 801

NOTES AND BRIEFS.

Homicide by excessive or improper chastisement:—(I.) The general rule; (II.) parent and child; (III.) persons in *loco parentis*; (IV.) schoolmaster and pupil; (V.) husband and wife; (VI.) master and servant, slave, or apprentice; (VII.) conclusion. 801

HUSBAND AND WIFE.

Husband's Right to Convey Homestead, see HOMESTEAD.

As to Witnesses, see WITNESSES, 1.

Marriage.

By Mother of Bastard; Effect on Right to Maintain Action in Bastardy, see BASTARDY, 2.

1. In this state the only essential of a

valid marriage is the free consent of competent parties to live together in the marriage relation. *Eaton v. Eaton* (Neb.) 605

2. If a marriage contracted in good faith is void by reason of some removable impediment, the parties may, after the impediment has been removed, become lawfully united by continuing to live together with the intention of sustaining toward each other the relation of husband and wife, and even where the existence of the impediment and its removal were unknown, continued cohabitation evidences consent to live in wedlock. *Id.*

3. A marriage contracted by a divorced person during the time allowed by law for commencing proceedings for the reversal of the divorce decree is absolutely void, even if the decree is not reversed, under Neb. Comp. Stat. 1901, chap. 25, § 45, making it unlawful for one obtaining a divorce to remarry during the pendency of an appeal or the time allowed for an appeal. *Id.*

Property.

Enjoining Husband from Interference with Wife's Separate Estate, see INJUNCTION, 1.

4. A lease of land which is the separate estate of a married woman, for a period of more than one year, is a conveyance within the meaning of statutes requiring husband and wife to join in the conveyance of real estate the separate property of the wife, and forbidding the conveyance of an estate for a term of more than one year unless the conveyance be in writing; and the wife must, therefore, join in its execution notwithstanding a statute giving the husband the sole management of the wife's property during marriage. *Dority v. Dority* (Tex.) 941

Actions.

5. A married woman may maintain a suit in equity against her husband to enforce his contract to convey property in trust for their children and herself in consideration of her resumption of marital relations which she had abandoned because of conduct on his part entitling her to a divorce, where the statute permits her to sue alone in actions between her and her husband. *Moayon v. Moayon* (Ky.) 415

Divorce.

Withdrawal of Action for, as Consideration for Promise, see CONTRACTS, 3, 4.

Mutuality of Promise to Convey Land if Wife Abstains from Bringing Suit for, see CONTRACTS, 5.

Ratification of Decree, see JUDGMENT, 7.

Contract to Convey Land in Consideration of Wife not Suing for, see SPECIFIC PERFORMANCE, 2.

6. A woman who consented to a decree of divorce against her to enable her husband to obtain a grant of property cannot, after her husband has married another woman, have the decree annulled, although, in consideration of her consent, he promised to remarry her after the grant was procured, and the decree was obtained by sup-

pression of facts, and false testimony. *Karren v. Karren* (Utah) 294

NOTES AND BRIEFS.

Marriage of divorced person; validity of; effect of continued cohabitation after removal of impediment. 606

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Right of party obtaining or consenting to divorce to contest its validity. 294

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Services of an attorney in prosecuting for an infant an action to recover damages for an indecent assault on her are *necessaries*. *Crafts v. Carr* (R. I.) 128
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INJUNCTION.

1. A husband may be enjoined, in a suit which does not seek the dissolution of the marriage, from further interference with his wife's separate estate, notwithstanding the statute gives him the sole management of it during marriage, where he refuses to support her, and so diverts the income of her property as to deprive her of the benefit which the law entitles her to receive therefrom through his management. *Dority v. Dority* (Tex.) 941

2. Facts with reference to contemplated buildings or improvements, which have been ascertained promptly by effort and expense, and compiled and put in form for the use of contractors, having a commercial value so long as they are not generally known, are property, and entitled to protection as such. *F. W. Dodge Co. v. Construction Information Co.* (Mass.) 810

3. The news of market quotations and sporting items gathered and furnished by a telegraph company to patrons by means of tickers is property, which will be protected by equity against appropriation by rival companies who intend to furnish it to their patrons in competition with complainant, to the injury or destruction of the service. *National Teleg. News Co. v. Western Union Teleg. Co.* (C. C. App. 7th C.) 805

4. The furnishing to subscribers of secret information, gathered by effort and expense, regarding intended buildings or improvements, which is advantageous to their respective lines of business, under contract not to disclose it, is not a publication which will deprive its owner of the right to protection against the unlawful use of it by a rival. *F. W. Dodge Co. v. Construction Information Co.* (Mass.) 810

Contract rights.

As to Maximum Rates for Gas, see *ACTION OR SUIT*, 8; *EQUITY*, 2.

5. Injunction will lie to prevent a gas company which has laid its mains in a city street from violating its contract as to maximum rates which it will charge. *Muncie Natural Gas Co. v. Muncie* (Ind.) 822

Water rights.

See also *EQUITY*, 1.

6. A landowner will be enjoined from draining, collecting, and diverting percolating waters on his premises for the sole purpose of wasting them, where such acts will destroy or materially injure the spring of a water company which makes use of the water thereof for supplying the people of a

municipality with water for domestic use.
Stillwater Water Co. v. Farmer (Minn.) 875

7. A riparian owner having a superior title to the use of the water of a stream as against an appropriator is not entitled to maintain an injunction to prevent the diversion of the storm or flood waters of the stream, and thereby prevent its application to a beneficial use for agricultural purposes, as contemplated by the Nebraska irrigation act of 1895. Crawford Co. v. Hall (Neb.) 889

Highways.

8. An injunction will not be granted to restrain the cutting of trees along a highway by a telephone company in erecting poles and wires under its franchise, in the absence of insolvency or some special circumstance, but the owner will be left to his remedy at law. Bronson v. Albion Teleph. Co. (Neb.) 426

9. The invalidity of the franchise of a telephone company does not entitle an abutting owner to an injunction to restrain it from cutting trees along a street, in erecting its poles and wires, since whether its franchise was acquired or is held rightfully can be determined only in a direct proceeding to oust the company, or in a proceeding to which someone who claims a better title is a party. Id.

Taxes.

10. The prevention of a multiplicity of suits is sufficient ground for an injunction against the certifying, by a board of tax appraisers, of assessments against corporations to the officers of a large number of counties, if the assessments are illegal. Sandford v. Poe (C. C. App. 6th C.) 641

11. Taking the relative value of the tangible property of a corporation within a state, as compared with the total value of all its tangible property in different states, where it is done under a statute which does not require this to be done, but requires the true value of the property within the state to be taken as the basis of assessment, considered with reference to the value of all the property of the corporation, including a consideration of the value of its capital stock as a factor, does not, even if it is inequitable and unjust as a matter of fact, constitute such an illegal assessment that the courts can grant an injunction against it. Id.

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INSURANCE.

Expulsion from Benefit Societies, see BENEVOLENT SOCIETIES, 2, 3.

Presumption of Death from Natural Causes, see EVIDENCE, 3.

Parol Evidence as to Company's Knowledge of Provisions, see EVIDENCE, 15.

Effect of Including Proofs of Death in Copy of Coroner's Inquest, see EVIDENCE, 13.

Imputing Agent's Knowledge to Company, see NOTICE, 3.

Premiums.

See also *infra*, 4-6.

1. An insurance company which desires to repudiate the act of an agent having general power to receive and collect premiums, in accepting a premium after loss occurs, must return or tender the money to the insured; and a mere return to the agent with unexecuted instructions to deliver it to the insured is not sufficient. German Ins. Co. v. Shader (Neb.) 918

Waiver; estoppel.

2. A condition in an insurance policy that it shall be void in certain cases means only that it is voidable at the option of the insurer, and a forfeiture for breach of such condition is waived where the company, with knowledge of the circumstances giving it power to avoid the policy, treats it as in force. Id.

3. An insurance company cannot set up that a policy issued by its agent with knowledge of the facts was void when issued because of such facts. Id.

4. Receiving the premium after the destruction of all the insured property, so that nothing remains to which the insurance may attach, waives a provision that the insurer shall not be liable for loss occurring before payment of the premium. Id.

5. Provisions in a policy of insurance that the risk shall not attach unless the premium has been actually paid are waived where the policy is delivered on an agreement to extend credit, and the insurer does

not take advantage of such provisions, but treats the policy as in force. *Id.*

6. A condition in an insurance policy that it shall not be in force until the premium is paid is waived by the company neglecting to insist on such condition after the agent reports that a policy has been issued, and that the premium thereon is unpaid. *Id.*

Provision for arbitration.

7. A provision making a submission of the question of the amount of loss to arbitrators and an award thereon a condition precedent to the right to maintain an action on a policy of insurance which limits the liability of the insured to the actual cash value of the property at the time of loss cannot be enforced, and if the insurer and insured cannot agree as to the extent of the loss a valid cause of action, subject to adjudication by a court of law, at once arises. *Hartford F. Ins. Co. v. Hon (Neb.)* 436

Cause of loss or injury.

Burden of Proving Suicide, see EVIDENCE, 10.

When Verdict Directed for Company on Ground of Suicide, see TRIAL, 15.

8. The breaking of a plate-glass window by the explosion of gas generated by the use of gasoline to clean clothes is not caused by the blowing up of the building, within the meaning of an insurance policy thereon which exempts the insurer from loss caused by the blowing up of buildings. *Vorse v. New Jersey Plate-Glass Ins. Co. (Iowa)* 838

9. Fire is not the cause of the breaking of a window, within the meaning of an insurance policy exempting the insurer from liability for losses which happened by or in consequence of any fire, where the loss was caused by the explosion of gas ignited by a match or light. *Id.*

10. Carrying a loaded gun from one room of a house, in which it had been left by another person, to an adjoining room, is "handling firearms" within the meaning of a clause in an accident insurance policy limiting to \$500 the recovery for any injury received while hunting, or while using or handling loaded firearms. *Doddy v. National Masonic Acci. Asso. (Neb.)* 424

Apportionment.

11. In distributing the loss upon a building, machinery, and stock between insurance policies covering all the items for a gross sum and those specifically liable on each item, all of which provided that the liability shall not be greater "than the amount hereby insured shall bear to the whole insurance," the blanket policies should be regarded as insuring each item to the entire amount unappropriated when it is reached, making the adjustment item by item in the order of greatest loss, if that will work substantial equity and justice to all concerned, and deducting the sums appropriated to the respective items as they are adjusted and passed. *Schmaelzle v. London & L. F. Ins. Co. (Conn.)* 536

Persons entitled to proceeds.

12. Afterborn children of a subsequent 60 L. R. A.

marriage are entitled to share in the benefit of a policy of life insurance taken for the benefit of the children of the insured. *Scull v. Aetna L. Ins. Co. (N. C.)* 615

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Right of afterborn child in policy for "children" of insured. 615

Sufficiency of finding as to suicide of insured; conclusiveness of proofs of death prepared by insurer's agent. 622

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Construction of policy; adopting construction most favorable to insured. 424

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Personal, in Creditor's Suit, Amount of, see **CREDITORS' BILL**, 3.

Effect of Foreign Judgment against Garnishee, see **GARNISHMENT**, 3.

Wife's Right to Annulment of Divorce Consented to, see **HUSBAND AND WIFE**, 6.

Allowing Amendment on Motion for, see **PLEADING**, 4.

Effect and conclusiveness.

1. A decision that a statute constitutes a contract, and that an act repealing it is void, is not an estoppel to a subsequent decision holding that the former statute itself is unconstitutional. *Adams v. Yazoo & M. V. R. Co.* (Miss.) 33

2. A decision as to an exemption from taxation, in a case between the sheriff of a county and a railroad company, is not *res judicata* in a case between a state revenue agent and a different railroad company, although it may be persuasive under the doctrine of *stare decisis*. *Id.*

3. A decision as to the taxes of one year is not *res judicata* as to the taxes for another year. *Id.*

4. A judgment against a city for personal injuries caused by a defective sidewalk in an action, of which the lot owner has notice, is conclusive upon the latter as to the fact, cause, and extent of the injury, but not as to the lot owner's responsibility for such cause. *Lincoln v. First Nat. Bank* (Neb.) 923

5. A judgment in a suit between the owner of property abutting on a highway and the municipality to establish the boundary of the highway is not conclusive on the owner of the property located on the opposite side of the street, who is not made a party to the suit, and whose access to and from his property will be interfered with if the boundaries so established prevail. *Long v. Wilson* (Iowa) 720

Collateral impeachment.

6. The record of a judgment based on an account for goods sold cannot be impeached, and evidence offered that the debt was in fact created by fraud, in order to prevent the release of the debtor from liability on it, by a discharge in bankruptcy under a statute providing that such discharge shall release all debts except the judgments in actions for fraud. *Goodman v. Herman* (Mo.) 885

Modification.

Consideration of Motion for, on Appeal, see **APPEAL AND ERROR**, 3.

7. Under a statute permitting changes in divorce decrees in respect to disposal of children or distribution of property, such changes can only be made in the action in which the divorce is granted. *Karren v. Karren* (Utah) 294
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Right of party obtaining or consenting to divorce to contest its validity:—(I.) Scope; (II.) direct attack by party obtaining it: (a) in general; (b) attempt by wife to vacate decree obtained in her name without her consent; (III.) application by both parties to set aside decree; (IV.) direct attack by party who has consented to, or colluded in, its procurement: (a) consent; (b) collusion; (V.) collateral attack: (a) by party obtaining; (b) by party who has consented to, or colluded in, its procurement; (VI.) summary. 294

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JURY.

Presumption of Prejudice from Improper Separation of, see **APPEAL AND ERROR**, 8.

Improper Use of Intoxicants by, see **APPEAL AND ERROR**, 19.

New Trial for Separation of Jurors, see **NEW TRIAL**, 2.

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LANDLORD AND TENANT.

Rights of Lessee of Lot from Camp Meeting Association, see **CAMP MEETING ASSOCIATION**, 2, 4.

Landlord's Liability for Independent Contractor's Failure to Heat Building, see **MASTER AND SERVANT**, 17.

Landlord's Liability.

See also **PROXIMATE CAUSE**, 3.

1. Mere failure of a landlord to comply with his agreement to make repairs on the leased premises will not render him liable for personal injuries suffered by a member of the tenant's family because of want of repair. *Thompson v. Clemens* (Md.) 580

2. Failure of a landlord who has agreed to make repairs, to send a carpenter to repair a porch, for a week after receiving notice that some boards in it were bulging, is not such negligence as to charge him with liability for injury to a member of the tenant's family by the giving way of boards in another place, which were not known to be

defective, merely because the latter defect might have been discovered while the repairs were in progress, where the known defect was not of such a nature as to call for such speedy action. *Id.*

3. A landlord is not relieved from liability for injury to tenants of a lower floor by the freezing and bursting of an automatic fire extinguisher in the portion of the building retained by him, by the fact that he has employed an independent contractor to keep the building heated. *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. (N. H.)* 116

4. No implied contract obligation rests upon the owner of a building leased in separate sections to keep the portion remaining in his possession in repair, so that damages resulting to property through breach of it can be set up as a counterclaim in an action for rent. *Kuhn v. Sol Heavenrich Co. (Wis.)* 585

5. A tenant of the lower floor of a building, the remainder of which is retained by the landlord, cannot, in an action on the contract, recover for breach by a third person of his contract with the landlord to keep such remainder heated, by reason of which water pipes freeze and burst, to his injury. *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. (N. H.)* 116

Holding over; renewal.

6. Merely holding over after the expiration of the term, under a lease which provides for a renewal on the same terms, is not sufficient to show an affirmative election to renew the lease for an additional term. *Andrews v. Marshall Creamery Co. (Iowa)* 399

7. An option to renew a lease in accordance with the terms of the instrument giving the lessee the privilege of renewal is exercised, so as to be binding on the lessee, by the statement of his authorized agent, shortly before the expiration of the term, that the lease will be renewed, on the faith of which the landlord makes improvements which he is under no obligations to make, followed by the assurance by the agent of intention to remain, and that no written renewal is necessary, when pressed for such writing after the expiration of the term, and while the lessee is still in possession. *Id.*

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Landlord's liability to tenant for failure to make repairs; right of tenant's family coextensive with that of tenant. 581

Failure to heat building. 118

Lease of separate portion of building to different tenants; landlord's duty to repair roof; landlord's implied covenant to repair. 586

Tenant holding over; presumption as to; oral lease for more than year; provisions for renewal of lease. 399

LARCENY.

1. To acquire a property right in animal *feræ naturæ*, so that they may be the subject of larceny, the pursuer must bring them into his power and control, so that he may subject them to his own use at his pleasure, and must so maintain his possession and control as to indicate that he does not intend to abandon them again to the world at large; but, in cases where larceny is charged, the law does not require absolute security against the possibility of escape. *State v. Shaw (Ohio)* 481

2. When fish are inclosed in a net, or in any other inclosed place which is private property, from which they may be taken at any time at the pleasure of the owner of the net or inclosure, the taking of them therefrom with felonious intent will be larceny. *Id.*

NOTES AND BRIEFS.

Larceny; when fish subject of. 483

LEGISLATURE.

Conclusiveness of Discretion of, see COURTS, 1-4.

Privilege of Members of, as to Service of Summons, see WRIT AND PROCESS.

LIBEL AND SLANDER.

Presumption of Good Faith in Making Publication, see EVIDENCE, 4.

Burden of Proving Malice, see EVIDENCE, 9.

1. Words spoken by a witness in a judicial proceeding concerning a stranger to the suit, which are pertinent to the issues involved, and fairly responsive to questions propounded to him, are absolutely privileged notwithstanding actual malice. *Cooley v. Galyon (Tenn.)* 139

2. Charges that one who had offered to complete a building at the contract price did not pay for materials purchased, and did not use the character of materials called for by his contracts, are responsive to inquiries as to his being a reliable contractor, and pertinent to an inquiry as to damages suffered by interference with the construction of the building, which was alleged to have increased its cost, so as to be privileged. *Id.*

3. The publication, after due investigation by a railroad company, that the reason for discharging an employee was that he had made statements which had been proved to be untrue, to the effect that one officer of the company had cast reflections upon the female ancestry of another officer, is privileged, and will not sustain an action for libel, unless it was inspired by malice. *Brown v. Norfolk & W. R. Co. (Va.)* 472

NOTES AND BRIEFS.

Libel; privileged communication as to reason for discharging employee; inference of malice from publication; liability of corporation for. 473

What is a privileged communication; defamatory words by witness. 139

LICENSE.

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Requiring owner to furnish bond for payment of contractor's claims. 815

LIEN.

Requiring Bond from Owner of Property, see CONSTITUTIONAL LAW, 13.
Of Chattel Mortgage, see MORTGAGE.

Consent to the erection of buildings on the land within the meaning of the mechanics' lien law, so as to make the property liable for liens after the contract has been forfeited and the vendor has resumed possession, is not shown by a clause in an executory land contract "that the vendee shall have a right to immediate possession" for the purpose of erecting buildings. Beck v. Catholic University (N. Y.) 315

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Lien; owner's consent to erection or alteration of building; when established. 316

Power of legislature to give creditors' liens on debtors' property. 947

LIMITATION OF ACTIONS.

1. Mere delay in asserting the right of re-entry for condition broken does not waive the failure to perform the condition, where the question of performance itself is one of reasonable time. Bouvier v. Baltimore & N. Y. R. Co. (N. J. Err. & App.) 750

2. The statute of limitations does not begin to run against an action on a lot owner's liability over to a city for a judgment for injuries growing out of a defective sidewalk until the city's liability is fixed by law, or by admission and payment on its part. Lincoln v. First Nat. Bank. (Neb.) 923

NOTES AND BRIEFS.

Limitation of actions; against suit on lot owner's liability over to city for judgment for personal injuries. 924

LOTTERY.

1. A scheme whereby a common fund is to be produced by the contributions of various parties, and afterwards distributed among the parties contributing thereto, and a valuable preference or privilege in the distribution thereof is made to depend upon chance, is a lottery. State ex rel. Prout v. Nebraska Home Co. (Neb.) 448

2. To constitute a lottery, it is necessary that a prize be offered, and something of value be given for a chance to obtain the prize, but the prize may be anything of value, and a preference or privilege in the distribution of a common fund among those entitled thereto may constitute a prize. Id.

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Lottery; scheme by investment company as. 449
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MAIL.

Right of Addressee to Receive, after Selling Good Will of Business, see GOOD WILL, 2.

MANDAMUS.

1. On demurrer to an alternative writ of mandamus the question presented is not whether relator is entitled to some relief, but whether he is entitled to the specific relief asked for. State ex rel. Indianapolis v. Indianapolis Union R. Co. (Ind.) 831

2. A return to a writ of mandamus to compel the restoration of a member of a mutual benefit society to his rights therein, which alleges that, upon evidence produced after notice to accused and an opportunity given him to be heard, the society made a judicial determination that he had been guilty of conduct which, under the rules of the association, subjected him to expulsion from the society, is sufficient although it does not aver that the charges were true, where he presented no evidence, and the society therefore had only part of the evidence before it in reaching its conclusion. Pepin v. Société St. Jean Baptiste (R. I.) 626

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Mandamus; province of court on demurrer to alternative writ. 831

MARKET QUOTATIONS.

As Subject of Copyright, see COPY-
RIGHT.

As Property, see INJUNCTION, 3.

MARRIAGE.

See HUSBAND AND WIFE, 1-3.

MASTER AND SERVANT.

Requiring Redemption, in Money, of Checks for Wages, see CONSTITUTIONAL LAW, 4.

Privilege in Publishing Reason for Discharge of Servant, see EVIDENCE, 4.

Evidence as to Master's Negligence, see EVIDENCE, 21.

Homicide by Whipping Servant to Death, see HOMICIDE.

Publication of Reason for Servant's Discharge as Privileged Communication, see LIBEL AND SLANDER, 3.

Contributory Negligence; Returning to Burning Building, see PROXIMATE CAUSE, 1.

Contributory Negligence; Question for Jury as to, see TRIAL, 10.

See also PROXIMATE CAUSE, 2.

Duty and liability of master.

Instruction as to, see TRIAL, 12.

1. An employer is not liable in damages for the consequences of mere error in judgment in furnishing structures, machinery, and appliances for the use of his servants in the prosecution of his business, unless it is shown that such error is itself the result of negligent or wilful ignorance or inattention. O'Neill v. Chicago, R. I. & P. R. Co. (Neb.) 443

2. Omission to block a guard rail will not render a railroad company liable for injury to a servant whose foot is caught between the rails while he is attempting to uncouple cars, where the evidence shows that there are wide differences of opinion between railroad companies with respect to the relative safety to their servants and the public of the blocked and unblocked guard rails. *Id.*

3. It cannot be said, as matter of law, that an employer sending a servant to clean out a drain filled with decaying animal matter cannot know of the presence of noxious and deadly gases therein which might cause serious injury to the servant, so as to be charged with the duty of informing the servant of the danger, or taking measures to protect him therefrom. *Cox v. American Agri. Chemical Co. (R. I.)* 629

Assumption of risks.

4. One engaged in unloading logs from cars onto a landing assumes the risk of injury from a hole in the landing 3 or 4 feet across the top and 3 or 4 deep, into which he steps and is killed by a rolling log. *McMillan v. Spider Lake Sawmill & Lumber Co. (Wis.)* 589

5. A servant undertaking to clean a drain filled with decaying animal matter does not assume the risk of injuries from dangerous gases of which he has no knowledge, the effect of which it requires special scientific knowledge to measure and determine, although he knows of the character of the contents of the drain, and that it emits offensive odors. *Cox v. American Agri. Chemical Co. (R. I.)* 629

Fellow servants and their negligence.

6. A master is liable for injury to a servant to which his negligence contributes, although negligence of a fellow servant of the injured person is also a contributory cause. *Howe v. Northern Pacific R. Co. (Wash.)* 949

7. A statute making a railroad company liable for injuries to servants through the negligence of fellow servants does not violate the equality clause of the Federal Constitution, although it does not confine such liability to acts performed in the operation of trains, but extends it to risks similar to those incurred by the employees of persons or corporations engaged in other lines of work. *Callahan v. St. Louis Merchants' Bridge T. R. Co. (Mo.)* 249

8. A foreman of a bridge gang, whose duty is to see that the bridge is clear of obstructions upon the approach of trains, may be found negligent from the fact that a passing train struck a maul, where the surface of the bridge was plain, with nothing to cover or hide the maul. *Texas & P. R. Co. v. Carlin (C. C. App. 5th C.)* 462

9. Under statutes requiring employees to be in the same grade of employment to be fellow servants, a foreman in control of a bridge gang is not a fellow servant of a member of the gang. *Id.*

10. A fireman on a train is not the fellow 60 L. R. A.

servant of the conductor of his train, or of that of a preceding one, with reference to the placing and observance of signals to prevent a collision in case the leading train is delayed so as to be a menace to the following one. *Howe v. Northern Pacific R. Co. (Wash.)* 949

11. A member of a section gang engaged in repairing the track to enable trains to run safely over it, who is stationed beneath a track running over a public street into which discarded ties are being thrown, to warn travelers on the street and remove the ties, is, while attempting to remove beyond danger a child which has appeared in the street, within the protection of a statute making railroad companies liable for injuries sustained by any servant or agent thereof while engaged in the work of operating such railroad, by reason of the negligence of any other servant or agent thereof. *Callahan v. St. Louis Merchants' Bridge T. R. Co. (Mo.)* 249

12. An employee operating a dump car, who is charged by the master with the duty of seeing that the links in the dumping mechanism of the cars are sound, is, in procuring and placing a link on a car, a fellow servant of one subsequently employed to operate it, so that the master is not liable for an injury to the latter because of the insufficiency of the link. *Buck v. New Jersey Zinc Co. (Pa.)* 453

13. One whose duty is to do the blacksmith work necessary upon the implements used in the construction of a manufacturing plant is, in making a link for the chain used to hold in position the box of a dump car, a fellow servant of one engaged in operating the car, so that the common employer is not liable for injury to the latter through insufficiency of the link made by the former. *Id.*

Liability of master to third persons.
Joinder of Master and Servant as Defendants, see ACTION OR SUIT, 10.

For Malicious Explosion of Gunpowder by Servant, see NUISANCES, 2.
See also LANDLORD AND TENANT, 3, 5;
PROXIMATE CAUSE, 3.

14. A master may be liable, in damages caused by negligence committed by his servant while in the course of his employment, although the latter may be at the time acting without the knowledge, or contrary to the known wishes, of the former. *Weber v. Lockman (Neb.)* 313

15. A railroad company is liable for the act of its engineer, in whose custody it has placed signal torpedoes, in placing one on the track, in dangerous proximity to bystanders, and moving the engine over it for his own amusement, in consequence of which one of the bystanders is injured. *Euting v. Chicago & N. W. R. Co. (Wis.)* 158

16. Moving an engine forward to pull a car onto the track, with knowledge that a torpedo lies on the track in front of the engine, the explosion of which will be dangerous to bystanders, is negligence on the part

of the engineer, and the railroad company is liable for injuries resulting therefrom. *Id.*

17. One who contracts with the owner of a building to keep the portions of it remaining in his possession heated, failure to do which may result in the bursting of water pipes designed for the protection of tenants in possession of lower floors, against fire, and in the flooding of their goods, owes the latter the duty of exercising care in the management of the heating apparatus so long as he retains control of it; and he will be liable to a tenant in tort for negligently permitting the fire to go out so that the pipes freeze and burst, to the tenant's injury. *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co. (N. H.)* 116

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1. A man must use his property so as not to incommode his neighbor. *Paolino v. McKendall (R. I.)* 133

2. *Aqua currit et debet currere, ut currere solebat.* *Crawford Co. v. Hall (Neb.)* 889

3. *Cessante ratione legis, cessat ipsa lex.* *Bouvier v. Baltimore & N. Y. R. Co. (N. J. Err. & App.)* 750

4. *Cujus est solum, ejus est usque ad cælum.* *Stillwater Water Co. v. Farmer (Minn.)* 875

5. *Damnum absque injuria.* *Crawford Co. v. Hall (Neb.)* 889

6. Equity looks to the substance, and not the form. *Home F. Ins. Co. v. Barber (Neb.)* 927

7. *Ex dolo malo non oritur actio.* *Gilmore v. Fuller (Ill.)* 286

8. *In pari delicto melior est conditio defendentis.* *Id.*

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9. *Qui prior est tempore potior est jure.* *Baltimore & O. S. W. R. Co. v. Adams (Ind.)* 396

10. *Sic utere tuo ut alienum non lædas.* *Kuhn v. Sol Heavenrich Co. (Wis.)* 585
Stillwater Water Co. v. Farmer (Minn.) 875

11. *Stare decisis.* *Citizens' State Bank v. Nore (Neb.)* 737

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MILITIA.

1. The militia of the state is an arm of the state government, and is in no sense such a county institution or establishment as that any particular county can, exclusively, be required to impose taxes for its, or any part of its, maintenance. *State ex rel. Milton v. Dickenson (Fla.)* 539

2. A statute requiring the board of county commissioners in each county in which there is a company or battery of state troops to provide each company or battery with an armory for its meetings, drills, etc., is unconstitutional and void. *Id.*

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Chattel Mortgage on Hotel Building Affixed to Land, see FIXTURES.

Notice of Mortgagor's Rights in After-Acquired Property, see NOTICE, 2.

1. A stipulation in a chattel mortgage authorizing the mortgagee to take possession of the mortgaged property upon failure of the mortgagor to make payments secured thereby is not contrary to public policy, and will authorize the mortgagee to take peaceable possession of the property, even against the will of the mortgagor. *Singer Mfg. Co. v. Rios (Tex.)* 143

2. A chattel mortgage on real estate creates no lien thereon, as Idaho Rev. Stat. § 3385, as amended, limits chattel mortgages to property other than real estate. *Beeler v. C. C. Mercantile Co.* (Idaho) 283

3. A mortgage of chattels to be acquired is not valid against one who takes actual possession of them under another mortgage executed by the mortgagor after they are acquired by him. *New England Nat. Bank v. Northwestern Nat. Bank* (Mo.) 256

4. A mortgage executed in the name of a third person, on chattels not yet acquired by the mortgagor, which does not purport to cover after-acquired property, does not bind such property as against a mortgage to another person, executed by the mortgagor in his own name, after the property has come into his possession. *Id.*

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Powers.

Right of Action for Violation of Contract as to Maximum Rates for Gas, see ACTION OR SUIT, 8, 9.

To Fix Maximum Rates for Gas, see GAS.

To Define Nuisances, see NUISANCES, 1.

1. Municipalities have authority to provide fuel for paupers; but they cannot be given power by the legislature to buy and sell fuel in competition with private enterprise, although it is scarce and high in price and the cost to consumers may be thereby reduced, unless there is such a scarcity as to create a general and wide-spread distress in the community, which cannot be met by private enterprise. *Re Municipal Fuel Plants* (Mass.) 592

2. Power to require a railroad company to elevate its tracks through the city for the purpose of abolishing grade crossings is not conferred on a municipality by a charter empowering it to define nuisances and require their abatement; to secure the safety of citizens in the running of trains, and to provide protection against injury from their operation; to require railroad companies to change the location, grade, and 60 L. R. A.

crossings of their roads; to compel them to raise or lower their tracks to conform to any grade that may be established, and to construct bridges, viaducts, or tunnels across their rights of way at street crossings,—where the conditions at some of the crossings do not require such remedy. *State ex rel. Indianapolis v. Indianapolis Union R. Co.* (Ind.) 831

Ordinances.

Limiting Speed of Railroad Train, see APPEAL AND ERROR, 7; COMMERCE.

3. That an ordinance limiting the speed of railroad trains within the corporate limits will prevent the railroad company from giving its passengers the service they demand, and also its successful competition with rival roads, does not make the ordinance void for unreasonableness. *Chicago & A. R. Co. v. Carlinville* (Ill.) 391

4. An ordinance limiting the speed of trains to 10 miles per hour within the corporate limits is not unreasonable, where the road lies for a mile and a quarter within such limits, and crosses four streets, two of which are main thoroughfares, and buildings located near the road obstruct, to a considerable extent, a view of the tracks and approaching trains, although the principal part of the buildings of the municipality are located to one side of the road. *Id.*

5. An ordinance requiring the closing of stores at 7:30 P. M., excepting Saturday night, is not authorized by general charter authority to make by-laws, rules, and regulations for preserving the health of the citizens, and such as are deemed necessary for the better government of the town. *State v. Ray* (N. C.) 634

Liability for damages.

6. A city exercises its police power in clearing an alley of weeds, so that it is not responsible for negligence in the performance of the work by one whom it has employed for that purpose, which results in the injury of a child attracted there by his operations. *McFadden v. Jewell* (Iowa) 401

7. A municipal corporation is not liable for injuries caused by failure to prevent coasting in its streets, since the duty of preventing such conduct rests on the officers as servants of the state. *Dudley v. Flemingsburg* (Ky.) 575

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 In Highways, see **HIGHWAYS**.
 Negligence of Municipal Corporations, see **MUNICIPAL CORPORATIONS**, 6, 7.
 Question for Jury as to, see **TRIAL**, 9, 10.

Of person causing injury.

1. The fact that the particular injury resulting from negligence was not to be anticipated will not defeat liability therefor if the negligence was such as to be likely to produce injury. *Texas & P. R. Co. v. Carlin* (C. C. App. 5th C.) 462

2. The proprietors of a saloon are liable for an injury to a guest therein caused by a third person pouring alcohol procured from the bartender, over his feet while he was asleep, and setting fire to the same. *Curran v. Olson* (Minn.) 733

3. The negligence of a bartender in permitting a third person to pour alcohol over the feet of a guest while asleep in the saloon, and set fire thereto, will be imputed to the proprietors of the saloon. *Id.*

4. An occupier of land who undertakes to burn rubbish thereon is under no obligation to guard children of tender years who are in the habit of resorting there to play, from injury by approaching the fire. *Pao-lino v. McKendall* (R. I.) 133

5. The storing of dynamite in a partially buried box on a vacant lot to which children are accustomed to resort to play is negligence which will render the one guilty thereof liable for injuries to a child by the explosion of one of the sticks, which was taken from the box by children who had resorted to the lot to play, and ignited by one of them in ignorance of its explosive character. *Nelson v. McLellan* (Wash.) 793

Contributory negligence.

6. A guest in a saloon who laughs and jokes with other guests while a third person pours alcohol over the feet of a sleeping guest and sets fire thereto, without saying anything to the bartender about it, and subsequently falls asleep, is not guilty of such contributory negligence as will prevent a recovery from the proprietors of the saloon for a similar injury to himself, where the bartender not only knew of the acts of such third person, but also furnished the alcohol used by him. *Curran v. Olson* (Minn.) 733
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- Of Carrier or Passenger, see **CARRIERS**.
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- Grant of, by Appellate Court, see **APPEAL AND ERROR**, 20.

- Presumption as to Time of Granting Further Extension of Time to File Statement of Evidence, see **APPEAL AND ERROR**, 9.

- For Use of Intoxicants by Jury, see **NEW TRIAL**, 5.

1. Refusal of a continuance of a prosecution for statutory rape upon a person under fifteen years of age, to enable defendant to procure the attendance of a witness who would testify that he knew that prosecutrix was born more than fifteen years before the commission of the alleged offense, is ground for new trial in case of conviction. *Brock v. State* (Tex. Crim. App.) 465

2. The mere separation of jurors, impaneled to try a capital case, from their fellows, without the attendance of an officer, although an irregularity, is not a sufficient cause for setting aside the verdict, if the court is satisfied that the prisoner has not sustained any injury from such separation. *Gamble v. State* (Fla.) 547

3. Testimony discovered after a conviction of statutory rape upon a female under fifteen years of age, that the mother of prosecutrix bore a female child a little more than fifteen years before the commission of the alleged offense, which may have been the prosecutrix, will warrant a new trial. *Brock v. State* (Tex. Crim. App.) 465

4. A statement of evidence on petition for new trial may be filed on the day "to" which the time for filing has been extended, since the extension includes the day to which it is granted. *Crafts v. Carr* (R. I.) 128

5. If intoxicants be shown to have been used by the jury impaneled in a capital case, the presumption arises in favor of the convicted defendant that it resulted injuriously to him; and the burden is on the state to show affirmatively, to the entire satisfaction of the court, that their use was to such a limited extent as completely to negate any harm to the defendant from their use by the jury, or any member of it. *Gamble v. State* (Fla.) 547

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Of Ground for Arrest of Passenger, see **CARRIERS**, 6.

Of Hearing as to Street Improvement, see **PUBLIC IMPROVEMENTS**, 1.

Of Hearing before Expulsion From Benefit Society, see **TRIAL**, 7.

1. Facts known which are sufficient to put a person on inquiry are sufficient to charge him with all knowledge which he would have acquired by a proper inquiry in the ordinary course of business. *Hodge v. United States Steel Corp.* (N. J. Err. & App.) 742

2. A mortgage by the holder of a bill of sale of chattels which the seller did not at the time possess is not notice to one who takes a mortgage from the seller upon chattels which he has purchased to fill the requirements of the bill of sale, since it is outside of the chain of the latter's title. *New England Nat. Bank v. Northwestern Nat. Bank* (Mo.) 256

3. Notice to an insurance agent of facts authorizing a forfeiture of a policy will be attributed to the company, where the policy does not contain any provision that notice to the agent shall not be notice to the company, but only that conditions of the policy may not be waived otherwise than in a prescribed manner. *German Ins. Co. v. Shader* (Neb.) 918

NUISANCES.

1. General charter authority to define nuisances does not empower a municipal corporation to declare anything a nuisance *per se* which in fact was not recognized as such by the common law. *State ex rel. Indianapolis v. Indianapolis Union R. Co.* (Ind.) 831

2. The storage of gunpowder by a fuse manufacturer in quantities necessary for his business, which is located in a proper place and is conducted with the utmost care, is not a nuisance *per se*, so as to render him liable for injuries caused to neighboring property by the malicious explosion of the magazine by an employee. *Kleebauer v. Western Fuse & E. Co.* (Cal.) 377

3. That which the general assembly has not declared to be a public nuisance, and the summary abatement of which it has not authorized, cannot be construed by the courts to be such nuisance and liable to be summarily abated without process of law. *Chicago & E. R. Co. v. Keith* (Ohio) 525

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PARENT AND CHILD.

Attorney's Services for Infant, as Necessaries, see **INFANTS**.

Necessity of Parent's Obtaining School Board's Consent to Child's Remaining Away, see **SCHOOLS**, 2.

1. A father is not bound to supply his infant daughter with counsel fees to prosecute an action for damages for an indecent assault on her. *Crafts v. Carr* (R. I.) 128

2. A mother who owns the property, takes care of the family, pays the bills, and who, by express direction amounting to a relinquishment of the father's right, is entitled to the earnings of their child, may maintain an action to recover for the loss and expense to which she is subjected by injuries negligently inflicted by a third person upon the child. *McGarr v. National & P. Worsted Mills* (R. I.) 122

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PARTITION.

A right of entry for condition broken, held by two or more persons, will not support a compulsory partition or alternative judicial sale of the land involved. *Bouvier v. Baltimore & N. Y. R. Co.* (N. J. Err. & App.) 750

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1. Allegations of waiver by the plaintiff to meet a defense based on conditions precedent are not inconsistent with the statutory allegation that all conditions on his part have been duly performed. German Ins. Co. v. Shader (Neb.) 918

Relief under.

2. A recovery on an implied warranty cannot be had by one who, in his complaint, relies on an express warranty. Pemberton v. Dean (Minn.) 311

Amendments.

3. A plaintiff does not change his cause of action by substituting allegations of waiver for a general denial with respect to a defense of breach of conditions precedent. German Ins. Co. v. Shader (Neb.) 918

4. On a motion for judgment, where plaintiff's claim is admitted, and no facts are stated to defeat it, the court is not required to permit an amendment of the answer. Kuhn v. Sol Heavenrich Co. (Wis.) 585

Plaintiff's pleadings.

Raising on Appeal, Sufficiency of, see APPEAL AND ERROR, 13.

5. In pleading performance of conditions precedent, under Neb. Code Civ. Proc. § 128, the plaintiff may properly assume that 60 L. R. A

conditions which have been waived have not been relied on. German Ins. Co. v. Shader (Neb.) 918

6. An allegation that plaintiff "became so nervous and frightened" by defendant's conduct "that she could not sleep at night, and was greatly disturbed in body and mind," sufficiently charges a physical injury to admit evidence that she became helpless, could not go about her duties, and suffered from uterine trouble, and to warrant the submission to the jury of an issue as to what compensation she was entitled to for her "personal injuries," in the absence of anything to show that defendant was misled, or of any steps on his part to have the pleading made more definite. Watkins v. Kaolin Mfg. Co. (N. C.) 617

Defendant's pleadings.

Defendant's Right under Charge to Open and Close, see TRIAL, 4.

7. Answers which deny the commission of an assault and battery of the kind and character alleged in the petition cannot, under Ga. Civ. Code, § 3891, declaring that in every case of tort, if defendant was authorized by law to do the act complained of, he may plead the same as a justification, properly be treated as pleas of justification, although they admit a battery of a minor character, and aver, as a justification of the battery as admitted, certain opprobrious words and abusive language spoken by the plaintiff. Berkner v. Dannenberg (Ga.) 559

8. A demurrer to the answers filed in an action for assault and battery is properly overruled where, although insufficient as pleas of justification, they contain matter which may properly be pleaded in extenuation or mitigation of damages. 1d.

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Property; information as to intended building and improvements as. 810

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Question for Jury as to, see **TRIAL**, 5.

1. The proximate cause of the death of an employee mortally burned in the employer's burning building, which he had entered to telephone an alarm of fire after he had failed to give the alarm elsewhere as he had left the building to do, is not the employer's negligence in constructing and maintaining the building so as to be likely to burn, but the employee's act in re-entering the building after he had reached a place of safety. *Chattanooga Light & P. Co. v. Hodges* (Tenn.) 459

2. The negligence of a bridge foreman, whose duty it is to see that the bridge is

free from obstructions on the approach of trains, in failing to see a maul left by a workman in such a way as to interfere with the passage of the train, and not that of the workman in so leaving it, is the proximate cause of an injury to a member of the bridge gang who is struck by the maul as it is hurled from the track by the train. *Texas & P. R. Co. v. Carlin* (C. C. App. 5th C.) 462

3. One who has undertaken to furnish heat to protect from freezing fire-extinguisher pipes in the portion of a building retained by the landlord, where the freezing might result in injury to tenants of a lower floor, is not liable to the tenants for negligently permitting the fire to go out and the pipes to freeze to their injury, if the exercise by the landlord of the ordinary care which he owed the tenants to keep the water from injuring them would have detected the escape of water and prevented the injury, so that failure to exercise it was the proximate cause of the injury. *Pittsfield Cottonwear Mfg. Co. v. Pittsfield Shoe Co.* (N. H.) 116

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PUBLIC IMPROVEMENTS.

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Conclusiveness of Legislative Discretion as to, see **COURTS**, 2.

Conclusiveness of Commission's Determination as to, see **COURTS**, 3.

Right to Compel Payment of Assessments for Improvements for Private Interests, see **EMINENT DOMAIN**, 3.

See also **APPEAL AND ERROR**, 10.

1. That a notice of hearing as to a street improvement specified a brick pavement will not invalidate a determination to pave with asphalt and set a new curb, if the hearing covered those matters, and the statute empowered the commissioners to change or modify their original determination in reference to the improvement. *People ex rel. North v. Featherstonhaugh* (N. Y.) 768

2. A provision in a contract for street improvement that laborers must be paid in cash, and not in store orders, will not be

held to be unreasonable or illegal if it is authorized by statute. Id.

3. No illegal burden is placed on abutting property owners, who are required to bear the original cost of street paving, by a provision in the paving contract requiring the contractor to maintain the work for a period during which such a pavement, if properly laid, ought to wear, although the duty to repair pavements is by statute placed on the city at large. Id.

4. Abutting owners subject to assessment for a street improvement cannot complain that the specifications required compliance with the labor law as to hours and wages, if, before the bids were received, the law had been declared unconstitutional, and the improvement commissioners announced that the requirements with reference to it would not be enforced, while the successful bidder testifies that the bid was not increased by reason of such law. Id.

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Cross-Examination of Witnesses on Trial for, see WITNESSES, 2.

RATES.

For Gas, see ACTION OR SUIT, 8, 9; EQUITY, 2; GAS; INJUNCTION, 5.

Charge by Water Company; Admissibility to Show Value of Plant, see EVIDENCE, 19.

REAL PROPERTY.

A right of entry for condition broken is transferable after breach independent of statute, as the English law against maintenance which forbade such a transfer is not in force in New Jersey. *Bouvier v. Baltimore & N. Y. R. Co.* (N. J. Err. & App.) 750

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Real property; necessity of showing breach of condition subsequent; waiver of exact performance of condition; assignability of right of re-entry for condition broken; condition of re-entry as estate in land. 755

RELEASE.

By Discharge in Bankruptcy, see BANKRUPTCY, 2, 3.

RELIGIOUS SOCIETIES.

Territorial areas, described in the nomenclature of Roman Catholic Church as "parishes," are not recognized by the law as corporate or political entities, and, if they were such, the church could not legislate concerning them. *McEntee v. Bonacum* (Neb.) 440

REMOVAL OF CAUSES.

The dismissal of the servant from the suit at the close of the testimony, against the objection of plaintiff, because the evidence makes no case against him in an action against master and servant for a personal injury, will not entitle the master to remove the cause to a Federal court, which removal had been prevented at an earlier time by the presence of the servant as co-defendant in the case. *Howe v. Northern Pacific R. Co.* (Wash.) 949

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Removal of cause; after voluntary dismissal of action against one defendant. 950

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Of Lease by Agent, see **LANDLORD AND TENANT**, 7.

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Condemnation for Land for, see **ACTION OR SUIT**, 11; **EMINENT DOMAIN**, 6-10.

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See **JUDGMENT**, 1-5.

RESTRAINT OF TRADE.

Forbidding Purchase of Goods in Bulk without Settling Claims of Seller's Creditors, see **CONSTITUTIONAL LAW**, 7.

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For Résumé of Contents of Book, see p. 961.

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To Writ of Mandamus, see **MANDAMUS**, 2.

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Of Note by Maker's Death, see **BILLS AND NOTES**, 6.

RIPARIAN RIGHTS.

See **WATERS**, 1-19, **NOTES AND BRIEFS**.

ROBBERY.

Attempt to Commit, see **ATTEMPT**.
Punishment for Attempt to Commit, see **CRIMINAL LAW**, 2, 3.

SALARY.

Of Corporate Officer, see **CORPORATIONS**, 5.

SALE.

Recovery on Implied Warranty by One Alleging Express Warranty, see **PLEADING**, 2.

A warranty as to the speed capacity of an emery wheel, contained in a card placed by the manufacturers on the face of the wheel, will not be held to be adopted by wholesale and retail dealers because left on the wheel on a resale of the same by them. *Pemberton v. Dean* (Minn.) 311
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Sale; executory contract of. 257

Implied warranty that article sold fit for use; liability for injury resulting from breach; implied warranty excluded by express one; when maxim *caveat emptor* applies. 311

Induced by purchaser's fraud; seller's right to rescind after third party acquires interest. 597

SALOON KEEPER.

Liability for Injury to Guest, see **NEG-LIGENCE**, 2, 3, 6.

SCHOOLS.

Compulsory Attendance of Children at, see **COURTS**, 4.

1. The natural right of parental dominion does not render unconstitutional a statute requiring children to be sent to school. *State v. Jackson* (N. H.) 739

2. A parent cannot be required to procure the consent of the school board to his child's remaining away from school to protect himself from the penalty of the compulsory education law, if it is, apparently, reasonably necessary to the child's life that it be kept out of school. *Id.*

SEPARATION.

See **HUSBAND AND WIFE**, **NOTES AND BRIEFS**.

SET-OFF.

Of Damages Resulting from Landlord's Failure to Repair, see **LANDLORD AND TENANT**, 4.

SIGNATURE.**NOTES AND BRIEFS.**

Signature; presumption of bank's knowledge of depositor's or customer's. 955

SMUGGLING.

See also **DUTIES**.

NOTES AND BRIEFS.

Smuggling; by fraudulent purchaser of goods; right to forfeiture as against seller; principal liable for agent's unlawful acts. 597

SPECIFIC PERFORMANCE.

1. Specific performance of a contract by a man to convey one third of his property in trust for the benefit of his children will not be denied because the interest might be reconveyed so as to let into joint management and ownership with him of his business undesirable persons whose interference might jeopardize, if not destroy, its value. *Moayon v. Moayon* (Ky.) 415

2. Lack of mutuality of obligation and remedy will not, after the wife has resumed marital relations, defeat specific performance at her instance of a contract by a man to convey property to his children in consideration that the wife, who is living sep-

arate from him, and about to begin a suit for divorce, for which she has good grounds, resume her marital relations and live with the other contracting party as his wife after the full execution of the agreement; and the fact that she cannot be compelled to maintain such relations during life is immaterial. Id.

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Specific performance; of contract between husband and wife to compromise pending or contemplated divorce suit. 412

Necessity of mutuality in contract; of distinct mutual understanding as to identity and amount of lands covered by contract. 418

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Of Railroad Train; Ordinance Limiting, see APPEAL AND ERROR, 7.

SPORTING NEWS.

As Subject of Copyright, see COPYRIGHT.

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STATE.

Intervention by, in Condemnation Proceedings, see ACTION AND SUIT, 11.

STATUTE OF FRAUDS.

See CONTRACTS, 6-9.

STATUTES.

1. The existence of facts which would authorize the signatures of the presiding officers of the two houses of the legislature to a statute cannot be inquired into where it is authenticated by their signatures. *Western U. Teleg. Co. v. Taggart* (Ind.) 671

Construction.

Meaning of Word "Citizens," see TAXES, 3.

2. The strict letter of the law will not be followed in construing a statute when such an interpretation will lead to an unreasonable or absurd conclusion. *Parker v. Nothomb* (Neb.) 699

3. The court will, rather than pronounce imperfectly drawn statutes unconstitutional, draw inferences from the evident intent of the legislature, as gathered from the entire statute, supplying by implication technical inaccuracies of expression and obviously unintentional omissions, from the necessity of making them operative and effectual as to specific things included in the broad and comprehensive terms and purposes thereof; and such inferences and implications are as much a part of the statute as what is dis- 60 L. R. A.

tinctly expressed therein. *State ex rel. Utick v. Polk County Comrs.* (Minn.) 161

4. A statute will not be construed in Nebraska so as to make a negotiable instrument void in the hands of a bona fide purchaser, unless the act specifically so declares. *Citizens' State Bank v. Nore* (Neb.) 737

5. A constitutional provision adopted from another state must be construed according to the established meaning of the provision that had been acquired in the state from which it was taken. *Adams v. Yazoo & M. V. R. Co.* (Miss.) 33

6. An act the title to which relates to the issuance of checks by merchants in payment of wages assigned to them cannot be expanded to include persons and corporations generally by the use of the words "or any other person" after the word "merchants" in the body of the act, where the Constitution makes void so much of the act as is not expressed in the title. *Dixon v. Poe* (Ind.) 308

Amendment.

7. A statute so framed as to be wholly or in part unconstitutional, but having a title expressing a constitutional object, may, by amendatory legislation, be rendered constitutional, without having recourse to an enactment independent throughout its provisions. *State, Allison, Prosecutor, v. Croker* (N. J. L.) 564

8. Changes or modifications of existing statutes as an incidental result of adopting a new law, covering the entire subject to which it relates, are not forbidden by Neb. Const. § 11, art. 3, providing that no law shall be amended unless the new act contains the section or sections so amended and the amended section or sections shall be repealed. *Eaton v. Eaton* (Neb.) 605

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Effect of repealing act without saving clause. 925

Power to cure unconstitutional statute by amendment:—(I.) Introductory; (II.) statutes only partially unconstitutional; (III.) statutes unconstitutional in entirety: (a) in general; (b) curing defect in title of statute by amendment of title only. 564

Retrospective statute giving creditors liens on debtors' property. 947

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Construction of; subordinating letter to spirit. 742

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STREET RAILWAYS.

Appropriating Owner's Consent under Power of Eminent Domain, see EMINENT DOMAIN, 15.

Purchasing the consent of abutting owners to the construction of a street railroad in a city street is not contrary to public policy. *Hamilton, G. & C. Traction Co. v. Parrish* (Ohio) 531

NOTES AND BRIEFS.

Street railway; necessity of abutting owner's consent to ordinance for. 533

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Liability for Injury of Passenger by Strike Sympathizers, see CARRIERS, 7, 8.

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Carrier's liability to passenger injured by strikers. 601

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Error in Refusing Instruction as to Work, on, see APPEAL AND ERROR, 16.

Expulsion from Benefit Society on, see BENEVOLENT SOCIETIES, 2, 3.

Forbidding Barber to Keep Shop Open on, see CONSTITUTIONAL LAW, 5, 6.

Burden of Proving Necessity of Work on, see EVIDENCE, 11.

Question for Jury as to Necessity of Pumping Oil on, see TRIAL, 6.

1. It is not an act of necessity to keep open a barber shop on Sunday for the transaction of business. *State v. Sopher* (Utah) 468

2. The pumping of an oil well must be deemed a "work of necessity" within the meaning of a statute forbidding Sunday labor, except works of necessity or charity, where permanent loss and injury would result to the owner of the well by reason of not pumping it. *State v. McBee* (W. Va.) 638

NOTES AND BRIEFS.

Sunday; expulsion of member from association on; validity of resolution of association passed on. 627

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Prohibiting barber working on Sunday; validity of Sunday laws. 469

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Conclusiveness of Decision as to, see JUDGMENT, 2, 3.

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Power to tax.

1. Street lighting and road districts created by statute as bodies corporate, with power to sue and be sued, elect street, light, and road commissioners, and do all acts necessary to carry out the powers conferred, are political divisions of the state, to which the power of raising money by taxation may be committed. *State, Allison, Prosecutor, v. Corker* (N. J. L.) 564

Uniformity; equality.

2. The constitutional requirement of uniformity and equality in taxation is not violated by taxing shares of stock in foreign corporations and exempting those in domestic corporations, whose property is taxed within the state; and it is immaterial that the property, including the capital stock of the foreign corporations, is taxed at their domicile. *Bacon v. State Tax Comrs* (Mich.) 321

3. The use of the word "citizens" in Comp. Laws 1897, § 3831, subdiv. 9, providing that all shares in foreign corporations owned by citizens of the state shall be taxed, is not limited to its political sense so as to exempt stock owned by inhabitants who are not citizens, and thus make the statute void for lack of uniformity. *Id.*

What taxable; exemptions.

See also *supra*, 3.

4. The legislature is not prevented from exempting from taxation a waterworks plant owned and operated by a city, by the provision of Kan. Const. art. 11, § 1, that the legislature shall provide for a uniform and equal rate of assessment and taxation, but that "all property used exclusively for . . . municipal . . . purposes . . . shall be exempted from taxation." *Sumner County Comrs. v. Wellington* (Kan.) 850

5. A waterworks plant owned and operated by a city is exempt from taxation, although the water is furnished by the city to the citizens and other consumers at prescribed rentals, under Kan. Gen. Stat. 1901, § 7504, providing that all property belonging exclusively to any city shall be exempt from taxation. *Id.*

6. The provision of the Federal Constitution that full faith and credit shall be given in each state to the public acts of every other state does not prevent the taxation of stock in a foreign corporation owned by residents of the state because the property of the corporation is taxed at its domicile. *Bacon v. State Tax Comrs* (Mich.) 321

7. The legislature not only could, but was required to, impose taxes on the property of

private corporations for pecuniary profit, just as and when it would tax the property of individuals, under Const. 1869, art. 12, § 13, providing that the property of such corporations "shall be subject to taxation the same as that of individuals," and § 20, providing for equal and uniform taxation of all property according to value. *Adams v. Yazoo & M. V. R. Co. (Miss.)* 33

8. The right of corporations to consolidate is a grant of a corporate franchise subject to Const. § 180, so that any exemption of one of the old companies from taxation is cut off, although § 181 provides for the continuation of exemptions to which corporations "are legally entitled" at the adoption of the Constitution, and § 279 of the schedule provides for the continuation of the rights and charters of corporations. *Id.*

9. The use of property in the business of interstate commerce does not exempt it from liability to taxation like other property within the jurisdiction in which it is situated. *Sandford v. Poe (C. C. App. 6th C.)* 641

10. The fact that a telegraph line is engaged in interstate commerce does not prevent a state tax on the value of that portion of the property which is within the state, although the value of the whole line as a unit is taken into account in fixing such value. *Western U. Teleg. Co. v. Taggart (Ind.)* 671

Assessment; valuation.

Notice of Time and Place of Assessor's Meeting, see CONSTITUTIONAL LAW, 11.
Injunction against Illegal Assessment, see INJUNCTION, 10, 11.

11. Regarding the capital stock of a corporation as a factor in arriving at the value of its whole property considered as a unit plant, although it is situated in different states, may be authorized by state statute, where it is done for the purpose of determining the true value of that portion of the property which is within the state. *Sandford v. Poe (C. C. App. 6th C.)* 641

12. Valuing the property of an interstate express company as a unit profit-producing plant for the purpose of determining the taxable value of that portion of the property which is within a state does not amount to a taxation of property outside the state. *Id.*

13. A state tax on that portion of the property of an interstate telegraph company which is within the state may lawfully be made by considering the value of the whole line as a unit, and assessing the tax on a mileage basis after deducting the value of property subject to local taxation, such as real estate, structures, machinery, and appliances. *Western U. Teleg. Co. v. Taggart (Ind.)* 671

14. The fact that the portions of a telegraph line outside the state are of proportionally greater value than portions within the state does not prevent applying the mileage basis of valuation under the act of 1893, after deducting the value of prop-

erty subject to local taxation, since allowance for any such variance of value may be made, and the cardinal rule of the statute is to assess only what property is within the state, and that at its true cash value. *Id.*

15. The fact that the valuation of the property of an interstate telegraph company is made upon its capital stock is not objectionable, where the tax is in effect levied only upon the actual value of the property of the company within the state. *Id.*

Succession tax.

16. Shares in a joint-stock association are to be dealt with as personality in applying the laws providing a transfer or succession tax, although the property of the association is real estate. *Re Jones (N. Y.)* 476

17. In determining, for the purposes of taxation, the value of shares in a joint-stock association which are not listed on the stock exchange or sold in the open market, the value of the property they represent, including the real estate, should be ascertained. *Id.*

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Due process of law in taxation; taxation of telegraph company as illegal regulation of commerce. 673

Taxation of municipal waterworks. 850

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When equal and uniform; validity of double taxation; unequal taxation of non-resident's property; construing statute against exemption. 322

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Enjoining against Cutting Trees in Highway, see INJUNCTION, 8, 9.

A telephone company which removes, destroys, or injures trees planted by an abutting owner along the street adjacent to his property, under the terms of a city ordinance, in erecting poles and wires under its franchise, is liable for the resulting damage, though no unnecessary injury is inflicted. *Bronson v. Albion Teleph. Co. (Neb.)* 426

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Right to jury trial.

1. The right of trial by jury does not extend to proceedings for the organization of drainage districts. Mound City Land & Stock Co. v. Miller (Mo.) 190

Demurrer to evidence.

2. Calling for the remainder of the record of a suit, part of which has been introduced in evidence by plaintiff, is not an introduction of original evidence, so as to destroy the right to demur to plaintiff's evidence. Cooley v. Galyon (Tenn.) 139

Right to meet witnesses.

3. Reading on a second trial of a criminal case testimony of a witness who died after the first trial, at which accused was present and represented by counsel, who was accorded the right of cross-examination, does not infringe the right of the accused to be confronted with the witnesses against him in the presence of the court. People v. Elliott (N. Y.) 318

Right to open and close.

4. In order to entitle the defendant to the opening and conclusion before the jury under a plea of justification filed in an action to recover damages for the commission of a tort, the plea must admit the commission of the acts charged in the petition as they are therein alleged; and a plea which only partially admits the commission of the acts charged is not a plea of justification, and does not entitle the defendant to the opening and conclusion of the argument. Berkner v. Dannenberg (Ga.) 559

Questions of law and fact.

5. The question of proximate or intervening cause is for the court, where the facts are fairly incontrovertible. Chattanooga Light & P. Co. v. Hodges (Tenn.) 459

6. Whether the pumping of an oil well on Sunday is a work of necessity within the meaning of a Sunday law is a question for the jury, where the evidence is conflicting as to the injury which will be caused by not pumping it. State v. McBee (W. Va.) 638

7. Whether or not a member of a benefit society had notice of a hearing, in consequence of which he was expelled from a society for violating its rules, is a question of fact, and not of law. Pepin v. Société St. Jean Baptiste (R. I.) 626

8. Whether or not the franchises of a water company are exclusive is a question for the court, where the instruments granting them were before it under the pleadings in a proceeding for instructions to appraisers who are to value the property of the company which is to be taken by right of eminent domain; and the question should not be referred to the appraisers to be answered after the charters are put in evidence before them. Kennebec Water Dist. v. Waterville (Me.) 856

9. An action for negligent injuries should not be withdrawn from the jury, unless the conclusion follows, as matter of law, that no recovery can be had upon any view that can be properly taken of the facts the evidence tends to establish. Texas & P. R. Co. v. Carlin (C. C. App. 5th C.) 462

10. The question whether one who goes between cars moving at the rate of 4 or 5 miles an hour to uncouple them is guilty of negligence is one of fact for the determination of the jury. O'Neill v. Chicago, R. I. & P. R. Co. (Neb.) 443

Instructions.

11. A requested instruction that the petition sets out no cause of action against an infant under age is properly refused, where defendant was described as an infant, her guardian served with process, and the cause of action alleged to be for necessities furnished. Crafts v. Carr (R. I.) 128

12. In an action to recover for injuries to an employee by being struck by a parted belt, a requested instruction that, if she was not hit by the belt, negligence in its maintenance was immaterial, should be given. McGarr v. National & P. Worsted Mills (R. I.) 122

13. Instructions directing the jury to discriminate against expert testimony are erroneous. Nelson v. McLellan (Wash.) 793

Direction of verdict.

14. Requested instructions to find for defendant on counts of a declaration charging him with assault by the discharge of a pistol should be given where there is no evidence tending in the slightest degree to show that he intended to do any harm, or that the wound inflicted on plaintiff was in any way intentional or wilful. Gilmore v. Fuller (Ill.) 286

15. To warrant the direction of a verdict for defendant in an action on a mutual benefit certificate because the death was not the result of natural causes, the testimony adduced tending to establish that fact must

be such that there cannot reasonably be two opinions touching the result. *Cox v. Royal Tribe of Joseph (Or.)* 620

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 Suit in Equity to Determine, see EQUITY, 1, 3.
 Right to Enjoin Diversion of Stream or Flood Waters, see INJUNCTION, 7.
 1. The common-law rule as to the rights of private riparian proprietors has been a part of the laws of Nebraska from the time of its organization as a state. *Crawford Co. v. Hall (Neb.)* 889
 2. The common-law rules as to the rights and duties of riparian owners are in force in every part of Nebraska, except as altered or modified by statute. *Meng v. Coffey (Neb.)* 910
 3. The common-law rule defining the rights of riparian proprietors cannot be held inapplicable to the conditions prevailing in Nebraska because irrigation is found essential to successful agriculture in certain portions of the state. *Crawford Co. v. Hall (Neb.)* 889
 4. The purpose of the law as to the use of water by riparian owners is to secure to each equality therein, as near as may be, by requiring each to exercise his rights reasonably, and with due regard to the right of other riparian owners to apply the water to the same or other purposes. *Meng v. Coffey (Neb.)* 910
 5. The law in regulating the use of water by riparian owners distinguishes between those modes of use which ordinarily involve the taking of small quantities, and but little interference with the stream, and those which necessarily involve the taking or diversion of large quantities and a considerable interference with its ordinary course and flow. Id.
 6. The term "domestic purposes," as used in Neb. Comp. Stat. 1901, chap. 93a, art. 2, § 43, has reference to the use of water for domestic purposes, permitted to a riparian proprietor at common law, which ordinarily involves but little interference with the wa-

ter of a stream or its flow, and does not contemplate the diversion of large quantities of water in canals or pipe lines. Crawford Co. v. Hall (Neb.) 889

7. The common law does not give to a riparian owner an absolute and exclusive right to the flow of all the water of a stream in its natural state, but only a right to the benefit and advantage of the water flowing past his land, so far as consistent with a similar right in all other riparian owners. Id. Meng v. Coffey (Neb.) 910

8. A riparian proprietor's right to the use of water of a stream is ordinarily limited to its use for domestic purposes, and, if applied to the irrigation of riparian lands, to a reasonable use for such purpose in view of an equal right to the use belonging to all other riparian proprietors. Crawford Co. v. Hall (Neb.) 889

9. The extent of riparian land cannot, in any event, exceed the area acquired by a single entry or purchase from the government, even if it can in any case exceed the smallest legal subdivision of a section of which sales are made by the government. Id.

10. Land to be riparian must have the stream flowing over it or along its borders. Id.

11. A riparian owner's right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land, and is a property right and entitled to protection as such the same as private property rights generally. Id.

12. The legislature has not abolished, and has no power to abolish, the rights of riparian proprietors which have become vested, except as such rights are taken or impaired for a public use in an exercise of the powers of eminent domain, for which compensation must be made for the injury sustained. Id.

13. The two doctrines of water rights, that of a riparian proprietor, and that of the right of appropriation and application to a beneficial use by a nonriparian owner, may exist in the state at the same time, and both do exist concurrently in Nebraska, the common-law rule of riparian rights being underlying and fundamental and taking precedence of appropriations of water if prior in time. Id.

14. The right to the use of water, when acquired by appropriation, is, in its nature, a property right, and becomes a superior and better title to the use and enjoyment of such water than that of a riparian proprietor whose right attaches subsequently. Id.

15. A riparian owner acquires title to his usufructuary interest in the water when he secures the land to which it is an incident, and a non-riparian appropriator acquires title by appropriation and the application of the waters to some beneficial use; the time when either right attaches determining the superiority of title as between conflicting claimants. Id.

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16. The Nebraska irrigation acts of 1889 and 1895 abrogated the law of private riparian rights as previously existing, and substituted in its stead a law providing for the appropriation of the public waters of the state and their application to the beneficial uses therein contemplated, but did not have the effect of abolishing vested rights of riparian proprietors, the rights affected being such only as might have been acquired in the future under the law as previously existing. Id.

17. Although a riparian owner may take water from a stream for purposes of irrigation, his use of the water for such purposes must be reasonable with reference to the size, situation, and character of the stream, the uses to which its waters may be put by other riparian owners, the season of the year, and the nature of the region; and he must not, in so doing, unreasonably diminish or wholly consume such water, to the injury of other owners, nor so as to prevent reasonable use of it by them. Meng v. Coffey (Neb.) 910

18. The right of a riparian proprietor as such to use water for purposes of irrigation is limited to riparian lands; and cannot be extended to lands contiguous to the riparian land; nor can water be diverted to nonriparian lands which might be used on riparian lands, but is not. Crawford Co. v. Hall (Neb.) 889

19. What is a reasonable use of water for irrigation is largely a question of fact, depending on the circumstances of each case, and one which may be viewed with considerable liberality in semiarid regions, where use for such purposes necessarily involves much loss; but waste, needless diminution, or total consumption of a stream, to the injury of others, is clearly unreasonable. Meng v. Coffey (Neb.) 910

Prior appropriation.

See also *supra*, 13-16; *infra*, 25.

20. The doctrine of the civil law as to the right to acquire an interest in the use of water by prior appropriation and the application thereof to a beneficial use has never become a part of the laws of Nebraska, whether or not the doctrine was ever in existence as a part of the laws in force in the territory known as the "Louisiana purchase" acquired by the United States. Crawford Co. v. Hall (Neb.) 889

21. The act of Congress of July 26, 1886, granted to those appropriating water on the public domain for agricultural purposes a right in and to the use of such waters when made according to local customs, or when such right is recognized by the laws of the state or the decisions of the courts. Id.

22. Whether vested rights have been acquired in waters appropriated and diverted from the natural channels thereof into irrigation canals, and applied to agricultural purposes in accordance with the custom existing in the western part of Nebraska, must depend on the facts and circumstances as disclosed in each particular case. Id.

23. The right to appropriate the waters

on the public domain according to the custom prevailing in the arid states immediately west of Nebraska was impliedly recognized by Neb. Sess. Laws 1877, p. 168, and the rights of those which had appropriated the public waters and applied them to agricultural uses were expressly recognized and preserved by the irrigation acts of 1889 and 1895. Id.

Prescriptive rights.

24. There is no such thing as a prescriptive right of a lower riparian proprietor to receive water as against upper owners; and the receiving of the full flow of a stream for more than ten years does not give any prescriptive right that will prevent a reasonable use of the waters of such stream by an upper owner. Id.

25. The appropriation for any period of time of considerable quantities of water in seasons when it may be done without sensible injury to lower owners does not give a prescriptive right to divert the whole stream in dry seasons. Meng v. Coffey (Neb.) 910

26. An appropriation of water by "squatter's right," not recognized by the law of Nebraska, the decision of its courts, nor any general, well-recognized, or widely respected custom therein, does not, by virtue of U. S. Rev. Stat. § 2339, U. S. Comp. Stat. 1901, p. 1437, give to the settler who has appropriated water in that way for less than ten years an exclusive right thereto as against other settlers on the same stream, but a squatter who so appropriates water, and afterwards duly enters and receives a patent to the land from the government, may, as against other patentees from the government on the same stream, count the time during which he appropriated the water as a mere squatter in making out the statutory period of prescription. Id.

NOTES AND BRIEFS.

Waters; right of government to appropriate for irrigation purposes; applicability of common law as to riparian rights; relative rights of riparian owner and prior appropriator; right to use for domestic purposes. 892

Condemnation of land for irrigation purposes. 383

Procedure for establishment of drains and sewers. 161

Right to fish. 481

Percolating waters; underground stream with well-defined channel as; landowner's right to divert; malice in diversion. 875

Water company as public-service corporation; determining reasonableness of rates; determining value of plant in condemnation proceedings. 858

WATERWORKS.

Exemption of, see TAXES, 4, 5.

WEEDS.

Municipal Liability for Negligence in Cutting of, in Alley. see MUNICIPAL CORPORATIONS, 6.

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WHIPPING.

Homicide by Whipping Servant to Death, see HOMICIDE.

WILLS.

1. The intention of the testator as ascertained in the light of the whole will and the attendant circumstances are to be followed in construing the will, unless it is clearly in conflict with the law existing at his death. Sumpter v. Carter (Ga.) 274

2. All divesting clauses in a will, especially as to remainders, are to be strictly construed so as to vest the estate absolutely at the earliest period of time. Id.

3. Under a will devising all the testator's property to his wife during her life, and providing that in case of her not intermarrying his whole estate shall "at her death" be equally divided between his "children," and that in case any of such "children" should die without leaving issue their part of the estate should be equally divided between his other "children," the children take, on the death of the testator, a vested remainder interest, subject to be divested as to any child in favor of the testator's other children as substituted devisees and remaindermen upon such children dying during the existence of the life tenancy without leaving a child who survives the life tenant. Id.

4. A vested remainder interest of a son of a testator under a will leaving all the testator's property to his wife for life with a provision that at her death his whole estate shall be "then" equally divided between his children, and that in case any of such children die without leaving issue the share of such child shall be equally divided between the testator's other children, becomes absolute and indefeasible upon his dying before the life tenant, leaving issue *in esse* at the life tenant's death, and the grantee in a deed by such son during his lifetime of all his interest in specified realty which belonged to the testator at the time of his death becomes indefeasibly entitled to the son's remainder share therein upon the death of the life tenant. Id.

5. Under a will by which a testator devises all his property to his widow during her life, with a provision that at her death his whole estate shall be equally divided between his children, and that the effects going into the hands of his daughters shall not be subject to the control of any husband, but shall belong to his "said daughters and their children," and that in case any of the children die without leaving issue their part of the estate shall be equally divided between his other children to be co-daughter of the testator who, with such trolled in the same way, the children of a daughter, survive the life tenant, are entitled to share in common with their mother in the remainder interest which, on the death of the testator, vested in their mother, subject to open and let in any children subsequently born and living at the death of

the life tenant, and their rights are not affected by a deed of all her interest in certain realty belonging to the testator at his death, executed by their mother during the existence of the life tenancy. *Id.*

NOTES AND BRIEFS.

Will; vested remainders; postponement of vesting; when will takes effect; devise to children; who entitled to take. 274

WIRES.

On Highway as Additional Burden, see EMINENT DOMAIN, 17.

WITNESSES.

Liability of, for Slander, see LIBEL AND SLANDER, 1, 2.

1. A husband cannot waive the provisions of a statute that his wife shall in no case testify against him in a criminal prosecution except for an offense committed against her. *Brock v. State* (Tex. Crim. App.) 465

2. A son of defendant on trial for rape who has testified in behalf of the accused cannot be asked on cross-examination under the guise of impeaching him if he has not stated to a specified third person that he suspected his father of having committed a similar offense with other girls, one of whom was a member of his family, and that 60 L. R. A.

such conduct on the part of the accused caused the death of the witness's mother, and if the witness did not at such conversation cry and say that he could not go against his father even if he was guilty. *State v. Irwin* (Idaho) 716

3. Evidence as to the manner of repairing a belt which parted and caused injury to an employee is not admissible to corroborate witnesses who testify as to the custom with respect to the preparation of belts. *McGarr v. National & P. Worsted Mills* (R. I.) 122

NOTES AND BRIEFS.

Witness; liability for libel 140

WRIT AND PROCESS.

Writ of Error *Coram Nobis*, see CORAM NOBIS.

1. The law of Nebraska makes no distinction as to the service of summons between members of the legislature and other persons. *Berlett v. Weary* (Neb.) 609

2. A member of the legislature may in a proper case be served with summons while at the seat of government for the purpose of attending the legislative session. *Id.*

NOTES AND BRIEFS.

Writ and process; privilege from service of person in public service. 609

